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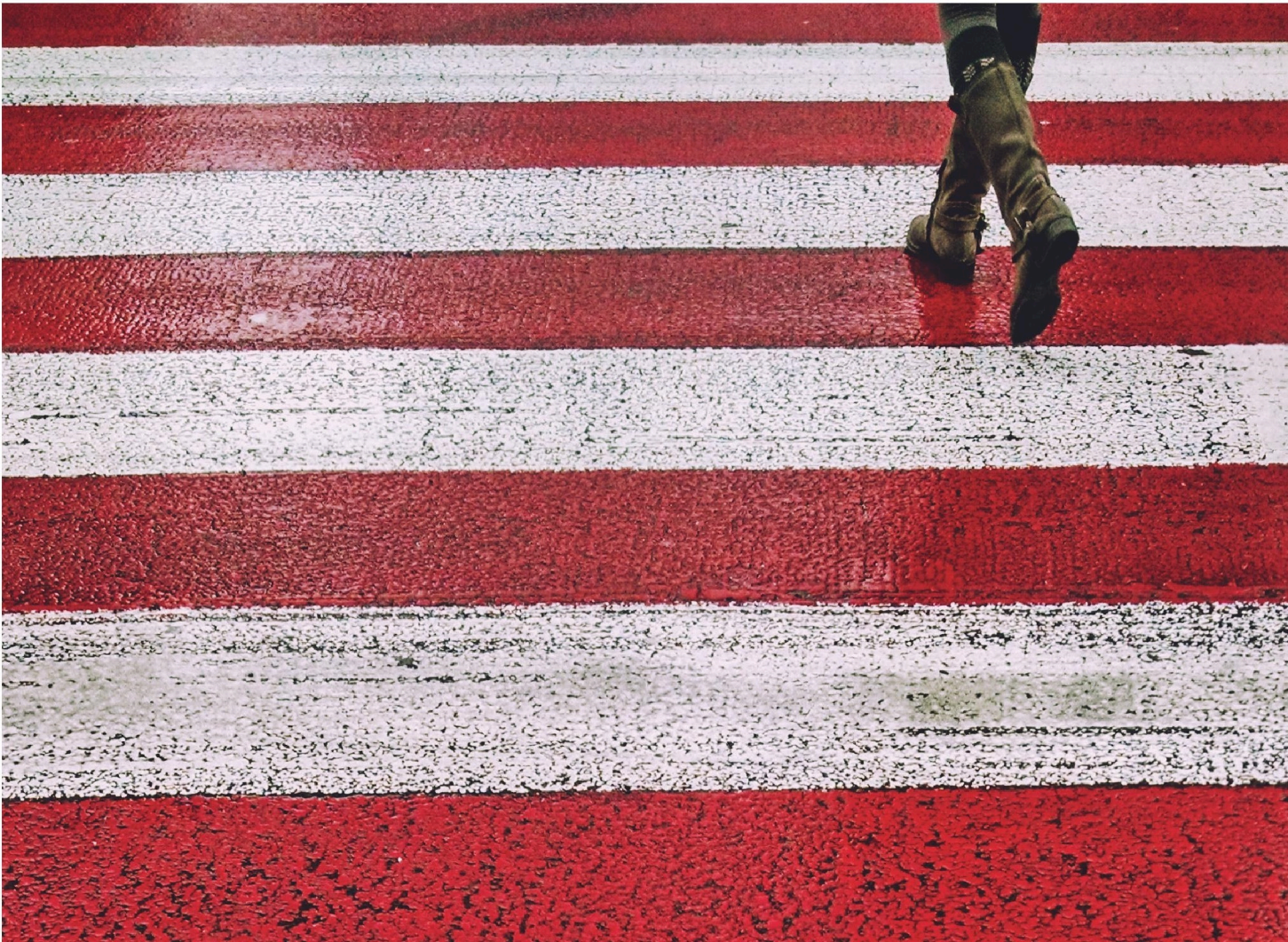
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EMC

Human Rights Education and Monitoring Center

# LEGAL SITUATION OF LGBTI PERSONS IN GEORGIA



## **Legal Situation of LGBTI Persons in Georgia**

*This study report – Legal Situation of LGBTI persons in Georgia - was prepared by Human Rights Education and Monitoring Center (EMC) within the frames of the EU-funded project “Solidarity Network for LGBTI in Armenia and Georgia” implemented by the South Caucasus Regional Office of the Heinrich Boell Foundation.*

**Research Assistant:** Tamari Keburia

**Correction:** Nino Kalatozishvili

**Translation:** Sandro Kevkhishvili, Tamta Gelashvili, Tamar Basilaia

**Photo on the cover:** Levan Giorgadze

**Layout:** Alex Kakhniashvili

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# **Legal Situation of LGBTI Persons in Georgia**

Author: Lika Jalagania  
Edited by Tamta Mikeladze

Human Rights Education and Monitoring Center

EMC

2016

“Human Rights Education and Monitoring Center” (EMC) is a non-governmental organization working on human rights issues, which aims to promote the protection of the rights of marginalized and discriminated groups, including rights of workers, homeless individuals, people with disabilities, religious minorities, LGBTQI persons, etc., through research, advocacy and strategic litigation. The organization also monitors the ongoing institutional reforms in Georgia and supports the improvement of legal protective mechanisms and strengthening of the legislative framework. EMC is not a traditional human rights organization, it represents an open platform for human rights activists, and aims to create alternative spaces, empower civic activists and support their inclusion in civic initiatives. Since 2015, the organization systemically works on LGBTQI issues through documenting violations of their rights and advocacy on national and international level. By criticizing state policy and engaging in legislative initiatives, the organization tries to support the elimination of homophobia and transphobia in the country.

## Foreword

As historically traditional societies, Georgia and Armenia have come a long way since the fall of the Soviet Union in terms of certain aspects of development. However, numerous challenges persist in the context of human rights, foretelling a long, arduous, obstacle-ridden road towards the achievement of equal rights for all groups. Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons represent one of the most marginalised, least visible and discriminated against groups in Armenia and Georgia. Despite a degree of success achieved in recent years, especially in Georgia with the adoption of the Law on the Elimination of All Forms of Discrimination in 2014, members of the group continue to face violence, oppression, and harassment from the general public, as well as specific institutions, including medical facilities and the workplace. Bias-motivated violence based on sexual orientation and gender identity (SOGI) frequently goes unreported and, hence, remain without proper investigation and retribution. Deep-rooted homo/bi/transphobia permeating virtually all segments of society is reinforced by traditional values, as well as binary, heteronormative gender roles, which, in turn, fuel the discriminatory culture prevalent in these two countries and prevent LGBTI persons from fully enjoying their rights and freedoms. A flawed understanding of democratic values and minority rights has also largely been inherited from the Soviet Union, and has been symptomatic of small nations with a collective memory of unresolved conflict and survivalist ideology, where LGBTI persons are seen as a threat to local customs and religion.<sup>1</sup>

In order to comprehensively combat discrimination against LGBTI people in the two countries, the South Caucasus Regional Office of the Heinrich Boell Foundation has been implementing the EU-funded action *Solidarity Network for LGBTI in Armenia and Georgia*, in partnership with the Women's Initiatives Supporting Group (WISG) and Human Rights Education and Monitoring Centre (EMC) in Georgia; and Society Without Violence (SWV) and Public Information and Need of Knowledge (PINK) in Armenia. The overall objectives of the action are to enhance the protection of and respect for LGBTI people's rights, combat homophobia and support LGBTI people's inclusion in Georgia's and Armenia's respective societies, while the specific objectives are to support LGBTI people in the full scale realization of their rights through the enhancement of an LGBTI-friendly environment and to stimulate a higher cohesion of civil society actors on SOGI issues in Georgia and Armenia.

The present publication is the result of a year-long coordinated effort by the project partners, which envisioned the development and implementation of two comprehensive studies: a full-scale research of homo/bi/transphobic societal attitudes, and a situational assessment of the legal and physical conditions of LGBTI persons in the two countries.

The large-scale in-depth study of homo/bi/transphobic societal attitudes includes a thorough examination of social prejudices and stereotypes that would facilitate the investigation of the scale and specific nature of homo/bi/transphobia in Armenia and Georgia. Although, several studies to measure attitudes towards homosexuals have been previously conducted in both countries (the 2011 CRRC Caucasus Barometer<sup>2</sup> being one example), the scope and scale of the present study is unprecedented, affording an integrated perspective on prevalent attitudes towards and knowledge

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1. Silvia Stöber, *LGBT Rights in the South Caucasus*, Heinrich Boell South Caucasus Regional Office, LGBTI Web-dossier: <https://ge.boell.org/en/2013/05/30/lgbt-rights-south-caucasus>
  2. Caucasus Research Resource Centers (CRRC), *Attitudes towards Homosexuality in the South Caucasus* <http://crrc-caucasus.blogspot.com/2013/07/attitudes-towards-homosexuality-in.html>

about LGBTI persons. An almost identical methodology for Georgia and Armenia allows for effective comparison of the data in the future.

The situational assessment depicting particular legal and physical conditions of LGBTI people in Armenia and Georgia provides an in-depth analysis of legal standards, existing international and local legislation, cases of discrimination in various spheres, levels of state responsibility towards LGBTI persons and their accessibility to relevant services (health care, education, etc).

The findings of the two studies and the specific areas of focus identified therein will serve as the basis for the development of country-specific evidence-based long-term advocacy strategies on the advancement of LGBTI issues, as well as a set of recommendations for specific actors. The advocacy strategy and the findings of the two studies will also be used as groundwork for a multifaceted awareness-raising campaign, as well as capacity-building activities for CSOs, LGBTI organisations, activists and initiative groups within the framework of the action.

The Heinrich Boell Foundation is particularly grateful to the four project partners mentioned above for their meticulous work and coordinated efforts in developing the methodologies, designing the study tools, producing in-depth analytical reports and ensuring the publication of the two studies; the Institute of Social Studies and Analysis (ISSA) in Georgia and the Caucasus Research Resource Center (CRRC) – Armenia Foundation for the comprehensive field work, data collection and analysis; and experts, Ms Ekaterine Aghdgomelashvili, who has almost single-handedly ensured the validity of every single correlation and invested countless hours and sustained effort in producing a high-quality, comprehensive and well-rounded report, as well as Ms Elmira Bakhshinyan, Mr Jack Vahan Bournazian, and Ms Mariam Osipyan for their invaluable and exhaustive work. Heinrich Boell Foundation's own Eka Tsereteli also deserves high commendation for her work on the graphic design of the homophobic attitudes study, as do Anne Nemsitsveridze-Daniels for their contribution to the translation and editing efforts of the study and situational assessment, and Hasmik Hayrapetyan, for her assistance in the translation of the quantitative tools.

It is our hope that the two detailed studies will provide a better understanding of LGBTI rights in both Armenia and Georgia and pave the way for a long-term strategy that would ensure their protection and inclusion in all aspects of life, which would consequently strengthen democratic development and lead to inclusive and tolerant societies free from discrimination.

*Tbilisi, 23 March 2016*

## **Nino Lejava**

Director  
Heinrich Boell Foundation  
South Caucasus Regional Office

## Terminology<sup>1</sup>

**Cisgender** - a term referring to those people whose gender identity and gender expression match the sex they were assigned at birth and the social expectations related to their gender.

**Cross dresser/Transvestite** - refers to people who enjoy wearing the clothing of another gender for certain periods of time. Their sense of identification with another gender can range from being very strong and indeed their primary gender, to being a less critical part of their identity. Some transvestite or cross-dressing people may seek medical assistance to transition and live permanently in their preferred gender at some point in their life. Others are happy to continue cross dressing part-time for the rest of their lives.

**Gay** - a person who feels sexual and/or emotional desire exclusively or predominantly for persons of her or his own sex.

**Gender Identity** - refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism (Yogyakarta Principles).

**Gender Expression** - refers to people's manifestation of their gender identity, and the one that is perceived by others. Typically, people seek to make their gender expression or presentation match their gender identity/ identities, irrespective of the sex that they were assigned at birth.

**Gender non-conformity and gender variance**- refers to anyone whose gender varies from normative gender identity and roles of the gender assigned at birth.

**Gender Dysphoria** - is a mental disorder diagnosis applied by psychiatrists and psychologists to classify

severe discomfort/ rejection that people may feel towards their sex embodiment and their internally felt gender identity.

**Intersex** - a term that relates to a range of physical traits or variations that lie between stereotypical ideals of male and female. Intersex people are born with physical, hormonal or genetic features that are neither wholly female nor wholly male; or a combination of female and male; or neither female nor male. Many forms of intersex exist; it is a spectrum or umbrella term, rather than a single category.

**Lesbian** - a woman who is sexually and emotionally attracted to women.

**LGBTI** - Acronym for lesbian, gay, bisexual, trans and intersex people.

**Man who has sex with men (MSM)** - Term used purely in HIV/AIDS prevention, and very rarely in other activist circles. It was coined for prevention purposes where the identity of a person does not matter - only the sexual practice. From that perspective the term MSM is very inclusive - as it includes all men (gay, bisexual, heterosexual, trans or intersex). However it does not include people identifying as women and other identities where a lot of prevention is needed and takes place.

**Sexual Orientation** - refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

**Sex** - refers to the biological makeup such as primary and secondary sexual characteristics, genes, and hormones.

**Transgender** - refers to those trans people who live permanently in their preferred gender, without necessarily needing to undergo any medical intervention/s. Until recently, this term was also the primary umbrella term referring to all trans people, but this use is now losing favour to the term 'trans' which is perceived to be more inclusive of all trans communities.

1. Taken from ILGA-Europe's Glossary: <http://old.ilga-europe.org/home/publications/glossary>



**Transgender Man** – FtM (Female-to-Male) – most commonly used to refer to a female-to male trans person. Someone who was assigned female at birth who now identifies as male. Also called a trans man. The term is widely discussed and should be avoided as it is based on the wrong assumption that there are only two possible sexes.

**Transgender Woman** – MtF (Male-to-Female) – Male-to-female, most commonly used to refer to a male to-female trans person. Someone who was assigned male at birth but who identifies as female. The term is widely discussed and should be avoided as it is based on the wrong assumption that there is only two possible sexes.

**Transsexual** – refers to people who identifies entirely with the gender role opposite to the sex assigned to at birth and seeks to live permanently in the preferred gender role. This often goes along with strong rejection of their physical primary and secondary sex characteristics and wish to align their body with their preferred gender. Transsexual people might intend to undergo, are undergoing or have undergone gender reassignment treatment (which may or may not involve hormone therapy or surgery).

**Heterosexism** - the belief, stated or implied, that heterosexuality is superior (religiously, morally, socially, emotionally, behaviorally, and/or in some other way) to other sexualities; the presumption that all people are heterosexual; the belief that all people should be heterosexual. As an institutionalized system of oppression, heterosexism negatively affects LGBTI peo-

ple as well as some heterosexual individuals who do not subscribe to traditional standards of masculinity and femininity.

**Heterosexual** - People are classified as heterosexual on the basis of their gender and the gender of their sexual partner(s). When the partner's gender is other than the individual's, then the person is categorized as heterosexual.

**Homophobia** – the fear, unreasonable anger, intolerance or/and hatred toward homosexuality. Homophobia can appear in various ways: Internalized Homophobia: when lesbian, gay men and bisexual people are considering and accepting heterosexuality as the correct way of being and living. Institutionalized Homophobia: when governments and authorities are acting against equality for LGB people. This can be hate speech from public elected persons, on pride events and other forms of discrimination of LGB people.

**Transphobia** – refers to negative cultural and personal beliefs, opinions, attitudes and behaviors based on prejudice, disgust, fear and/or hatred of trans people or against variations of gender identity and gender expression. Institutional transphobia manifests itself through legal sanctions, pathologisation and in-existent/inadequate mechanisms to counter violence and discrimination. Social transphobia manifests itself in the forms of physical and other forms of violence, hate speech, discrimination, threats, marginalization, social exclusion eroticization, ridicule and insults.

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## Preface

The Georgian legal system has undergone significant changes related to the fight against discrimination on the grounds of sexual orientation and gender identity (hereinafter, SOGI), including the adoption of new normative acts, as well as the incorporation of additional norms and amendments into the existing legislation. The Human Rights Action Plan and Strategy document was adopted, which introduced specific mechanisms for the implementation of legal guarantees.

Regardless of the determined legislative guarantees, the adoption of which was mainly related to the fulfillment of international obligations, the human rights situation of LGBTI individuals in the country is grave, manifesting in their subjection to systemic violence, discrimination, and harassment. The tendency to politicize LGBTI issues and strengthen the homophobic discourse further intensifies the discrimination and marginalization of the community and influences the effectiveness of state policies directed at the protection of LGBTI rights. The state fails to enforce secular, human rights-based policies in response to the homophobic agenda produced by different social, religious, and political groups and often expresses open loyalty to the dominant religious group and discourse.

The present report aims at the comprehensive description and documentation of the human rights situation of LGBTI persons and state policies in Georgia. The report reviews the situation for LGBTI persons in relation to each right, identifies systemic problems on legislative, institutional, and human rights levels, and proposes specific recommendations for relevant state agencies.

### Goals and Objectives of the Report

The purpose of the report is to provide an in-depth assessment of the human rights situation for lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, to analyze the existing legal, institutional or practical problems, and present relevant recommendations for the state and other institutions working on LGBTI rights, in order to support the protection of the human rights of LGBTI persons.

The objective of the report is to present a systemic and result-oriented strategy in response to the shortcomings or practical problems identified as a result of the assessment in order to contribute to the reduction of discriminatory practices towards LGBTI persons existing in every sphere of public life.

### Research Methodology and Data Collection

The methodology and the structure of the present report was designed with the cooperation of the NGO “Society Without Violence” (SWV), who carries out the identical research according to local reality within abovementioned project, in Armenia.

Due to the scale and the scope of the assessment, the research team simultaneously used several methodological tools.

Two main methods were used during the research process:

1. Obtaining and processing data gathered from focus groups with LGBT community members, from individual in-depth interviews and interviews with expert.
2. Processing secondary data from normative material, policy papers, resolutions, reports, research studies, publications, and other information;

#### *1. Obtaining and Collecting Information Using Focus Group Interview Methodology*

Within the scope of the assessment, primary information was collected through qualitative research, aiming at the evaluation of the relevance and actuality of the information obtained through secondary sources, the identification of new problems, and the implementation of a detailed analysis of already identified issues.

Primary information was obtained through three different techniques:

- Focus groups
- In-depth interviews
- Interviews with experts

### a) Focus Groups

Three target focus groups were conducted within the framework of the assessment. Focus groups were held in Tbilisi in July of 2015. Target groups were lesbian and bisexual women,<sup>3</sup> gay and bisexual men,<sup>4</sup> and transgender persons (MtF; FtM; Agender)<sup>5</sup>.

**Remark:** *Due to nonexistence of the intersex community in Georgia their inclusion in qualitative analysis couldn't be conducted.*

### b) In-Depth Interviews

#### Interviews with gay/MSM and Transgender sex workers

In-depth interviews were conducted with gay/MSM and transgender sex workers (five respondents in total)<sup>6</sup>. The method was selected due to the high degree of necessity to protect the anonymity in the given group. Given that the life experiences and perceptions of the respondents include particular specificities, conducting in-depth interviews with the group was the most optimal option.

Strengths and Limitations of the Utilised Methodology:

Given that the number of participants was five (5), it is difficult to discuss the validity of generalising the obtained information to the whole group. However, taking into account the fact that the number of the representatives of the mentioned group is also relatively small in the given population, the information, tendencies and problems identified are homogeneous, similar and analogical for gay/MSM and transgender sex workers in Georgia.

#### Interviews with Experts

In order to obtain additional information on the matter, the research team interviewed representatives of state institutions and representatives/experts of non-governmental organisations working in the field.

#### 2. Methods and Instruments for Processing Secondary Data and Resources

In the process of preparing the report, one of the methods used was desk research, during which the research team obtained and reviewed national, as well as international normative bases related to the rights of LGBTI persons.

Most of the information in the report is based on primary and secondary sources pertaining to the human rights situation of LGBTI persons:

### a) Obtaining and Reviewing Main Sources

For the purposes of reviewing the main sources, the team obtained and analysed the principal normative and policy documents existing in Georgia, which aim at regulating different aspects of human rights for LGBTI persons.

- 
3. Number of participants: 12 (twelve) participants; age range: 18-31; sexual orientation of participants: 8 (eight) lesbian and 4 (four) bisexual individuals.
  4. Number of participants: 8 (eight) participants; age range: 20-25 and one 36-year-old participant; sexual orientation of participants: 6 (six) gay and 2 (two) bisexual individuals.
  5. Number of participants: 7 (seven) participants; Place of residence: Tbilisi; sexual orientation and gender identity of participants: Interview #1 – transgender woman (25 years old); Interview #2 – gay, cross-dresser (22 years old); Interview #3 – gay, cross-dresser (24 years old); Interview #4 – transgender woman (23 years old); Interview #5 – transgender woman (19 years old).
  6. Gay/MSM and transgender sex workers, 5 (five) respondents; current residence: Tbilisi; Gender identity and sexual orientation of interviewees: Interview #1 – transgender woman (25); Interview #2 – gay, cross-dresser (22); Interview #3 – gay, cross-dresser (24); Interview #4 – transgender woman (23); Interview #5 – transgender woman (19).

Also, In order to obtain and review the standards for legislative enforcement, the research team processed the decisions and recommendations of the general courts of Georgia and the Public Defender's Office

**b) The process of obtaining and reviewing of additional sources had three main directions:**

**1. Documenting and Assessing the Information Requested from State Institutions**

Requesting public information from state institutions had four main objectives:

- Documenting planned/completed state measures for fulfilling state obligations;
- Documenting the official answers/positions of the state regarding particular topics;
- Verifying non-existent or existent, but incomplete information related to certain topics;
- Obtaining statistical data.

**2. Parliamentary and Special Reports Published by the Public Defender's Office**

In order to assess the human rights situation for LGBTI persons in Georgia, the research team reviewed the annual parliamentary and special/thematic reports published by the Public Defender's Office.

**3. Reports and Studies by Organisations/Experts Working on LGBTI Issues in Georgia**

In order to document the discriminatory practices and violations of the human rights of LGBTI persons, the research team obtained and analysed studies, policy papers and reports prepared by local non-governmental organisations. The present report uses these documents as basic/main sources and, to an extent, compiles these sources.

**4. Instrument for Obtaining and Reviewing International and Regional Documents**

To compare the existing legal environment in Georgia with international standards and analyse the obligations under determined standards, the research team relied on the following international and regional instruments: 1. Documents of the United Nations and its key institutions (resolutions, general comments, reports); 2. OSCE standards; 3. The Council of Europe standards and guidelines; 4. Case law of the European Court of Human Rights.

The report also uses studies/reports published by international and regional organisations working on LGBTI issues.

**Defining Instrument for the Report Structure**

The structure of this report is based on the structure of the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe "On Measures to Combat Discrimination on the Grounds of Sexual Orientation and Gender Identity,"<sup>7</sup> modified according to local specificities.

*Methodology of individual assessment of the mentioned issues/rights*

Each aforementioned topic/right will be analysed in light of the following range of factors:

- Legal regulation and scale of rights;
- The scale of implementation of legal regulations and protection guarantees in practice;
- Systemic reasons for rights violations.

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7. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010 at the 1,081st meeting of the Ministers' Deputies)

### Structure of documenting and analysing each topic/right

The structure of the analysis of each right (in chapters) is based on the internationally recognised IRAC format, based on which, each chapter comprises of the following:

- General description of the subject
- Normative regulations (international standards and national legislation)
- Situational analysis/existing practice
- Conclusion

The structure of certain chapters and review of some rights may vary due to the specifics of the issues discussed.

### **Report limitations**

The given report does not aspire to comprehensively problematize the presented issues and propose solutions. Taking into account the methodological limits and scope, the report does not offer a comprehensive and in-depth assessment of existing problems related to each topic. Rather, the report aims at preparing a comprehensive compilation on the human rights situation of LGBTI persons. The compilation will identify the dynamics of the current policies, their progress and shortcomings. The recommendations and assessments presented in the report will create a basis for the government, as well as international, donor, and non-governmental organisations to plan further targeted policies.

## SOCIO-CULTURAL CONTEXT AND INSTITUTIONAL HOMOPHOBIA

In-depth research to investigate the scope of homophobia and transphobia in the Georgian society has not yet been conducted in Georgia. However, homophobia can be identified as a pressing social problem through fragmented studies. According to the CRRC Caucasus Barometer of 2011, 88% of the Georgian population considers homosexuality justifiable under no circumstances<sup>8</sup>. A 2013 study, showing that for 32% (n 532) of respondents in Tbilisi, homosexuals are the least desired neighbours, also confirmed negative attitudes towards the LGBTI community<sup>9</sup>.

Homophobic attitudes in society were also apparent during the massive raids on LGBTI persons and their supporters on May 17, 2012 and 2013, as well as during the subsequent cases of violence.

The strengthening of anti-LGBTI discourse also relates to the development of EU-Georgian relations. In 1994, Georgia began working on the Partnership and Association Agreement. The Agreement, signed on April 22, 1996 in Luxembourg, defined the basic framework for further EU-Georgian relations. The Agreement came into force in 1999. Since September 1, 1997, Georgia has been implementing the process of harmonisation of national legislation with the EU legislative framework, according to the Resolution of the Parliament of Georgia.

On June 14, 2004, the Council of Ministers of the European Union made the decision to include Azerbaijan, Georgia, and Armenia in the European Neighborhood Policy instrument. Since then, the EU-Georgian relations entered a new phase and adopted an even more intensive character.

With expanding cooperation with the EU and the Western inclination of the state, the political and societal powers opposing this position were also strengthened. The discourse of the latter groups entirely focused on labelling the “West” as a whole as an enemy and claiming its incompatibility with the Georgian national and cultural values<sup>10</sup>.

By discussing gender and sexuality as Western imports, the aforementioned issues adopted a political character and completely transcended the scope of human rights. As a result, the issue became an instrument for the manipulation of the electorate by political subjects, effectively exploiting the former’s national and religious sentiments<sup>11</sup>.

In the existing socio-political system, the animosity towards LGBTI persons is also based on religious discourse, which considers homosexuality as a danger to Georgian values. The emergence of such dialogue is largely related to the increasing role of the Church as a political institute<sup>12</sup> and its active involvement in the ongoing political processes in the country<sup>13</sup>. Religious leaders often engage in homophobic hate speech, and their principal mobilization strategy is revealed in the rhetoric on the protection of “Georgian Orthodox values” and “clearing public spaces from sin.”<sup>14</sup>

Recent experience points to the transformation of the existing discourse in relation to LGBTI issues, as demonstrated in public statements of government officials, as well as in the relatively neutral coverage of these issues in the media, which certainly warrants a positive evaluation.

In such conditions, the de-politicization of the issue and its transformation from discriminatory and negligent practices to ones based on human rights and equality becomes essential. In this regard, the secularization of government and public policy and the unconditional protection of religious neutrality of the state are especially crucial.

8. See: <http://caucasusbarometer.org/en/cb2011ge/JUSHOMO/>

9. CRRC, Research of 17<sup>th</sup> of May, 2013, see: <http://blog.crrc.ge/2015/05/2.html>

10. For easy reference, please see the chapter on “Hate Speech.”

11. For detailed information, see MDF “Hate speech and discriminative expression in Georgian political discourse”, Media monitoring results, 17 February-17 May, 2014, see: [http://eurocommunicator.ge/mdf/uploads/Hate\\_speech\\_in\\_political\\_discourse.pdf](http://eurocommunicator.ge/mdf/uploads/Hate_speech_in_political_discourse.pdf)

12. It should be noted that, according to the research conducted by CRRC, 72% of the Georgian population completely trust the Georgian Orthodox Church, see: <http://caucasusbarometer.org/en/cb2013ge/TRUGOCH/>

13. Eka Aghdgomelashvili “Ideological Homophobia”, Journal “Solidaroba”, 2009, N3 (30), see: <http://lesbi.org.ge/ka/2015/10/15/ideology/>

14. *Ibid.* Also see, MDF report for 2014-2015 years.



# LEGAL AND POLITICAL FRAMEWORK

## General Review of Legal Amendments

### Anti-Discriminatory Legislation

Until 2014, there was no comprehensive and consolidated anti-discriminatory legislation, which would ensure the readiness of the government to combat all forms of discrimination and which would subordinate it to adequate legal mechanisms in Georgia. The law, adopted on May 2, 2014, “On the Elimination of all Forms of Discrimination” changed the situation at hand; the law consolidated all internationally recognised principles and grounds for discrimination, including SOGI. Along with the court, the Public Defender’s Office was also identified as a law enforcement mechanism. The Department for Equality, established within this framework, began separately working on discrimination cases.

### Law on Gender Equality

The Law of Georgia on Gender Equality, adopted in 2010, defines the principles of equality in the most problematic areas, including education and employment.

However, the law itself does not include a separate paragraph on SOGI. At the same time, the law is not equipped with effective implementation mechanisms, and thus has a mostly declaratory nature.

### Criminal Legislation

Until 2012, crimes with discriminatory motives as defined in the Criminal Code of Georgia included only those committed on racial, national, ethnic, and linguistic grounds, and automatically excluded crimes committed on the grounds of SOGI. In order to eliminate this shortcoming and provide protected grounds, after March 27, 2012, Article 53.3<sup>1</sup> was added to the Criminal Code. The Article defined the motive of hate towards SOGI as an aggravating circumstance for all crimes mentioned in the Code. The adoption of this norm was conditioned by the General Policy Recommendations, issued for Georgia by the European Commission against Racism and Intolerance (ECRI) in 2010, in which the ECRI once again calls upon the government to define racist motives as aggravating circumstances in all criminal offense.<sup>15</sup>

The given amendment is essentially a positive development, but failure to employ the norm in practice and the non-existence of relevant statistical data for proper verification raises objective doubts regarding its efficiency.

## Assessment of Relevant Policy Papers

### Human Rights Action Plan and Strategy Document

In 2014, the Human Rights Action Plan for 2014-2015 and corresponding Strategy for 2014-2020 were adopted. The given documents represent progressive steps, given that the Action Plan is the first policy document of its kind that outlines measures for improving the human rights situation for LGBTI persons in Georgia. However, it must be noted that the Action Plan does not dedicate a separate chapter to the issue, and rather covers it in Chapter 14 on Gender Equality.

Apart from the aforementioned documents, the government also has thematic plans, several of which are worth mentioning, namely: the Action Plan for 2013-2015 against Domestic Violence and Measures for Protecting the Victims of Domestic Violence; Strategy to Combat Ill-treatment and the 2011-2013 Action Plan against Ill-Treatment; as well as the 2012-2015 Action Plan for Child Welfare and Protection.

15. ECRI Report on Georgia, CRI (2010)17, fourth monitoring cycle, Adopted on 28 April, par. 11, see: <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/georgia/GEO-CbC-IV-2010-017-ENG.pdf>

# REVIEW OF THE HUMAN RIGHTS SITUATION OF LGBTI PERSONS

## 1. Unequal environment towards LGBTI persons and Anti-Discrimination policy

### 1.1. Developing the Principle of Non-Discrimination Based on SOGI in International Law

The widespread homophobic and transphobic attitudes in society, often provoked by the absence of effective anti-discrimination legislation, subject lesbian, gay, bisexual, transgender and intersex persons to a wide range of human rights violations, preventing them from exercising their fundamental rights.

In the last few years, the international community has largely been focusing on the issues of visibility of LGBTI persons and their protection from discrimination. Although major international instruments, including the United Nations Covenant on Civil and Political Rights<sup>16</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>17</sup> do not include sexual orientation and gender identity separately, additional explanatory documents and resolutions provide extensive coverage of SOGI-based rights.

In the 1994 case of *Toonen v. Australia*<sup>18</sup>, the Human Rights Committee concluded that states have the obligation to protect individuals from discrimination on the grounds of sexual orientation. This position was also reflected in the subsequent decision of the Committee,<sup>19</sup> as well as in General Consideration N20 of the Committee for Economic, Social and Cultural Rights, which stated that “other status” indicated in the Covenant also includes sexual orientation and gender identity.<sup>20</sup>

Since 2003, the United Nations General Assembly has continuously called upon states to pay close attention to the prevention of frequent cases of homicide on the grounds of SOGI. In 2011, the Human Rights Committee adopted the very first Resolution 17/19 on sexual orientation and gender identity, which expressed deep concern for the practices of violence and discrimination against LGBTI persons.<sup>21</sup> The Resolution was followed by the first official report by the UN High Commissioner for Human Rights, A/HRC/19/41, in which the Committee underlined the negative results of discrimination and identified the most problematic areas in terms of discrimination, among them, labour relations, and rights to adequate housing and social protection.<sup>22</sup> The Committee noted the relative frequency of discrimination against LGBTI persons in labour relations, since these persons do not conform to the binary perception of sex and gender,<sup>23</sup> leading to the practices of harassment.<sup>24</sup>

*In relation to SOGI, the Yogyakarta Principles<sup>25</sup> adopted in 2007 also indicate that every person can exercise human rights without facing discrimination based on sexual orientation or gender identity. The law must prohibit all types of discrimination and ensure equal rights protection for all persons.<sup>26</sup>*

16. Article 2.1.

17. Article 2.2.

18. *Toonen v. Australia*, communication No. 488/1992 (CCPR/C/50/D/488/1992)

19. *Young v. Australia*, communication No. 941/2000 (CCPR/C/78/D/941/2000)

20. E/C.12/GC/20, para. 32

21. A/HRC/RES/17/19, see: <http://arc-international.net/wp-content/uploads/2011/09/HRC-Res-17-19.pdf>

22. A/HRC/19/41, para. 50

23. *Ibid*

24. *Ibid*, para. 53

25. See: [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm)

26. *Ibid*

Moreover, Recommendation CM/Rec(2010)5 of the Council of Europe Committee of Ministers on eliminating discrimination on the grounds of sexual orientation and gender identity contains detailed measures to be implemented by states in order to eliminate discrimination and calls for the development of effective legal mechanisms.

The last thematic document by the EC Human Rights Commissioner deserves special mention; it concerns the situation for intersex persons and calls on states to exercise caution not to omit the rights of this group while designing national policies and strategies. The Commissioner underlined cases of human rights violations for intersex children, *inter alia*, the practices of unsolicited medical intervention, sterilization and “normalization” of genitalia, which, in certain cases, may be compared to torture and inhuman treatment<sup>27</sup>. The document also discusses the possibility of including the “sex characteristics” of intersex persons in legislation<sup>28</sup> on a par with the terms “gender identity” and “sexual orientation”, as an opportunity to contribute to increasing the visibility and recognition of the intersex community.<sup>29</sup>

## 1.2. The review of national standards and mechanisms against discrimination based on SOGI

Georgian legislation is not discriminatory in its nature; Article 14 of the Constitution of Georgia includes a principle on the prohibition of discrimination, although it does not separately define SOGI as protected grounds; through literal reading, the provision is exhaustive, but the case law of the Constitutional Court confirms its flexibility.<sup>30</sup>

One of the latest rulings of the Constitutional Court of Georgia, concerning a decree issued by the Minister of Labour, Health and Social Affairs, prohibiting gay and MSM men from donating blood, is essentially noteworthy in terms of sexual orientation. The Court indicated that the list of discriminatory grounds in Article 14 of the Georgian Constitution is not exhaustive. “The purpose of this paragraph of the Constitution goes beyond the prohibition of discrimination according to the existing limited list [...] Narrow grammatical interpretation would undermine Article 14 and diminish its significance in the constitutional legal framework.”<sup>31</sup>

Despite the fact that while discussing the issue, the disputed norm was rendered void, the Court continued the discussion and resolved that “in the given case, the limitation imposed by the disputed norm establishes unjustifiably harsh unequal treatment among essentially equal persons and limits their rights to a greater extent than necessary for achieving the legitimate objective. [...] Consequently, the disputed norm contradicts the basic right to equality, guaranteed by Article 14.”<sup>32</sup>

Provisions on non-discrimination can be found in thematic laws, such as the Law on Health (m. 6.1.), the Law on General Education (m.13.3.), the Higher Education Act (m.3.2(t)), and the Law on Gender Equality.

The principle of non-discrimination on the basis of SOGI can also be found in Article 2, Paragraph 3 of the Labour Code of Georgia, which, on the basis of a positive change implemented on 12 June 2013, expanded the boundaries of protection from discrimination to include pre-contractual relations.<sup>33</sup>

On May 2, 2014, amendments were also made to the criminal legislation, in particular, for crimes defined in Article 142 (violating equality rights), sexual orientation, and gender identity and expression were added as grounds for protection.<sup>34</sup>

27. Human rights and intersex people, Issue paper, Council of Europe Commissioner for Human Rights, see: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2768767&SecMode=1&DocId=2282716&Usage=2>

28. Intersex refers to the bodily characteristics of a person. Although it is not correct to link specific sex characteristics with either gender identity or sexual orientation, accordingly, the ground of discrimination such as sexual orientation, gender identity and sex cannot fully cover intersex people, which is why it is important to have separate ground of discrimination based on “sex characteristics”. FRA, the fundamental rights situation of intersex people, 2015. See: <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>

29. Reference N 21, p. 44

30. Shota Beridze and others vs Parliament of Georgia 2008, 32/1/-392, chapter 2, para. 2

31. LevanAsatiani, IrakliVachradze, BeqaBuchashvili and GochaGabodzevs Minister of Labor, Health and Social Affairs #2/1/536, February 4, 2014, chapter 2, para. 22

32. Ibid, chapter 2, para. 49

33. See: <https://matsne.gov.ge/ka/document/view/1951529#DOCUMENT:1>

34. See: <https://matsne.gov.ge/ka/document/view/2339385#DOCUMENT:1>

### 1.2.1. The adoption of the Anti-Discrimination Law and its mechanisms

The Law, adopted on May 2, 2014, on the Elimination of All Forms of Discrimination is essentially a step forward for the Georgian legislation; especially, since it identifies sexual orientation and gender identity as separately protected principles.

The content of the law and its means of protection from discrimination are very different from the model described in the initial version of the law developed by the Ministry of Justice of Georgia, which included a special and effective enforcement mechanism in the form of an equality inspector. The approved version of the law assigned the responsibility for mitigating cases of discrimination and monitoring the protection of equality to the Public Defender<sup>35</sup> and the court. It is noteworthy that the law applies to all public institutions, organizations, individuals and legal entities in all fields of activity.<sup>36</sup>

Although, it must be noted that the law lacks an effective implementation mechanism due to a short limitation period<sup>37</sup> (one month for labour and administrative disputes). It essentially excludes the possibility of complementary usage of the court system and the Public Defender mechanism and turns them into alternative means for legal protection. The recommendations and general suggestions of the Public Defender are not binding. Unlike administrative bodies, for which the Public Defender can employ the administrative dispute mechanism if the instructions are not fulfilled, recommendations issued to individuals are fully deprived of any legal means to ensure their enforcement and thus entirely depend on the goodwill of the individual.

At the same time, despite the fact that the law envisages the possibility for moral and/or material compensation through court, it is problematic to determine legal grounds for moral damages and criteria for calculating said damages. For moral compensation, current case law requires the injured party to provide evidence of the stress endured, which severely complicates the possibility of compensation. In these conditions, it is important for the law to clearly define legal grounds for moral compensation and consider the establishment of discrimination *per se* as sufficient grounds to originate a claim for compensation.

The scale of damage will depend on the intensity of differentiation, vulnerability of the victim and other circumstances. Thus, it is necessary that, in addition to improving the above-mentioned shortcomings, the law reflect clear grounds and criteria for compensating non-pecuniary damages.<sup>38</sup>

After the adoption of the law, court justices did not undergo special training to enable them to adequately process discrimination cases, which is why the system was almost completely unprepared for the challenges of dealing with the new types of cases. As existing practice of the employment of anti-discrimination mechanisms demonstrates, justices fail to use the special rules for litigating discrimination cases and render clearly unsubstantiated decisions. Thus, in discrimination disputes, effective use of legal mechanisms is hindered due to the fact that judges lack appropriate knowledge and capacity necessary to identify and establish instances of discrimination. Often, they cannot understand the concept of unequal treatment, which frequently becomes the reason for rejecting the claim.

It is important to note that, within the second cycle of UPR process Georgia has received important recommendations<sup>39</sup> in regard of the effective usage of anti-discrimination legislation and strengthening the existing legal remedies. Among them, State was urged that to inform appropriately the wider society, law-enforcement and judicial system representatives about the anti-discrimination legislation and to make amendment in the law about elimination of all forms of discrimination in order to give competence to Public Defender to use the fining method or other sanctions on the facts of discrimination.<sup>40</sup>

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35. Article 6.1

36. Article 3

37. Article 6.2

38. Amendments have been initiated in the Law on the Elimination of All Forms of Discrimination; however, it is unclear to which part, since the parliament has not yet approved the amendments.

39. A/HRC/WG.6/23/L.12, UN HRC, Report of the Working Group on the Universal Periodic Review, see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/005/04/PDF/G1600504.pdf?OpenElement>

40. *Ibid.*, para. 118.2

### 1.2.2. Existing discrimination Precedents based on SOGI

Before and after the adoption of the anti-discrimination law, for the purpose of researching the practice of Georgian general courts, EMC requested public information on discrimination cases on the grounds of sexual orientation and gender identity from the Tbilisi, Batumi and Kutaisi civil courts, the Tbilisi appellate court and the Supreme Court of Georgia. The latter<sup>41</sup> notified the requesting organization that in the statistical report forms used by the courts, civil and administrative cases are recorded according to the category of dispute and this does not include grounds of discrimination. The organization received similar responses from other territorial and instance courts.<sup>42</sup>

According to the 2015 report of the Public Defender, since the adoption of the Anti-Discrimination Law and until August 31, 2015, the Public Defender's Office received 107 complaints/applications<sup>43</sup>, 11% of which concerned alleged offenses<sup>44</sup> of discrimination committed on the grounds of sexual orientation or gender identity. The public information<sup>45</sup> obtained from the Public Defender's Office shows that the instances of discrimination on these grounds most frequently occur while using or attempting to use different services. For example, according to one of the cases, the applicants faced discrimination at a fast food chain and a cafes in Gori because of their sexual orientation (case N 2247/15).

As a result of group discussions, different forms of discrimination were outlined and it was revealed that such cases of discrimination occur with the highest frequency and intensity in labour relations, which include access to employment and work process, as well as dismissal and harassment practices<sup>46</sup> (see in detail below – Labour Practices).

### 1.3. Conclusion

As the results of the assessment demonstrate, in terms of developing anti-discriminatory mechanisms, the law indeed changed the substance of the Georgian legislative system. It established instrumental norms for realising rights and ensuring equal treatment, although the state itself is unable to cope with these compulsory proceedings and fulfill its obligations.

In the conditions of weak legislative mechanisms, elimination of the negative effects of discrimination becomes impossible on the social, and even on the individual level. Thus, it is essential for the state to reconsider and analyse the experience accumulated over the last year and to base further steps for improving the effectiveness of the enforcement mechanism on this analysis.

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41. Response from the Supreme Court of Georgia N1000, 09.09.2015

42. Response from the Tbilisi City Court N1084328, 10.09.2015; response from the Batumi City Court N21481/15-529g/k, September 11, 2015; Response from the Tbilisi Appellate Court N119, 09.09.2015; response from the Kutaisi City Court N12655, 15.09.2015.

43. Special Report on Combating Discrimination, Its Prevention and State of Equality, September, 2015, p. 10

44. The high rate of applications can be attributed to the active work of LGBT organisations and can not to be interpreted as openness of the community members or as an increasing level of trust towards the governmental institution.

45. Response from the Public Defender's Office September 2, 2015, N08-2/7110.

46. Focus group with lesbian and bisexual women 22.07.2015; focus group with transgender persons 17.07.2015

## 2. Right to Life, Security and Protection from Violence

### 2.1. Hate Motivated Crimes

#### 2.1.1. Problem Description

Existing homophobic and harshly negative attitudes towards LGBTI persons within the Georgian society often result in violence and lead to social isolation and marginalisation of the members of the community. Non-fulfillment of the state's positive obligations to prevent and effectively investigate homophobic and transphobic crimes resembles a trend, which generates a syndrome of impunity and encourages violence.

In this respect, it is noteworthy that law enforcement agencies in Georgia do not hold official statistical data for hate crimes. This indicates that the state does not have a distinct vision and strategy to combat hate crimes on the one hand, and that the state is indifferent towards the prevention of hate crimes and maintains a policy of neglect on the other. Information on hate crimes gathered and publicised by the state is extremely scarce and does not correspond to reality. This is also caused by low referral rates, which can be explained by a lack of trust towards law enforcement agencies, ineffective investigations, and previous experience of ill-treatment. An ineffective response policy of the police towards the oppression and humiliation of LGBTI persons has reduced the members of the community into victims of repeated violence, making them a highly vulnerable group in Georgia.

#### 2.1.2. International Standards

According to the acting definition of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), hate-motivated crimes are defined as: "Any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a [specific] group."<sup>47</sup> Hate-motivated crimes pose a real threat to the democratic process, aim at the division and differentiation in society, and oppose the fundamental principle of human dignity and equality – the basis of the universality of human rights.

The elimination of hate crimes and incidents largely depends on relevant national regulations, adequate measures and procedures<sup>48</sup>. By condemning discriminatory motives, reflecting them in legislation and taking practical measures, the state proactively prevents crimes, which, in turn, facilitates the collection of statistical data for further processing and ensures the visibility of the vulnerable group.<sup>49</sup>

The OSCE guidelines indicate that effective handling of hate crime cases requires close cooperation among criminal justice system actors – the police, the Prosecutor's Office, and the court – not only on the operational, but also on the policy level. In addition, the existence of a unified definition of hate crimes will only facilitate the effectiveness of such cooperation.<sup>50</sup>

Decision N 9/09<sup>51</sup> on Combating Hate Crimes, adopted in 2009 by the OSCE Ministerial Council lists the basic measures to be implemented by the state for crime elimination. The document focuses on the collection and publication of data, adoption of comprehensive legislation, and planning of relevant measures to ensure that states are able to encourage victims and witnesses to declare potential hate-motivated crimes. The document also underlines the significance of professional trainings for policepersons, prosecutors and judges to increase their knowledge and sensitivity while working on hate crimes.

To encourage referrals, the Recommendation of the Council of Europe Committee of Ministers CM/Rec(2010)5 encourages States to take appropriate measures to ensure that law enforcement agencies and the court system are

47. OSCE/ODIHR annual report for 2006, p. 9. see: <http://www.osce.org/odihr/26759?download=true>

48. Combating discrimination on grounds of sexual orientation or gender identity, Council of Europe standards, 2011, p. 21. See: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBTI\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBTI_EN.pdf)

49. *Ibid*, p.22

50. OSCE Prosecuting hate crimes. A practical guide, p. 17-18, see: <http://www.osce.org/odihr/prosecutorsguide?download=true>

51. Decision No. 9/09, Combating Hate Crimes, see: <http://www.osce.org/cio/40695?download=true>

prepared to identify such crimes and incidents and possess necessary skills to support victims and witnesses.<sup>52</sup> The Recommendation underlines that states should ensure effective, prompt and impartial investigations of alleged criminal cases and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive<sup>53</sup>.

Disregarding discriminatory motives by the state during investigation or sentencing may constitute indirect discrimination. In the case of *Angelova and Iliev v. Bulgaria*, the European Court of Human Rights reiterated, “Under Article 2 of the Convention, States have general obligation to conduct effective investigation in cases of deprivation of life, which must proceed without discrimination, as required by Article 14 of the Convention. Moreover, when investigating violent incidents, the State has an additional duty to take all reasonable steps to unmask any [racist] motive and to establish whether [ethnic] hatred or prejudice may have played a role in the mentioned events. Treating violence and brutality on racial motives in a manner similar to crimes without racist overtones would constitute ignoring the specific nature of actions particularly destructive to fundamental rights. When the state fails to differentiate among situations that are essentially different from each other, the situations might constitute unjustified treatment irreconcilable with Article 14 of the Convention.”<sup>54</sup>

In the case of *Identoba and Others v. Georgia*, the European Court for Human Rights considers that it is “the obligation of the authorities to prevent hate-motivated violence on the part of private individuals, as well as to investigate the existence of a possible link between a discriminatory motive and the act of violence, which can fall under the procedural aspect of Article 3 of the Convention, or can be considered as the positive obligation of the authorities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination.”<sup>55</sup> The ECHR also resolves that the domestic criminal legislation directly provided that discrimination on the grounds of sexual orientation and gender identity should be considered an aggravating circumstance of an offence. The Court therefore considers that it was essential to conduct the investigation in that specific context, so that the state took all reasonable steps with the aim of unmasking the role of possible homophobic motives in these events.”<sup>56</sup>

### 2.1.3. National Legal Environment

It is important to note that the Georgian legislation does not contain a definition of a hate crime and does not comprehensively regulate its various forms. Hate-motivated crimes based on SOGI are reflected in the general part of the Criminal Code as aggravating circumstances of a crime, and in the in the material part - as a violation of equality.

Until 2012, crimes motivated by bias against sexual orientation and gender identity were not considered as aggravating circumstances for the crimes defined in the Criminal Code. However, on March 27, 2012, legislative amendments were introduced, following which Article 3<sup>1</sup> was added to Article 53 of the Criminal Code and was formulated to read as follows: “committing a crime, *inter alia*, motivated by intolerance on the grounds of sexual orientation, gender identity [...] or other forms including grounds for discrimination, constitutes an aggravating circumstance for all relevant crimes defined in the Criminal Code”.

As the norm shows, Article 53.3<sup>1</sup> is an aggravating circumstance of a general nature for all relevant crimes in the Criminal Code. In addition, Article 142 of the Criminal Code, which concerns the violation of equality, includes sexual orientation and gender identity, which was reflected in the norm after the changes in 2014. However, it should be noted that despite the existence of the norm, its usage is complicated, taking into account the general nature of its content and the difficulty of presenting evidence (substantial violation of human rights).

52. *Ibid.*, I.A.3

53. CM/Rec(2010)5, I.A.1, 2. see: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>

54. *Angelova and Iliev v. Bulgaria*, No. 55523/00, judgment of 26 July 2007, para.115. Also, *Nachova and other V. Bulgaria*, No. 43577/98, judgment of 6 July 2005, para. 160

55. ECHR, *Case of Identoba and Others v. Georgia* (Application no. 73235/12), May 12, 2015, para. 63

56. *Ibid.*, para. 77

It is also important that the Action Plan adopted in 2014 assigned the liability for effective investigation of hate-motivated crimes to the Prosecutor's Office and the Ministry of Internal Affairs of Georgia. The Plan also mentions that the investigation of hate-motivated crimes should take the motive into account<sup>57</sup> and, therefore, statistical data should be produced on hate motivation.<sup>58</sup>

### 2.1.3.1. The Analysis of the Performance of the Ministry of Internal Affairs and the Prosecutor's Office in Relation to their Obligations to Record Statistical Data

Despite the fact that since 2012, numerous hate-motivated crimes have been committed against LGBTI persons, the law enforcement agencies have continuously failed to commence adequate investigation on the cases and to ensure the protection of the right to fair trial. Since 2012, the Ministry of Internal Affairs and the Prosecutor's Office have not recorded a single crime motivated by hatred on the grounds of SOGI.<sup>59</sup> Abovementioned is validated with Hate Crime Reporting data base of OSCE/ODIHR, where the reports submitted by the state doesn't contain any data on the hate crimes based on SOGI.<sup>60</sup>

On December 23, 2014, the Minister of Internal Affairs issued Reference N47 "On the prevention of discrimination and the implementation of effective response measures for crimes committed on these grounds by the units of the Ministry of Internal Affairs," the Reference identifies the major obligations of the agencies of the Ministry of Internal Affairs in the process of combating discriminatory crimes.

According to Article 2 of the Reference, in cases of crimes of discrimination, the relevant field of an online filing program – "Circumstances of the Crime" – should include an indication of the "alleged" existence of motives of intolerance and concrete grounds of discrimination envisaged by Article 53.3<sup>1</sup> of the Criminal Code. The Information-Analytical Department of the Ministry was designated as the responsible body for recording the statistics.<sup>61</sup> However, the Reference is not implemented in practice, in particular, according to information received from the Ministry of Internal Affairs, Article 53 is included in the general principles of the Code and establishes the initial grounds for sentencing, thus, these circumstances are taken into account by the court during sentencing<sup>62</sup>. The letter also stated that "Article 53.3<sup>1</sup> of the Criminal Code does not constitute a qualifying circumstance for a crime and its indication in the electronic filing program is inexpedient."<sup>63</sup>

In order to review court practice, EMC also requested information from other courts of Georgia about the statistical records on the usage of Article 53.3<sup>1</sup> since 2012. The organization was informed that the courts do not hold data on the application of the Article.<sup>64</sup>

It is noteworthy that according to the response received from the Chief Prosecutor's Office, the agency plans to create guiding recommendations on the investigation and prosecution of hate-motivated crimes, which will include procedures for the identification of crimes of this category and for the collection/delivery of statistical data.<sup>65</sup> In order to receive detailed information, during the interviews<sup>66</sup> conducted with the representatives of the Prosecutor's Office, EMC learned that the Office has developed guiding documents/guidelines on hate-motivated crimes, which include "the specificities of investigation of hate crimes, identification of signs of discrimination, peculiarities of collecting evidence and its depiction in the formulation of charges"<sup>67</sup>. The document will be binding for prosecutors and its enforcement will be supervised by the Human Rights Protection Division of the Prosecutor's

57. Action Plan of the Government of Georgia on the Protection of Human Rights 2014-2016, Section 14.4.2.2. See: <http://yourhumanrights.ge/temp/>

58. *Ibid*, sec. 14.4.2.3.

59. Registered crimes in Georgia 2012-2015, Information and Analytical Department of the Ministry of Internal Affairs of Georgia.

60. see: <http://hatecrime.osce.org/georgia>

61. Minister of Internal Affairs 2014 reference N47, section 3

62. Response letter from the Ministry of Internal Affairs of Georgia, N1189435, 03.06.2015

63. *Ibid*,

64. Response from the Tbilisi Appellate Court N117, September 07, 2015; Response from the Tbilisi City Court N20964, 07/09/2015; Response from the Kutaisi Appellate Court N46, 09.09.2015, Response from the Kutaisi City Court N12429, 09.09.15

65. Response from the Chief Prosecutor's Office of Georgia, N13/52993, August 20, 2015.

66. Interview with representatives of the Chief Prosecutor's Office of Georgia – Natia Mezvrishvili, Salome Shengelia 30/09/2015

67. *Ibid*,



Office, while the General Inspection will respond to instances of violation of the guidelines. However, it should be noted that the Prosecutor's Office does not publicize the document and refuses to share it with civil society.<sup>68</sup>

As for hate crime statistics, as the representatives of the Prosecutor's Office mentioned in an interview, given the fact that, due to technical shortcomings, the current system does not allow qualification of crimes according to motives, in the future, prosecutors will have the obligation to regularly submit information related to hate crimes to the Human Rights Protection Division, which, in turn, will process the information non-electronically.<sup>69</sup> In these conditions, it is unclear how the validity of manually produced statistics will be ensured and why the Prosecutor's Office does not implement a systemically organised, technically quantifiable method to collect statistics on hate-motivated crimes.

### 2.1.3.2. Statistical Data Collected by Non-Governmental Organizations

The inaccuracy of the official state statistics on hate-motivated crimes is verified by surveys and reports conducted by non-governmental organisations. According to a 2012 survey<sup>70</sup>, out of 48 victims of physical abuse interviewed in 2011-2012, 60.87% experienced abuse once, 17.39% - twice and 21.74% - three or more times. Out of 134 respondents who experienced psychological abuse (threats), 75.37% experienced abuse three or more times, 11.94% - twice, and 12.69% - once.<sup>71</sup>

According to a survey conducted by the organisation Identoba, of 150 respondents from the LGBTI community, 45.83% reported being attacked out-of-doors, 18.75% mentioned the family as a hostile environment, while 14.58% indicated bars/clubs. Several cases of attacks in public transport were also reported, while two respondents were assaulted at a store and four were subjected to violence at various other locations. Since the streets are the most common places for attacks, it may be concluded that the perpetrators of violence against LGBTI persons are mostly strangers. The most common form of physical violence is battery (58.33%), followed by sexual coercion (11.67%).<sup>72</sup>

According to the same study, cases of reports to the police were very few, which, according to the respondents, was an outcome of negative previous experiences of interaction with law enforcement agencies.<sup>73</sup>

This tendency is validated by the implemented qualitative research findings. The majority of the focus group respondents asserted that they have victims of psychological or physical violence more than once. However, in terms of reporting to the police, discussion showed varied responses, namely some have addressed the police, nevertheless the measures taken by the police were believed to be ineffective, others have not even considered to report the case, because of fear and lack of trust towards law enforcement officials<sup>74</sup>.

The ineffective state policy on hate crimes is also confirmed by the case of the murder of a transgender woman on November 11, 2014. On August 7, 2015, the Tbilisi City Court acquitted the defendant, and the judge considered the murder as an act committed in necessary self-defense. Given that the court did not examine the possible hate motive and did not analyse causal links in conjunction with other significant incidents of the case, the decision of the court cannot be considered substantial.

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68. *Ibid*,

69. *Ibid*,

70. "Situation of LGBT persons in Georgia", 2012, p. 28, see: [http://women.ge/wp-content/uploads/2012/12/WISG\\_situation-of-LGBTI-persons-in-Georgia\\_GEO-www.pdf](http://women.ge/wp-content/uploads/2012/12/WISG_situation-of-LGBTI-persons-in-Georgia_GEO-www.pdf)

71. *Ibid*, p. 27-28.

72. Irakli Vacharadze "LGB discrimination study in Georgia, "LGBT persons in Georgia" p.28. In addition, Public Defender's Office has studied 32 cases of human rights violations during and after 17<sup>th</sup> of May 2013. The Public Defender's response N 08-2 / 7110, 02.09.2015

73. *Ibid*.

74. "I personally believe that nowadays Georgian police cannot address these issues...it cannot even address hooliganism [...] for the last year, I've addressed them about 5-6 times with different statements, and till this day, I have no idea where they are, because no measure where taken by the police". Focus group with gay and bisexual persons.

The court ruling on the case involving four persons arrested during the events on 17 May 2013, according to which all defendants were acquitted due to a purported lack of evidence in the case, is also a result of the state policy of negligence of LGBTI rights.<sup>75</sup>

### 2.1.3.3. Institutional Readiness to Combat Hate-Motivated Crimes

In order to increase the effectiveness of the investigation of violence and hate crimes towards LGBT individuals, under the framework of the UN Universal Periodic Review (UPR), Georgia was given the recommendation, to create a special unit in the law enforcement, which will collaborate with LGBT community and with organizations in order to create a trusting relationships.<sup>76</sup> OSCE also supports the effectiveness of the special unit, and notes that units armed with specialized knowledge and sensitivity might be more effective in the process of combating discriminatory offenses.<sup>77</sup>

In relation to the establishment of specialized units for hate crimes in Georgia, Reference N47 of the Minister of Internal Affairs notes that the working process regarding the establishment of such units should have been started in 2014.<sup>78</sup> According to the letter received from the Ministry of Internal Affairs, “the relevant divisions of the Ministry of Internal Affairs have submitted their position and views. At this point, the general concept of the unit’s activities is under development.”<sup>79</sup> As for the Prosecutor’s Office, a representative of the Division of Human Rights Protection explained<sup>80</sup> that the institution of a special unit to investigate hate crimes is not planned.

### 2.1.3.4. Training Activities for Law Enforcement Employees

The Human Rights Action Plan for the years 2014-2015, approved by the Parliament of Georgia, which includes measures to protect the rights of LGBTI persons, distinguishes trainings on hate-motivated crimes for the representatives of law enforcement agencies<sup>81</sup>. EMC appealed to the Prosecutor’s Office and the Ministry of Internal Affairs about the implementation of this plan, later to be informed<sup>82</sup> that training sessions on the issues of human rights and the prohibition of all forms of discrimination were conducted for the staff of the prosecution system in 2014 -2015. The training programme covered all forms of discrimination, including sexual orientation and gender identity-related hate crimes. In 2014, newly appointed prosecutors (23 participants) and trainee prosecutors (57 participants) participated in a training covering issues related to hate crimes. In 2015, two trainings on the principles of anti-discrimination were conducted for regional staff (20 participants). The letter also stated that training for 100 prosecutors is planned in 2016.

According to a letter<sup>83</sup> received from the Ministry of Internal Affairs, from January 2014 to December 31, 2014, 791 students of the Academy of the Ministry of Internal Affairs completed a training course on the elimination of all forms of discrimination, while from January to March 2015, the same course was delivered to 4,230 students. It should be noted that the topics of the training material are essentially vague and cannot be considered as a comprehensive training tool on hate-motivated crimes for the staff of the Ministry.

## 2.1.4. Conclusion

As the analysis presented above has shown, the official statistics on hate-motivated crimes in the country are not produced and special permanent training programmes on the investigation of such crimes for the representatives of the law enforcement agencies are not implemented. Ineffective government investigation results in an

75. This decision was appealed to Tbilisi Appeal Court by the Prosecutor’s office of Georgia.

76. A/HRC/31/15 Report of the Working Group on the Universal Periodic Review Georgia, para. 118.10

77. OSCE/ODIHR, PROSECUTING HATE CRIMES a practical guide, 2014, p. 77, see: <http://www.osce.org/odihr/prosecutorsguide?download=true>

78. According to Reference N47 of Minister of Internal Affairs, The proposals regarding the hate crime unites must be submitted to the administration of the Ministry before February 2015

79. Response from the Ministry of Internal Affairs N1966182, 07/09/2015

80. Interview with the representatives of the Chief Prosecutor’s Office of Georgia– Natia Mezvrishvili, Salome Shengelia, Sopho Jiadze.30.09.2015

81. Action Plan of the Government of Georgia on the Protection of Human Rights 2014-2016. sec. 14.4.2.2. see: <http://yourhumanrights.ge/temp/>

82. Response from the Chief Prosecutor’s Office N13/52993, August 20, 2015

83. Response from the Interior Ministry N1966182, 07.09.2015

increased number of homophobic and transphobic crimes and exacerbates the marginalisation of LGBTI community members. Law enforcement systems are not institutionally adapted to combat hate crimes, which further reduces confidence towards these systems among the members of the community.

In conclusion, it must be stressed that the government still does not have a clear understanding of the negative effects of hate crimes that could pose substantial threat not only to the implementation of the principles of pluralism and equality in society, but also to the cultivation of a democratic and secure environment, which is the state's prerogative. This type of violence has a systemic nature, and therefore, requires an equally systemic response from the state. The government should adopt measures that will ensure regular accountability, constructive dialogue and continuous, systematic attention to human rights violations on the grounds of sexual orientation and gender identity.

## 2.2. Domestic Violence

### 2.2.1. Problem Description

Domestic violence against LGBTI persons motivated by their sexual orientation, gender identity, or sex characteristics may be considered a specific form of hate-motivated crime. The stress and suffering elicited by the offense may exceed those caused by classic cases of hate crime, because in this case, the abuser is a family member with whom the victim may have close emotional connection.

The study of domestic violence experiences was one of the components of the 2014 survey conducted by the European Union Agency for Fundamental Rights (FRA). Seven percent of respondents indicated that they had experienced serious incidents of violence by their family members. Moreover, female respondents indicate far more cases of domestic violence than their male counterparts. Only 5% of respondents were gay or bisexual men.<sup>84</sup>

No such studies on domestic abuse cases towards LGBTI persons have been carried out in Georgia. Therefore, the number of victims and the scale of the problem are difficult to identify. It should be noted that the steps taken by the State to eliminate domestic violence and to protect and assist victims is essentially a positive development, although, the mechanisms envisaged on legal and political levels entirely rule out the LGBTI perspective and limit the issue strictly to the heteronormative point of view.

### 2.2.2. National Legal Environment

In June 2012, the Parliament of Georgia voted to criminalize domestic violence. In particular, Articles 11<sup>1</sup> and 126<sup>1</sup>, which recognized domestic violence as a criminal offense and defined the corresponding punitive measures were added to the Criminal Code.

The issue of domestic violence is also regulated by the special law adopted in 2006 on the "Prevention of Domestic Violence, Protection and Support of the Victims of Domestic Violence", despite the fact that the law underwent a number of fundamental amendments in 2009 and 2014, its content is still formulated in a gender-neutral manner.

The law indicates that, through its authorised bodies, the state promotes and ensures the introduction and implementation of mechanisms to prevent domestic violence<sup>85</sup>. For the purposes of the law, prevention implies the analysis, study and evaluation of the factors contributing to domestic violence, as well as the production of relevant statistics and the implementation of preventive measures in respect to persons in the domestic violence risk group.<sup>86</sup> However, it should be noted that the state does not have statistical data, which would provide details on crimes according to motives and would thus facilitate analysis; this once again points to the fragmented approach of the state, manifested in the strategy to tackle the symptoms, rather than the causes of crimes.

The signature of the Istanbul Convention by Georgia on June 19, 2014 should also be considered as a positive development. During the ratification process, amendments were planned for up to 20 legal acts, including for

84. FRA, EU LGBTI European Union Lesbian, Gay, Bisexual and Transgender Survey, Main findings, 2014, p. 65.

85. Georgian law on Prevention of Domestic Violence, Protection and Support of the Victims of Domestic Violence, Article 6.2.

86. *Ibid*, Article 6.3. (a)(b)(c)

legislation regulating domestic violence, which concerned changes both in the disposition of norms and in procedural issues. The package of legislative amendments was prepared by the Ministry of Justice in July 2015<sup>87</sup>, to be submitted to the Parliament for discussion during the fall session, however, the bill has not yet been registered in the Parliament.

It must be noted that the Action Plan for 2013-2015 concerning domestic violence and the protection of victims of domestic violence<sup>88</sup> includes no sections explicitly discussing the issues of LGBTI persons.

#### 2.2.2.1. Analysis of Response Mechanisms of Law Enforcement Agencies

Criminal, civil and administrative mechanisms are used for the purposes of disclosure and elimination of domestic violence.<sup>89</sup> In order to rapidly respond to domestic violence cases, law enforcement agencies have the authority to issue restraining or protective orders<sup>90</sup> as an interim measure to protect the victim and constrain the offender, non-fulfillment of which entails liability as established by Georgian legislation.<sup>91</sup>

According to the special report by the Public Defender of Georgia, law enforcement agencies frequently overlook their responsibility to issue restraining orders and other punitive measures in case of friendship, kinship, or acquaintance with the offender.<sup>92</sup> In some cases, law enforcement officers acted indifferently and assumed advisory roles. Similar cases were also mentioned during focus groups conducted by EMC with LGBTI persons. Participants explained that they had experienced superficial treatment by police officers, and in certain cases, attempts were made to dissuade the victims or to settle disputes informally<sup>93</sup>. In the case of one transgender man, the police subjected him to unfair treatment and misidentified the situation at hand.<sup>94</sup>

In addition to the problems discussed above, in practice, law enforcement officers consider that single altercations do not constitute violence and that violent acts must carry a repeated character.<sup>95</sup> This attitude is precipitated by an incorrect interpretation of the law and, in each specific case, undermines domestic violence victims.

#### 2.2.2.2. Assessment of Services Offered at Domestic Violence Shelters

The Government Action Plan for 2014-2015, which also includes objectives for the improvement of the human rights situation in relation to gender identity and sexual orientation, stipulates that the Ministry of Labour, Health and Social Affairs of Georgia shall provide shelter for the victims of domestic violence committed on the grounds of sexual orientation and gender identity<sup>96</sup>. The shelters can be used by all persons whose status of victims of domestic violence has been assigned by the relevant Service of the Ministry of Internal Affairs and/or a judicial authority and/or the team responsible for defining the status of victims of domestic violence.<sup>97</sup>

According to the charter of the service facilities for the victims of domestic violence (shelters), victims/injured parties of domestic violence must be accepted to the shelter regardless of, *inter alia*, sexual orientation, gender identity and other forms of expression.<sup>98</sup>

87. See: <http://www.justice.gov.ge/News/Detail?newsId=4921>

88. Approved by the decree of the President of Georgia on July 17, 2013, N17/07/01

89. Georgian law on Prevention of Domestic Violence, Protection and Support of the Victims of Domestic Violence, Article 9.1

90. *Ibid*, Article 10.1

91. *Ibid*, Article 10.4

92. Special report of the Public Defender on Violence Against Women and Domestic Violence in Georgia p.50

93. Focus groups with lesbian and bisexual women

94. "My mother filed a complaint with the MIA against me, despite having assaulted me herself [...] when two patrol police crews of arrived, I helped them fill out the forms, explained to them that she was not in a sober state, that she had scratched and injured me, that I had bruising on my neck from her attempts to strangle me and that, logically, if you know anything about criminal investigation, you will understand that I am the victim here; but they altered the statement to say that I was a perpetrator, she - the victim." Transgender man, focus group with transgender people.

95. Public Defender's Office, Special Report on Violence Against Women and Domestic Violence in Georgia, p.51

96. Action Plan of the Government of Georgia on the Protection of Human Rights 2014-2016, section 14.4.2.4, see: <http://yourhumanrights.ge/temp/>

97. Georgian Law on Prevention of Domestic Violence, Protection and Support of Victims of Domestic Violence. Article 16<sup>1</sup>.1

98. Charter of the service facilities for the victims of domestic violence, authorised on August 13, 2015 by Decree #7-137/o issued by the Director of the State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking.

It is essential that as per the 2014 amendments to the Law on Domestic Violence, the period for granting the status of victims of domestic violence has been increased to 18 months; however, service timeframe of the shelter is still defined at 3 months.

In order to obtain information on the statistics pertaining to LGBTI persons at DV shelters, as well as the number of shelters and available services, EMC applied to the Ministry of Labour, Health and Social Affairs of Georgia, which informed the organisation that the State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking currently operates three shelters<sup>99</sup>. Despite the availability of some services, experts point out that in reality, these services do not meet the victims' needs, since they do not aim at full rehabilitation and psychological and material empowerment, which the state is unable to provide to the victims of domestic violence.<sup>100</sup>

Since 2014, two victims of domestic abuse (aged 18 and 19 years), victimised due to their sexual orientation, applied to the domestic violence shelter.<sup>101</sup> As for underage victims of domestic violence based on SOGI, no such persons have applied to the shelter since 2012.<sup>102</sup>

It is also noteworthy that the specialised Crisis Centres envisaged in Article 18<sup>1</sup> of the Law on Domestic Violence are still non-existent.

#### *Trainings for Shelter Employees*

According to the Human Rights Action Plan of the Government of Georgia, the employees of shelters for the victims of domestic violence will be trained on issues of sexual orientation and gender identity.<sup>103</sup> In this regard, the letter received from the Ministry of Labour, Health and Social Affairs only mentions future trainings,<sup>104</sup> which signifies that the trainings have not yet been conducted.

### **2.2.3. Conclusion**

As the comprehensive review of domestic violence legislation revealed, the needs of LGBTI persons are completely excluded from institutional mechanisms for combating violence. Apart from formal prohibition, domestic violence shelter regulations include no additional specific issues. At the same time, as indicated by the obtained information, shelter employees are not thematically trained to respond to issues of sexual orientation, gender identity and sex characteristics. Consequently, LGBTI persons, isolated by all social or institutional systems, face increased risks of being subjected to repeated victimisation, which may be perpetrated by shelter staff, as well as other residents. The sensitivity of security personnel at the shelters is also questionable.

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99. Shelters operate in Gori (opened in 2010), Tbilisi (2010) and Kutaisi (2013), with one more shelter in the Kakheti region to be opened in 2015. Each shelter is designed for 17 beneficiaries. Response from the Ministry of Labor, Health and Social Affairs N01/60900, August 14, 2015.

100. Individual in-depth interview with Ana Abashidze, PHR, 25.09.15

101. Response from the Ministry of Labour, Health and Social Affairs N01/60900, August 14, 2015.

102. Response from State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking N07/964, September 22, 2015

103. Action Plan of the Government of Georgia on the Protection of Human Rights 2014-2016. Section 14.4.2.4

104. Response from the Ministry of Labour, Health and Social Affairs N01/60900, August 14, 2015.

### 3. Regulation of the Hate Speech

#### 3.1. Problem Description

Homophobic hate speech, generated and multiplied by a variety of actors and accumulated in the media, is also based on religious discourse, which presents homosexuality as a phenomenon incompatible with Georgian values. The reinforcement of such discourse is often related to “increased importance of the role of the Church as a social institution, and the ongoing growth of its active involvement in the political process.”<sup>105</sup> Apart from the media and political parties, religious leaders also distinguish themselves with homophobic hate speeches, and their principal mobilization strategy is manifested in their rhetoric on the preservation of “Georgian Orthodox values” and the “cleansing” of public spaces “from sin.”<sup>106</sup>

It must also be noted that media monitoring studies conducted in Georgia in the recent years demonstrate that harsh derogatory language is being replaced with neutral language<sup>107</sup>, and there are several cases of positive coverage. Nevertheless, in certain media spaces, both media representatives and guest speakers (members of political parties, public and religious figures) continue to exhibit acutely homophobic attitudes and language,<sup>108</sup> which serves to politicize issues relating to LGBTI persons and thus diminish the human rights value of these issues.

#### 3.2. International Standards

Firstly, it must be noted that there is no cohesive and consolidated definition of hate speech. According to the Recommendation issued by the Council of Europe Committee of Ministers in 1997, “the term ‘hate speech’ refers to all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including nationalism, ethnocentrism, discrimination, or animosity expressed towards minorities or migrants.”<sup>109</sup>

The first principle of the Recommendation notes that the governments of Member States, public authorities and representatives of public institutions have a special responsibility to refrain from statements legitimising, spreading, or supporting racist or xenophobic hatred or hatred based on other forms of discrimination or intolerance. According to the Recommendation, such statements should be prohibited and publicly disavowed whenever they occur.<sup>110</sup>

Expression of hate speech closely relates to the freedom of expression, the basis and fundamental principle for social development and progress. According to the European Court of Human Rights, free expression includes even those opinions that are offensive, shocking, or disturbing to the State or the population.<sup>111</sup> This is conditioned by the requirements of pluralism and tolerance, without which “democratic societies” do not exist. This conveys that any formalities, conditions, restrictions or penalties that are associated with limiting the freedom of expression, must be proportional and necessary for achieving the goal<sup>112</sup>.

In its numerous decisions, the ECHR repeatedly stresses the fundamental significance of the freedom of expression. However, its case law demonstrates that certain forms of expression, such as racism, xenophobia, anti-Semitism, aggressive nationalism, and homophobia are not protected by the freedom of expression. One of the first cases of the ECHR regarding the use of homophobic hate speech was *Vejdeland v. Sweden*. The case concerned the distribution of

105. Eka Aghdgomelashvili “Ideological Homophobia” Magazine “Solidaroba” 2009, N3 (30). see: <http://lesbi.org.ge/ka/2015/10/15/ideology/>

106. *Ibid.* see also, MDF2014-2015 report, exp. Teodore Gagnidze, deacon: “A human being may not do anything wrong, but he is a sinner anyway, if he has a damaged nature. This damaged nature is revealed in many forms, including homosexuality.” (Reportiori, May, 18 2014); Elizbar Diakonidze, deacon: “Why should I be grateful [to Bidzina Ivanishvili] for constructing the Trinity Cathedral? Instead, why is he destroying my soul? Can a gay person enter the church? Who did he build it for?” (Alia, April 29, 2014).

107. Eka Aghdgomelashvili “Hate Speech and Regulation Mechanisms”, How to Overcome Hate Speech, *Heinrich Böll* Foundation, 2012. p.44

108. Media Development Foundation. Homophobia and Gender Identity. Media Monitoring Report 2014-2015.

109. Recommendation No. R(97)20 of the Committee Of Ministers to Member States on “Hate Speech”, see: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other\\_committees/dh-LGBTI\\_docs/CM\\_Rec\(97\)20\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-LGBTI_docs/CM_Rec(97)20_en.pdf)

110. *Ibid.*, first principle.

111. Case of *Handyside v. The United Kingdom*, 1976, para. 49, see: <http://hudoc.echr.coe.int/eng/?i=001-57499>

112. European Convention on Human Rights, Article 10 (2)

leaflets in schools, which referred to homosexuality as “deviant sexual behavior” that had “a morally destructive effect on society”. The leaflets also alleged that homosexuality was one of the main reasons for the transmission of HIV and AIDS<sup>113</sup>. The ECHR reiterated that inciting hatred does not necessarily entail calls for violent acts. Insult/defamation of specific groups of the population should be sufficient for the state to combat [racist] hate speech in the face of freedom of expression exercised in an irresponsible manner<sup>114</sup>. The Court also stressed that discrimination based on sexual orientation is as grave as unequal treatment based on “race, origin or colour.”<sup>115</sup>

In relation to the use of hate speech by a political entity, in the case of *Feret v. Belgium*, the Court maintained that political discourse has a high standard of protection, even when such views may be offensive, shocking or disturbing for some parts of society. However, political entities are required to avoid the use of language that incites discrimination and hatred, since such statements might generate societal reactions that are incompatible with peaceful existence and undermine confidence in democratic institutions.<sup>116</sup>

Along with technological development, the role and significance of online social spaces increase, and the dangers of disseminating hate speech through these spaces and networks also increase. International consensus on regulating these issues does not yet exist, although in one of its latest decisions, the ECHR ruled that the obligation to filter insulting comments on the webpage of an online edition did not constitute a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>117</sup>

### 3.3. National Legal Environment

Until 2015, hate speech was not criminalized in Georgia. However, in June 2015, a new norm, committed to limit cases of hate speech to a certain extent, was added to the Criminal Code as Article 239<sup>1</sup> and formulated as follows: “Public calls for violent actions, made verbally, in writing or through other forms of expression, aimed at initiating discord between racial, religious, national, regional, ethnic, social, linguistic or/and other groups, if this poses an obvious, direct and substantive threat.”

It should be noted that the text of the regulation (in particular, the phrase “initiating discord”) is very general and does not comply with the requirements of foreseeability, creating the risk of different interpretations and practical misuse. It is noteworthy that the law does not regulate public calls for violence against vulnerable, disadvantaged groups and has the sole legitimate objective of preventing dissent. This approach directly points to the lack of interest in legislation to protect marginalised groups from violence. Moreover, the presence of the phrase “obvious, direct and substantive threat” in the wording of the regulation was inserted only after the initiation of the law was followed by serious criticism on the part of the civil society<sup>118</sup>.

It is noteworthy that “sexual orientation and gender identity” were not included in the norm, which indicates that the adoption of the regulation largely aimed at eliminating the opportunity for public expression by specific groups, rather than at the eradication of the negative consequences of hate speech. Even today, there are risks that the norm will be used against, rather than for the protection of, minority groups.

#### 3.3.1. The Practice of Hate Speech by Public Figures

The analysis of Georgian media monitoring shows that in public spaces, homophobic expressions are most frequently used by politicians and religious figures. MDF’s quarterly report in 2014 identified 41 cases of expression of homophobic attitudes, 21 anti-western sentiments and 10 cases of hate speech<sup>119</sup>. It is worth mentioning that the public figures

113. Case of *Vejdeland and Others v. Sweden*, para. 54, see: <http://hudoc.echr.coe.int/eng/?i=001-109046>

114. *Ibid*, para.55

115. *Ibid*.

116. The case of *Feret v. Belgium*, 16/07/2009, para. 77, see: <http://hudoc.echr.coe.int/eng/?i=001-93626> (French), also see: Case of *Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007, para. 55, See: <http://hudoc.echr.coe.int/eng/?i=001-82846>

117. Case of *Delfi AS v. ESTONIA*, Application no. 64569/09, para. 89, see: <http://hudoc.echr.coe.int/eng/?i=001-126635>

118. Netgazeti, Statement of NGO’s and the media regarding the initiated law on incitement to hatred, 26.01.2015, see: <http://www.netgazeti.ge/GE/105/opinion/40638/>

119. MDF “Hate Speech and Discriminatory Expressions in Georgian Political Discourse” media monitoring results February 17-March 17, 2014, see: [http://eurocommunicator.ge/mdf/uploads/Hate\\_speech\\_in\\_political\\_discourse.pdf](http://eurocommunicator.ge/mdf/uploads/Hate_speech_in_political_discourse.pdf)

or political parties that issue homophobic statements also express anti-western sentiments. In addition to pro-Russian parties, in 2014, homophobic hate speech was used by members of the ruling party and acting public officials<sup>120</sup>. In February-May 2014, the “Georgian Dream”<sup>121</sup> party members made eight, and incumbent ministers made two homophobic statements<sup>122</sup>. Despite the fact that the civil society issued a public statement<sup>123</sup> condemning the discriminatory statement by one of the Ministers, no official Government response followed.

The period following the May 17, 2013 events, when the Media Development Foundation documented up to 115 cases of hate speech and negative references to LGBTI people, is especially noteworthy.<sup>124</sup> Part of these cases concerned political parties and the representatives of the Parliamentary majority.<sup>125</sup> Members of the “Georgian Dream” and other political groups cultivated the idea that the freedom of expression of sexual minorities and their supporters was nothing more than propaganda of homosexuality.

As for the legislative framework, no legal documents in Georgia provide explicit regulation of hate speech by public officials and state institutions. However, it is significant that the anti-discrimination law discussed above includes certain requirements, according to which, any institution, including public institutions and organisations, is obliged to guarantee the compliance of its activities, as well as legal acts and internal regulations, if any, with the law and other anti-discrimination legislation, to respond to alleged instances of discrimination in a timely and efficient manner and, in case of confirmed discrimination, hold the offender accountable, according to Georgian law and internal regulations, as well as to ensure the elimination of discrimination without violating the rights and legal interests of the third party.<sup>126</sup> However, it should also be noted that since the enactment of the law, no public entities have applied the mechanism.

### 3.3.2. Hate Speech in the Media

The effectiveness of media self-regulation mechanisms in Georgia is disputable and manifested in inadequate reactions of specific media outlets to violations of ethical and professional standards, which prevents the development and establishment of accountable media standards.

The 2011-2012 report on the coverage of LGBTI issues in print media indicates that “Asaval-Dasavali” (22%) and “Primetime” (22%) rank first in the frequency of coverage of LGBTI issues. In terms of coverage tone, both neutral and negative tones were used to cover issues related to sexual minorities, however, the articles using a neutral approach dominated (68%) over those with negative undertones (32%).<sup>127</sup>

The 2014-2015 monitoring reports of the Media Development Foundation identified 108 cases of the use of homophobic hate speech, most of which are found in print media (78), followed by online media (21) and television (9).<sup>128</sup> The typology of homophobic expression demonstrates open calls for the annulment of the anti-discrimination law, rhetoric linking homosexuality with the West and highlighting its noncompliance with Georgian values;

120. *Ibid*, p. 29

121. According to the report, most often homophobic statements in the context of the anti-discrimination law are employed by the electoral bloc “Nino Burjanadze - United Opposition” (19 cases). As for the other parties the situation is as follows: Georgian Dream (8), Free Georgia (2), the Patriots Alliance (4), the Labour Party (1), and Hope (1). See: [http://eurocommunicator.ge/mdf/uploads/Hate\\_speech\\_in\\_political\\_discourse.pdf](http://eurocommunicator.ge/mdf/uploads/Hate_speech_in_political_discourse.pdf)

122. David Darakhvelidze, Minister of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia: “Homosexual people are ill and they deserve compassion, however, these people hold rallies which earn bread and butter for their supporters, those with completely normal orientations. We are unable to properly advertise and raise public awareness about the work we do and why should people with sexual deviations advertise said deviations?” (Versia, 9 May, 2015). Also, Dima Jaiani, Minister of Education and Culture of the Autonomous Republic of Abkhazia: “You scoundrels! Stop driving people mad or last year’s May 17 will seem like a cakewalk to you! The government must do everything in its power to ensure that the “Rustaveli” cinema [...] is not perverted by the apologia of homosexuality”. (Asaval-dasavali, April 21-27, 2015), see: [http://eurocommunicator.ge/mdf/uploads/Hate\\_speech\\_in\\_political\\_discourse.pdf](http://eurocommunicator.ge/mdf/uploads/Hate_speech_in_political_discourse.pdf)

123. See: [http://mdfgeorgia.ge/eng/view\\_statements/95](http://mdfgeorgia.ge/eng/view_statements/95)

124. Media Development Foundation, “Monitoring of Hate Speech and Discriminative expression in Georgian Media”, April 15 -15 August, 2013, p. 7, see: [http://mdfgeorgia.ge/uploads/library/Monitoring\\_Hate\\_Speech\\_and\\_Discrimination\\_in\\_Georgian\\_Media\\_GEO.pdf](http://mdfgeorgia.ge/uploads/library/Monitoring_Hate_Speech_and_Discrimination_in_Georgian_Media_GEO.pdf)

125. *Ibid*,

126. The Law on the Elimination of All Forms of Discrimination, Article 4 (a) (b) (c)

127. Internews-Georgia, “Ethnic, religious and sexual minorities in the press”, Summary Report of the monitoring, 2012, p. 12- 13. See: [https://ge.boell.org/sites/default/files/downloads/Media\\_Monitoring\\_5\\_Report\\_1\\_June\\_31\\_August.pdf](https://ge.boell.org/sites/default/files/downloads/Media_Monitoring_5_Report_1_June_31_August.pdf)

128. The following media outlets are leading in expressions of homophobic hate speech: “Asaval-dasavali”, “Weekly Chronicle”, “Geworld.ge”, “Sakinform”, and “Obiektivi”. Media Development Foundation, “Homophobia and Gender Identity”, Media Monitoring Report, 2014-2015, p. 13.



promotion of the idea of homosexuality as a disease; drawing parallels with crime and prostitution; and portrayal of same-sex marriage as a threat.<sup>129</sup>

In Georgia, hate speech on television and radio stations is regulated by the “Law on Broadcasting.” According to Article 56, Paragraph 3 of the law, it is forbidden to broadcast any programme aimed at the humiliation and defamation of a person or group based on their sex, sexual orientation, or specific emphasis on this feature or status. The media is obligated to establish effective disciplinary mechanisms for these violations.<sup>130</sup>

The complaints submitted to a broadcaster are subject to review by the self-regulatory mechanism, which should render a transparent, timely, and substantiated decision.<sup>131</sup> However, the broadcasters’ self-regulatory mechanisms often refuse to discuss complaints filed by non-governmental organisations on cases of hate speech, as the latter are not considered as “stakeholders”. Under this concept, the “Law on Broadcasting” envisages only those people, or group of people, directly or indirectly affected by specific actions.<sup>132</sup> It should also be noted that the “Law on Broadcasting” prohibits the opportunity to appeal the decision of the self-regulatory mechanism or the relevant Appellate Body in the National Communications Commission or in court.<sup>133</sup>

In addition to the self-regulatory mechanisms, the *Georgian Charter of Journalistic Ethics* currently unites 242 members. The Charter sets out the standards of professional conduct,<sup>134</sup> the violation of which gives citizens the right to apply to the Council of the Charter in connection to violations of ethical or professional norms by the media.<sup>135</sup>

#### *Funding of [Homophobic] Media*

A report produced by the Media Development Foundation (MDF) investigating media funding in Georgia, indicates that state funds are used to finance certain media outlets that propagate hate speech,<sup>136</sup> which clearly contradicts ECRI’s recommendations, indicating that “the legislation should include an obligation to suspend public funding for organisations that foment [racism];” the same principle applies to funding for public political parties.<sup>137</sup>

### 3.4. Conclusion

As the preceding legal analysis shows, circulation of homophobic-hate speech in public spaces remains a substantial problem, which presumably contributes to increasing discriminatory violence. Anti-discrimination legislation and media self-regulation mechanisms are ineffective and unable to ensure the fulfillment of the duties of public or private entities, thus causing substantial harm to LGBTI community members of the.

The state does not fully comprehend the consequences of hate speech, and therefore, it does not utilize all available mechanisms to eliminate or mitigate discriminatory forms of expression and subject them to proportionate and effective disciplinary measures. It is noteworthy that the government and the media realize the negative consequences of the dissemination of homophobic and transphobic hate speech that may result in substantial threats to LGBTI groups and, in some cases, be converted into violent acts.

129. *Ibid*, p. 12

130. The Law “On Broadcasting”, Article 14.1

131. Code of Conduct of Broadcaster, Article 7.1

132. The Law “on Broadcasting, Article 2 (e)

133. *ibid*, Article 59’, para 1 and 2.

134. “A journalist should be aware of the threats caused by encouraging discrimination; Therefore must do everything to prevent any person from grounds of race, sex, sexual orientation, language, religion, political and other opinions, national or social origin or any other ground “Article 7.

135. Council of Ethics, procedures. See: [http://qartia.org.ge/?page\\_id=4889](http://qartia.org.ge/?page_id=4889)

136. For Ex. The media, which are distinguished for the hate speech that received state funding for advertising purposes for the 2013-2014 years: Newspaper “Sakartvelos respublika” (63 923, 33 GEL), Media Union “Obieqtivi” (52 167,84 GEL). Media Development Foundation (MDF), “ State funds in Media which spreads hate speech and anti-Western Sentiments “ Report, in 2015, see: <http://mdfgeorgia.ge/uploads/Report%20on%20Obiektivi%20&%20others.pdf>

137. ECRI General Policy Recommendation No. 7 On National Legislation to Combat Racism And Racial Discrimination Adopted on 13 December 2002, para. 16, See:[http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N7/ecri03-8%20recommendation%20nr%207.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/ecri03-8%20recommendation%20nr%207.pdf)

## 4. Struggle of LGBTI persons for Public Space: Freedom of Assembly and Manifestation

### 4.1. Problem Description

In Georgia, the freedom of assembly and manifestation of LGBTI persons is essentially complicated, due to an incorrect understanding of private and public spaces in society and attempts by specific groups to privatise and indoctrinate public space. The dominant religious groups and discourse limit the freedom of assembly and manifestation for the LGBTI community and any form of presentation in public spaces is “perceived as propaganda of homosexuality,”<sup>138</sup> which results in the expulsion of the community members from public areas. In such circumstances, it becomes clear that binary normative views on sex and gender shift to public zones, narrowing social and civic spaces for LGBTI persons, and limiting their ability of disclosure;<sup>139</sup> in these conditions, the community members are obliged to express their identities in exclusively private spaces.

Since 2012, the negative experience of exercising the freedom of assembly and manifestation contributed to provocations of public violence, which was also manifested in the failure of the state to ensure the fundamental freedoms of assembly and manifestation, as well as to penalise the perpetrators. This position is shared by the respondents of the EMC-led focus group, who emphasised the prevalence of violent culture in society, often provoked by religious sentiment and religious authorities.<sup>140</sup>

In such circumstances, a purely legalistic provision of the right cannot be sufficient if it is not followed by adequate implementation in practice, because only the practical implementation of rights may serve as a precondition for the establishment of a pluralistic and tolerant environment in society.

### 4.2. International Standard

Freedom of assembly and manifestation is an essential value for the democratic development of any country, since it can promote the generation of societal attitudes and opinions, which in turn have the power to create and maintain dialogue between the state and society. Freedom of assembly may bear both a symbolic and instrumental character, which can be used to promote cultural development and the visibility and preservation of minority identities.<sup>141</sup>

However, restrictions on the freedom of assembly and manifestation are possible if prescribed by law and if necessary for the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or the rights and freedoms of others in a democratic society.<sup>142</sup> It is significant to note that LGBTI people often risk their health and lives while exercising their freedom of assembly and manifestation. In relation to the above, the European Court of Justice develops an interesting discussion in the case of *Alekseyev v. Russia*, which indicates that “if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, the society would be deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion.”<sup>143</sup> The state should not base limitations on the freedom of manifestation on “moral” arguments; rather, it should support complete realisation of the freedom of manifestation, even if the content of expression is arguable and negatively perceived by the majority.<sup>144</sup>

138. Ekaterine Aghdgomelashvili “Homophobic Hate Speech and Political Processes in Georgia,” *Situation of LGBT Persons in Georgia*, 2012, p. 10

139. Such rhetoric is often expressed both by politicians and other community members. For example, Zaza Papuashvili “Kviris Palitra” July 8-14: “You may do whatever you want at home, but if you give yourself the right to pass by the Kashveti [church] and transform your whims, folly or illness into a norm - I do not appreciate that ... if they challenge us to battle, then let us come out to the battlefield”. (Georgian Dream). MDF “Monitoring of Hate Speech and Discriminatory Expression in Georgian media”, 2013, p. 74

140. Focus group with lesbian and bisexual women; focus group with gay and bisexual men; focus group with transgender individuals.

141. OSCE / ODIHR, *Guidelines on Freedom of Assembly*, Second Edition 2010. Section B, explanatory notes

142. ECHR, Article 11.2.

143. ECHR, *Case of Alekseyev v. Russia*, (Applications nos. 4916/07, 25924/08 and 14599/09), 21 October 2010, para. 77, see: <http://hudoc.echr.coe.int/eng?i=001-101257>

144. *Ibid.*, para. 73; also see, *Bączkowski and Others v. Poland*, Application No. 1543/06, judgment of 3 May 2007, see: <http://hudoc.echr.coe.int/eng?i=001-80464>

It should be noted that in order to protest against the views expressed at demonstrations, persons have the freedom of counter-assembly.<sup>145</sup> In the case of *Ärzte Für Das Leben v. Austria*, the European Court of Human Rights ruled that “In a democracy, the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”<sup>146</sup> All persons and groups have the right to express personal opinion without interference. The state is obliged to prevent this type of interference. Additionally, the ECHR explains that “The [demonstration] participants must ... be able to exercise the freedom of assembly without having to fear that they will be subject to physical violence by their opponents; such a fear would be liable to deter ... associations or other groups ... from openly expressing their opinions on highly controversial issues affecting the community.”<sup>147</sup>

In the case of *Baczowski and Others v. Poland*, the ECHR also discussed the passivity of police in preventing aggression expressed by counter-demonstrators. The Court ruled that the freedom of assembly and manifestation cannot be reduced to a negative duty of the State not to refrain from unfair intervention; the state bears the positive obligation to ensure the security of those enjoying the right to free assembly.<sup>148</sup>

The positive obligation of the state also implies that law enforcement agencies should be adequately trained and should possess adequate knowledge and skills in crowd control.<sup>149</sup> The state also needs to ensure that any deviation from this obligation is fully investigated and that the responsible parties are subjected to punitive measures.<sup>150</sup>

### 4.3. National Legal Environment

Freedom of assembly and manifestation is protected by the Constitution of Georgia,<sup>151</sup> as well as by the Law “On the Freedom of Assembly and Manifestation”, prescribing a list of guidelines for exercising this right, according to which all persons may enjoy the right to peaceful public assembly without prior permission, both indoors and outdoors.<sup>152</sup> At the same time, while implementing the right, the law considers the principle of prohibition of discrimination.<sup>153</sup>

In addition, the violation of the freedom of assembly and manifestation is regulated by Article 161 of the Criminal Code, according to which “Illegal interference in exercising of the right to assembly or manifestation through violence, threat of violence, or by using one’s official position, shall be punishable by fine, community service for a period of up to one year, or imprisonment for a term of up to two years.”

However, it should be noted that regardless of the legal regulations in place, the protection of the freedom of assembly and manifestation is problematic, as demonstrated by the analysis of the practical implementation of this freedom by the LGBTI community since 2012.

#### 4.3.1. Assessment of the Events of May 17, 2012 and 2013

In 2012, on the International Day against Homophobia and Transphobia, a peaceful demonstration planned by the organisation “Identoba” was violently suppressed by opposition forces. “Identoba” filed a suit on the violation of the freedom of assembly and manifestation based on discrimination in the European Court of Human Rights. The corresponding ECHR ruling was published on May 12, 2015. The decision indicates that “[h]aving regard to the reports of negative attitudes towards sexual minorities in some parts of the society, as well as the fact that the organiser of the march specifically warned the police about the likelihood of abuse, the law enforcement authorities were under a compelling positive obligation to protect the demonstrators, including the applicants, which

145. ECHR, *Öllinger v. Austria*, (Application No. 76900/01), see: <http://hudoc.echr.coe.int/eng?i=001-76098>

146. ECHR, Case of *Plattform “Ärzte Für Das Leben” v. Austria* (Application no. 10126/82) 21 June 1988, para. 32, see: <http://hudoc.echr.coe.int/eng?i=001-57558>

147. *Ibid.*

148. Case of *The United Macedonian Organization Ilinden and Ivanov V. Bulgaria*, (Application no. 44079/98), 2005. Para. 115, see: <http://hudoc.echr.coe.int/eng?i=001-70678>

149. OSCE / ODHR, *Guideline on Freedom of Assembly*, Second Edition 2010. Para. 34

150. *Ibid.*, para. 179

151. Constitution of Georgia, Articles 24 and 25.

152. *Ibid.* Article 2, 1

153. *Ibid.* Article2, 3(d)

they failed to do.”<sup>154</sup> The Court noted that given the attitudes in certain parts of Georgian society towards sexual minorities, the authorities were or should have been aware of the risk of tensions associated with the applicant organisation’s street march to mark the International Day against Homophobia.<sup>155</sup> Notwithstanding the previous experience, on May 17, 2013, non-governmental organisations “Identoba” and the “Women’s Initiatives Supporting Group” were unable to organise events to celebrate the Day against Homophobia and Transphobia due to massive violence from counter-demonstrators mobilised by the clergy of the Georgian Orthodox Church. The police strategy and measures to secure a safe environment for the LGBTI community and its supporters were clearly ineffective. Despite the fact that the relevant state agencies had/should have had sufficient information about the scope of the expected counter-demonstration and the intentions of its participants, they failed to adequately assess the expected risks<sup>156</sup>. The measures taken to ensure the security of the participants of the gathering, as well as the peaceful organisation of the counter-demonstration, were clearly futile and ineffective in deterring the anticipated violence. In these conditions, the state failed to provide a safe environment for the participants of the rally to organise the gathering.<sup>157</sup>

Investigation on the May 17, 2013 events, which should have aimed at the identification and retribution of the perpetrators of the violations was inadequate and flawed. Only four individuals were detained under Article 166 (petty hooliganism) and Article 173 (failure to obey a police officer) of the Administrative Code. The court imposed a maximum fine of 100 GEL for petty hooliganism in all four cases<sup>158</sup>.

It is noteworthy that investigation was also launched in connection to the May 17, 2013 events and criminal charges were filed against five persons on the basis of Article 161 of the Criminal Code, which refers to illegal obstruction of the right to assembly. Two of the defendants were members of the clergy of the Orthodox Church, although criminal proceedings against one of the clerics were suspended after he filed a motion. The other four individuals were acquitted of all charges<sup>159</sup> with the argument that, during the hearing, the plaintiff failed to present a package of evidences that would prove beyond reasonable doubt that the alleged fact of offense was committed by the defendants.

The assessment of the investigation process shows that on the case of May 17, 2013, the investigation failed to comprehensively identify the network of violence. The identity and number of the defendants identified by the investigation does not reflect the violent crackdown of the demonstration and other serious offenses and is disproportionately small. The investigation did not study the most important episodes of the crackdown and violence, including the breakthrough of the police cordon by the leaders of the counterdemonstration, the violent attack on the minibus of the participants of the IDAHOT demonstration on Vachnadze Street, and individual cases of violence towards the members of the LGBT community and affiliated persons during the crackdown of May 17 or the aftermath. During the investigation, the Prosecution did not identify the key individuals who organized the violent breakthrough of the police cordon by the counterdemonstrators and merely identified the individuals participating in particular violent episodes. As for these individuals, the Prosecution failed to collect sufficient evidence and present it to the court in compliance with high standards, thus facilitating the ruling of acquittal.

However, the court ruling itself includes insufficient substantiation and, in certain cases, incorrectly interprets factual circumstances and legal norms. In the ruling, the court tries to use all, often unjustified, arguments in order to rule out the culpability of the defendants and unreasonably underestimates and disregards the evidences of the plaintiff. Such approach of the court and analysis of the tone of the ruling point to bias on behalf of the judge.<sup>160</sup>

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154. Case of *Identoba and Others v. Georgia* (Application no. 73235/12) 12 May 2015, para. 80, see: <http://hudoc.echr.coe.int/eng?i=001-154400>

155. *Ibid.*, para. 99.

156. Georgia in Transition, Assessment and recommendations by Thomas Hammarberg, September 2015, pg. 35

157. Statement by Non-Governmental Organizations on the May 17 events, 24 May 2013. See: <https://gyla.ge/geo/news?info=1581>

158. Discrimination and Hate Crimes, WISG, 2015 Series, p. 35

159. See: <http://www.tcc.gov.ge/index.php?m=443&newsid=748>

160. For further information see the assessment paper of EMC and WISG on the court decision: <http://emc.org.ge/2015/12/22/17-maisi-shefeseba/>

Taken to account the scale and nature of the violence on 17<sup>th</sup> of may 2013, the actions taken by law enforcement officials and the decision of the court creates a climate of impunity and encourages hostility and violence towards the LGBT community.

#### **4.3.2. Assessment of the Events of May 17, 2014 and 2015**

Because of the negative experiences of the past two years, the International Day against Homophobia and Transphobia was not marked in public in 2014 and the constitutional freedom of assembly and manifestation was thus restricted.

However, May 17, 2015 deserves a positive evaluation as IDAHOT was marked at three different locations in Tbilisi<sup>161</sup>. It should be noted, however, that the gatherings were held in a strictly confidential manner, which may not be considered as a precedent of full enjoyment of the right to freedom of assembly and expression.

#### **4.4. Conclusion**

The analysis of the freedom of assembly and manifestation shows that for LGBTI persons, this right is inherently problematic. The impunity of the individuals responsible for the raid on the peaceful demonstration on May 17, 2013, which was most likely not based on the principles of effective investigation and fair trial, illustrated the fallacious practices towards LGBTI persons prevalent in the country.

Under these conditions, it is crucial that the government take appropriate measures to ensure the protection of the freedoms of assembly and manifestation and to publicly condemn cases of violation of these freedoms and unlawful intervention in peaceful gatherings in order not to encourage violence.

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161. On May 17, homophobia and transphobia were protested in three different locations in Tbilisi. Women's Initiatives Supporting Group gathered at Vachnadze Street, LGBT-Georgia - at the Ministry of Internal Affairs, and Identoba - at the "Round Garden" in front of the UN House.

## 5. The Restrictive Practices in the enjoyment of the right to private and family life by LGBTI persons

### 5.1. Problem Description

Private life implies a private sphere of life and individual development. On one hand, the right to private life refers to the right of a person to create and develop his/her private sphere based on his/her own will and opinions, and on the other hand, it obligates the state to ensure the protection of this right from any interference.

However, in today's reality, LGBT persons' right to respect for private and family life is inherently limited, which is also implied by non-recognition policy of same sex relationships. Existing patriarchal and social-political discourse defines private life in terms of morality and, this way, devaluates all those relationships which do not fit in heteronormativity. This is exemplified in the staged discussions around the marriage equality, which is periodically activated on purpose by political parties and/or politicians themselves<sup>162</sup>, leading to complete marginalization and enhanced frequency of hmo/transphobic violence, instead of eradicating oppressive environment.

Specific provisions for the protection of the right to private and family life are vastly represented in Georgian legislation, but their enforcement remains inherently problematic. This becomes especially apparent in terms of the protection of personal data of LGBTI persons, which is frequently violated by law enforcement agencies, the penitentiary system, medical personnel or other actors (these issues are discussed in detail below).

In addition, LGBTI persons are restricted in the pursuit of their personal and family lives as neither same-sex marriage nor civil partnerships are legally recognized in Georgia.

Although the legislation itself does not restrict LGBTI persons from adopting a child or utilizing artificial insemination services, it is yet unknown whether or not the non-discriminative legal approach is being exercised in practice.

### 5.2. International Standards

The right to respect for private and family life is enshrined in several international instruments<sup>163</sup> which envisage the right to establish personal relationships with others, including sexual activity, as the most intimate aspects of an individual's private life<sup>164</sup>.

The right to respect for private and family life of LGBTI persons has been defined in Recommendation CM/Rec(2010)5 of the CoE Committee of Ministers which regulates non-registered marriages and recommends that states seek to ensure that the legal status of same-sex couples and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation<sup>165</sup>.

The European Court of Human Rights maintains its traditional approach in terms of the right to respect for private and family life, but is unequivocally critical of the absence of registered partnership regulations in member states. In the case of *Vallianatos and Others v. Greece*, ECHR ruled that there had been a violation of Article 14 due to the prohibition of the registration of a same-sex partnership<sup>166</sup>.

As for postoperative transgender persons, the case of *Hämäläinen v. Finland*<sup>167</sup> is of particular significance, where a transgender person who had entered a heterosexual marriage prior to her sex reassignment, lodged an application with the ECHR on the grounds that she was obliged by national courts to divorce her spouse so which would

162. In May 2012 Christian-Democratic Party initiated constitutional amendment and started collecting 200 000 signatures from supporters. Political party was asking to reformulate the constitutional norm, meaning that the marriage is union of man and women. These kind of initiatives were voiced in 2014 by incumbent Vice President and also in 2015 by the Vice Speaker.

163. International Covenant on Civil and Political Rights, Article 17, European Convention on Human Rights, Article 8.

164. ECHR, *Dudgeon v. United Kingdom*, 22 October 1981

165. CM/Rec(2010)5, para.18-28

166. *Vallianatos and Others v. Greece*, see: [http://hudoc.echr.coe.int/eng?i=001-128294#{"itemid":\["001-128294"\]}](http://hudoc.echr.coe.int/eng?i=001-128294#{)

167. *Hämäläinen v. Finland*, see: [http://hudoc.echr.coe.int/eng?i=001-145768#{"itemid":\["001-145768"\]}](http://hudoc.echr.coe.int/eng?i=001-145768#{)

serve as a prerequisite for the legal recognition of her new sex. The ECHR found no violation of Article 8 of the Convention, however, given the fact that the Court does not yet recognise same-sex marriage, this decision can, to some extent, be interpreted to mean that the ECHR has acknowledged the new sex of the applicant and was guided by it in rendering its decision (see Chapter IV for the legal recognition of sex for transgender people in terms of Article 8). The right to respect for private and family life is associated with the right to adopt a child and, in this case the, the recommendation of the Committee of the Ministers first and foremost calls for the prioritisation of the best interests of the child. This principle should also be applied to single parents applying for adoption - more specifically, all SOGI-based discrimination in this process should be prohibited. This approach has also been endorsed by the ECHR in *Salgueiro Da Silva Mouta v. Portugal* when the Court noted that the refusal of national courts to grant parental rights to a homosexual man, a decision that was solely based on the orientation of the applicant and not the best interests of the child, was discriminative and therefore in violation of Article 14 in conjunction with Article 8<sup>168</sup>.

### 5.3. National Legal Environment

The right to respect for private and family life has been enshrined in Article 20 of the Constitution of Georgia but this provision is not exhaustive and other facets of this right are scattered in other constitutional provisions, such as Articles 16 and 36 that provide the right to personal development and marriage.

Article 36 of the Constitution does not employ sex differentiation between parties to a marital union and defines that marriage is based upon the equality of the rights and free will of the spouses. However, Article 1106 of the Civil Code defines marriage as a voluntary union between a woman and a man for the purpose of creating a family. The latter, compared to the constitutional provision, is blatantly restrictive by its very nature and effectively excludes the right of marriage for same-sex couples under civil law. In reality, however, the absence of the right to marry is not as problematic as the inability of same-sex couples to enjoy the benefits and guarantees deriving from marriage<sup>169</sup>.

It is also noteworthy that the Civil Code does not provide any other legal measure, such as registered partnerships, to recognise same-sex couples that would create a legal framework for LGBTI couples and entitle the partners to statutory rights and benefits.

The case of *Oliari and others v. Italy*<sup>170</sup> is an exclusively applicable case for the context of Georgia where the ECHR found a violation of Article 8 due to the absence of any legal framework for same-sex relationships. The established standards of the Court raise the possibility that Georgia will also be made liable for the failure to provide guarantees to same-sex couples.

It should be noted, the focus group respondents also stressed the importance of the legislative impacts and benefits of right to marriage. Part of the respondents asserted that in case of marriage equality or its alternatives, they might have enjoyed those rights, considering their legal implications. However, others note that this right, even if it existed, would be practically not exercisable.<sup>171</sup> Some respondents claim that this issue is not a priority at this point, however they believe that starting discussions is legitimate.<sup>172</sup>

#### Marriage and Transgender People

Obtaining legal recognition of a different sex is not listed in the Civil Code of Georgia as a ground for terminating or annulling an already registered marriage<sup>173</sup>. Therefore, the legal consequences of sex reassignment of a pre-

168. *Salgueiro Da Silva Mouta v. Portugal*, see: [http://hudoc.echr.coe.int/eng?i=001-58404#{"itemid":\["001-58404"\]}](http://hudoc.echr.coe.int/eng?i=001-58404#{)

169. This includes inheritance rights, reciprocal duty of support, spousal testimonial privilege etc.

170. *Oliari and Others v. Italy*, 21/07/2015, see: <http://hudoc.echr.coe.int/eng?i=001-156265>

171. „If you sign it (the marriage agreement), it will more obvious, you will be forced to come out, and, consequently, you will become a victim of bullying and violence“. Lesbian woman (focus group with lesbian and bisexual women).

172. Focus group with lesbian and bisexual women, focus group with gay and bisexual men.

173. Civil Code of Georgia, Article 1140

viously married transgender person are unclear. On the other hand, in case of legal recognition of transgender persons, the law does not prohibit them from entering a marriage with the opposite sex.

#### LGBTI Rights and Adoption

The Law of Georgia on Adoption and Foster Care guarantees the right of adult legally competent individuals to adopt a child<sup>174</sup>. The law provides an exhaustive list of restrictive circumstances, including involuntary termination of parental rights, health condition or a criminal record, upon the identification of which an applicant may be stripped of adoption rights<sup>175</sup>.

However, according to Article 18 of the law, in the conclusive document on child adoption, personal features of the applicant are taken into consideration<sup>176</sup>. This regulation is open to interpretation and its definition in individual cases is vague.

#### Accessibility to Artificial Insemination Services

Article 141, Paragraph “a” of the Law of Georgia on Health Care provides that a consenting single woman is entitled to undergo artificial insemination using donor sperm. In this case, the single mother is considered the parent of the child born via this method<sup>177</sup>. This norm therefore entitles a lesbian woman to have her own biological child. Moreover, Article 144 authorizes a consenting couple to freeze their reproductive cells and embryos (oocyte and sperm cryopreservation) for later use. The law does not specify whether the couple whose cryopreserved reproductive cells and embryo are used should be legally married, which theoretically grants gay men and lesbian women a right to have their own biological children.

### **5.4. Conclusion**

In order to protect the right to respect for private and family life of LGBTI persons, especially in regards to same-sex relationships, it is crucial for the state to review the negative effects of the absence of relevant legal guarantees for the protection of these relationships and associated benefit entitlements and consequently ensure the elimination of discriminative practices hindering the enjoyment of these entitlements. This may contribute to the establishment of a basis for the legal regulation of same-sex registered partnerships in the future.

Besides, it is worth noting that legal acts on adoption and artificial insemination does not in itself entail neither discriminative, nor non-discriminative norms, leading to a reasonable doubt that, despite the non-discriminative nature of the acts, relevant enforcement agencies, such as the Social Service Agency, may employ discriminative practices, the identification and elimination of which must be based on a systemic analysis on the part of the state.

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174. Article 5, Article 7

175. *Ibid*: Adoption procedures are also regulated by Decree #50/n issued in 2010 by the Minister of Labour, Health and Social Affairs of Georgia “On the Approval of Procedures of Child Adoption” which specifies the grounds to revoke the right to adopt a child, for instance, having a certain disease.

176. Article 18.2(a)

177. See: <https://matsne.gov.ge/ka/document/view/29980>



## 6. The Discrimination of LGBTI Persons in Employment Relationships

### 6.1. Problem Description

Labour relations are a part of social rights that often affect the enjoyment of other rights. The labour market for LGBTI persons is limited and their choice of workplace is usually restricted to places that are more protected or less normative; but many LGBTI persons are not even entitled to such a choice and are therefore forced to work in environments where they are obliged to constantly conceal their orientation or identities in order to avoid discrimination or oppression from their coworkers.

One of the studies conducted by the NGO “Identoba” revealed specific issues related to employment rights and, which, apart from direct discrimination, have been linked to limitations of professional choices or social circles for LGBTI persons and the stress that they endure due to the obligation to conceal their sexual orientation or gender identity<sup>178</sup>.

The practice of employment discrimination against LGBTI persons in Europe varies – one of the surveys conducted by the European Agency of Fundamental Rights (FRA) has shown that transgender persons are subject to discrimination, especially in the recruitment process, more frequently, than LGB persons. Every third transgender person surveyed (30%) had been a victim of discrimination in the workplace, which exceeds such practices for LGB persons twice. Besides, experiences of discrimination largely depend on disclosure of orientation or gender identity<sup>179</sup>. Almost one third of the survey participants (33%) conceal hide their sexual orientation or gender identity in the workplace at all times<sup>180</sup>.

In Georgia, there has been no comprehensive study on employment and labour rights of LGBTI persons has been conducted in recent years and thus, the assessment of the scope of discriminative practices is rather ambiguous, however, focus group discussions with LGBT people that EMC has conducted confirmed that labour relations as the most problematic field in terms of discrimination.

### 6.2. International Standards

The right to work is enshrined in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)<sup>181</sup>. General Comment #18 of the ICESCR emphasises that the “Covenant prohibits any discrimination in access to and maintenance of employment *inter alia* on the grounds of sexual orientation.”<sup>182</sup>

According to Fundamental Convention #111 of the International Labour Organisation (ILO) on discrimination in employment and occupation, each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.<sup>183</sup>

Besides, Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe establishes that member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on the grounds of sexual orientation or gender identity in employment and occupation, in the public, as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation<sup>184</sup>.

178. Lela Rekhviashvili, “Obstacle of Dilemmas and Compromises – Employment of LGBTQ People”, p. 25

179. FRA, EU LGBT survey European Union lesbian, gay, bisexual and transgender survey, Main results, p. 29

180. *Ibid* p. 30

181. ICCPR, Article 8.

182. ICESCR Para. 12 (b) (i).

183. C111 - Discrimination (Employment and Occupation) Convention, International Labour Organisation, Article 2.

184. CM/Rec(2010)5, para.29

In addition, particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees<sup>185</sup>.

### 6.3. National Legal Environment

The principle of prohibition of discrimination in labour relations has been established in Article 2 of the Labour Code of Georgia covering the prohibition of discrimination on pre-contractual and employment stages on the grounds of *inter alia* sexual orientation or other opinions<sup>186</sup>. Gender identity and sex characteristics are not explicitly indicated in the provision but they may be implied in the “other” category.

Prohibition of discrimination in pre-contractual relationships is commendable, but the Code does not guarantee any enforcement mechanism for this provision, which fails to identify information that is irrelevant for the purposes of recruitment of a qualified candidate or provide the right of the candidate not to disclose such information. It is also noteworthy that the Code directly indicates that the employer is not obliged to provide a reasonable explanation for refusal of employment<sup>187</sup>, which leads to discriminatory practices in pre-contractual relationships and excludes the liability of the employer.

Besides, the Labour Code also contains objective circumstances<sup>188</sup> for the termination of the employment contract. Although, an “objective circumstance” is a largely conditional category, which entitles employers not acting in good faith to arbitrary dismissal and evasion of liability via deliberate misinterpretation of “objectivity”<sup>189</sup>.

As for public space, according to Article 9 of “Law of Georgia on Civil Service,” all public servants are equal before the law and restriction or interfere with the rights, freedoms and legal interests of public servants on the grounds of *inter alia* sexual orientation, gender identity or expression is prohibited. The law establishes that all citizens should enjoy equal opportunity in joining civil service in terms of their skills, qualifications and professional expertise<sup>190</sup>.

The Labour Code of Georgia that establishes general prohibition of discrimination also contains a specific regulation on oppression but does not explicitly list sexual orientation as a ground. Paragraph 4 of Article 2 of the Labour Code states that “direct or indirect harassment with the purpose of creating an intimidating, hostile, humiliating, or degrading environment or establishing circumstances that directly or indirectly exacerbate the condition of a given person compared to other persons in similar conditions amounts to discrimination.” This regulation combines the notion of harassment with the general definition of discrimination and requires for a comparator to argue for the presence of discrimination. This can be considered an essential flaw of the law, as according to international standards, sexual harassment claims do not necessarily call for a comparator who would facilitate the correlation of the conditions of the claimant to those of another individual under similar circumstances<sup>191</sup>.

Neither the Labour Code, nor any other legal act in Georgia includes the positive obligation or an enforcement mechanism of an employer to ensure a healthy and safe environment for staff. The practice of foreign states confirms that in cases of harassment, liability is imposed not only on the offender, but also on the employer who was aware or was should have been aware of the incident and failed to take adequate measures to terminate harassment or discriminatory treatment<sup>192</sup>.

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185. *Ibid*, para.30

186. Labour Code of Georgia, Article 2.3

187. *Ibid*, Article 5.8

188. *Ibid*, Article 37.1 (o)

189. Georgian Trade Unions Confederation, 2014 report

190. Law of Georgia on Civil Service, Article 13

191. Lika Jalagania, Tinatin Nadareishvili, “Gender Discrimination in the Workplace”, 2014

192. For ex. Finland, Estonia

### 6.3.1. Analysis of Harassment or Discriminatory Practices in the Workplace

Discrimination in the workplace is one of the most problematic issues for LGBTI persons. Propensity to discriminate on the pre-contractual stage has been revealed within the LBT focus group. Participants of the focus group indicate that employers often turn down<sup>193</sup> their applications due to their clothing and style<sup>194</sup>.

Due to continuous discriminatory treatment, transgender persons often abandon their attempts to find employment in order to avoid discrimination. Group discussion also uncovered that during job interviews, transgender persons try to conform to their originally assigned gender roles,<sup>195</sup> but the absence of identification documents compliant with their gender identity becomes the main obstacle for employment accessibility.<sup>196</sup>

The LBT focus groups demonstrate that persons who are currently employed or were employed in the past often experience unsolicited differential treatment from their coworkers, expressed as questions<sup>197</sup>, comments or interference with their private lives.

## 6.4. Conclusion

With the analysis of employment rights, it can be concluded that LGBTI persons are often subject to discriminatory treatment, which reaches its highest peak on the pre-contractual stage. Analysis of legislation, on the other hand, reveals that despite the prohibition of discrimination, relevant provisions are incapable of preventing unequal treatment due to absence of enforcement mechanisms that would oblige employers to monitor recruitment process.

Besides, the situation of LGBTI persons is aggravated by practices of harassment from coworkers or employers in the workplace. The absence of specific provisions that would oblige the employer to ensure a safe and harassment-free environment creates a hostile working atmosphere for LGBTI persons that often forces them to leave their workplaces.

Legislative or institutional issues require comprehensive recognition on the part of the state. Establishing an internal institutional mechanism to enforce the prohibition of discrimination should be enshrined in the Labor Code and hence provide LGBTI persons with adequate protection from unequal or degrading treatment in the workplace.

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193. "We worked as interns for a day [...] Later we heard the manager saying that he couldn't hire or let people with such an appearance stay at this workplace" (Lesbian woman)

194. Implying appearance that is not in compliance with socially constructed gender roles

195. "I had three cases like that [...] When I go to a job interview, I try to wear [conforming]clothes, such as a T-shirt and the rest [...] I can't really wear a dress or any make-up to get a job" (Transgender man)

196. "If I show them my identification, they will either laugh at me or ask me to bring a real document [...] in order to avoid such things, we either do not seek employment at all or work at places where we are not required to provide identification" (Transgender man)

197. "My boss also found out... I did not tell him, he found out by himself and since then began bothering me on a constant basis... When I used to take breaks and went to the kitchen to get a cup of coffee, he used to follow me out and ask questions [...] then, I noticed a cynical tone when he spoke to me, he was kind of making fun of me, but I ignored him since I needed a job" (focus group with lesbian and bisexual women)

## 7. Access to Education and Practices of Homo/Transphobic Bullying

### 7.1. Problem Description

The centrality of the right to education in the process of personal development is widely endorsed by states. This is not an abstract, stand-alone right, rather, it creates prerequisites for the enjoyment of other rights<sup>198</sup>. Despite international recognition to establish a universal primary educational system and provide fair access to secondary and higher education by the state, the enjoyment of such rights is often related to a number of difficulties, including state failure to ensure access to education or create an equal and secure environment.

Dominating homophobic and transphobic attitudes in Georgian public schools or universities promote limitations that are already in place for LGBTI community members, with such a hostile environment leading to their isolation. Regulatory documents in the educational system are largely declaratory in nature and are not suitable for tangible application as effective instruments. The low level of sensitivity towards and the widespread misinformation about the LGBTI community have a significant impact on the development of the students' tolerance and acceptance levels.

The state does not take the responsibility to introduce adequate sex education in schools that would provide pupils with objective information. The inclusion of the "Society and Me" course as a subject in the curriculum from 2016 can be seen as an attempt to do so, but interference of the Patriarchate<sup>199</sup> of the Georgian Orthodox Church has led to increased influences on the Ministry of Education which largely questions the content of the subject.

### 7.2. International Standards

The right to education has been recognised as a universal right in international instruments<sup>200</sup>. According to recommendation CM/Rec(2010)5 of the Committee of Ministers of the CoE, the protection of a child from discrimination on the grounds of sexual orientation or gender identity includes safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.<sup>201</sup>

States must closely monitor education – including all relevant policies, institutions, programmes, spending patterns and other practices – in order to identify and take measures to redress all *de facto* cases of discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.<sup>202</sup>

### 7.3. National Legal Environment

The Law on General Education of Georgia enshrines every citizen's equal right to education<sup>203</sup> and prohibits discrimination on any grounds while enrolling in school.<sup>204</sup> The Code of Ethics for Educators,<sup>205</sup> on the other hand, obliges teachers to act in good faith, be independent and impartial,<sup>206</sup> not to subject students to verbal or physical abuse or exert psychological pressure.<sup>207</sup> In addition, during the educational process, teachers are obligated to protect the students' health, personal safety and property. In relations with students, teachers must uphold moral

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198. UN General Assembly, Report of the Special Rapporteur on the Right to Education, Kishore Singh, A/HRC/17/29, Para. 6

199. The Holy Synod of the Orthodox Church requested to organise public discussions on this subject, 2015-05-25. See: <http://www.newposts.ge>

200. Universal Declaration of Human Rights (article 26), International Covenant on Economic, Social and Cultural Rights (Article 13)

201. CM/Rec(2010)5, Para. 31

202. CESCR General Comment No. 13: The Right to Education (Art. 13), 1999, Para. 37. see: <http://www.refworld.org/docid/4538838c22.html>

203. Law of Georgia on General Education, Article 9.1

204. *Ibid*, Article 13.3

205. See: <https://matsne.gov.ge/ka/document/view/1032919>

206. Professional Code of Ethics for Educators, Article 3

207. *Ibid*, Article 4, 2

and ethical norms,<sup>208</sup> respect students' opinions and create an environment for the free exchange and expression of ideas.<sup>209</sup>

The Law on Higher Education of Georgia obliges educational institutions to prohibit all types of discrimination on the grounds of academic, religious, ethnic belonging/opinion, sex, social origin, etc.<sup>210</sup>

### 7.3.1. Admitting Homophobic Bullying and Policy of Ignorance

None of the regulatory documents in the Georgian educational system includes issues related to bullying, therefore, there is no unified methodology or guidelines to assist school administrations and resource officers to identify different forms and characteristics of bullying, assess students' behaviour, relevant risk factors, and risk-groups.

According to UNESCO, damage caused by bullying is deliberate, persistent and cumulative, reflected, in its various manifestations, via different levels of quality and scale of impact. Bullying can include disturbing or degrading teasing and taunting, use of hurtful nicknames (verbal bullying), psychological manipulation, social exclusion, isolation (emotional bullying), various forms of physical violence and harassment in internet spaces (cyber-bullying)<sup>211</sup>.

The UNESCO report also stipulates that the implementation of anti-bullying measures should focus on and specifically address possible consequences of bullying<sup>212</sup>. The Report also demonstrates strong links between bullying and poor academic achievement, missed classes and self-destructive behaviours.

Interviews with ten public school students aged 15-18 and belonging to the LGBT community, surveyed by "Identoba,"<sup>213</sup> show that despite certain internal school mechanisms, bullying remains a widespread practice manifested in violence, ridicule and humiliation<sup>214</sup>.

#### 7.3.1.1. Institutional Framework and Ineffective Mechanisms

The joint Decree on the Approval of Referral Procedures for the Protection of Children issued by three Georgian Ministers on May 31, 2010, aiming to protect children from all forms of violence in or outside the family through the establishment of a coordinated and effective system of referral, can be considered a positive step<sup>215</sup>. The Decree assigns the function of identifying and responding to cases of violence to specific professional groups, *inter alia* schools, which, in case child abuse is suspected, are subject to the liability of analyzing the incident on the ground and subsequently notifying police and relevant agencies, if needed.<sup>216</sup>

EMC addressed the Social Service Agency of Georgia to acquire statistical data on referrals to the Agency with regard to cases of homophobic or transphobic bullying and violence since 2012. The organisation was informed that the Agency has not yet received such information.<sup>217</sup> EMC received a similar response from the Ministry of Education and Science of Georgia.<sup>218</sup> This information vacuum emphasizes the ineffectiveness of the referral mechanism. It should be mentioned, first and foremost, that referral procedures mostly focus on identifying domestic violence, rather than violence, including bullying practices, in schools. Therefore, applying the mechanism to all types of violence in schools is questionable.

208. *Ibid*, Article 4, 7

209. *Ibid*, Article 4, 8

210. Law of Georgia on Higher Education, Article 3.2 (t)

211. UNESCO, Education Sector Responses to Homophobic Bullying, Booklet 8, 2012, p. 13

212. UNESCO, Review of Homophobic Bullying in Educational Institutions, 12 March 2012, Chapter 2.6.

213. Giorgi Noniashvili, "Bullying in Schools", May 17, Edition #1, 2014, p. 205

214. Seven of 10 surveyed students have been a victim of bullying

215. Joint decree of the Ministers of Labour, Health and Social Affairs, Internal Affairs and Education and Science of Georgia on the Approval of Referral Procedures for Protection of Children N152/l-N496-N45/n, Article1(1).

216. *Ibid*, Article 4(4)

217. Letter of LEPL Social Service Agency of the Ministry of Labour, Health and Social Affairs of Georgia, N04/68190, 10.09.2015

218. Letter of the Ministry of Education and Science of Georgia, MES O 15 00877599, 10.09.2015

### 7.3.1.2. Analysis Liability Mechanisms for Teachers

It is noteworthy, that educators also may provoke violence and bullying on homophobic or transphobic grounds and often fail to respond to such cases<sup>219</sup>.

Violation of the Code of Ethics, including ignoring cases of violence or bullying, can lead to disciplinary measures against a teacher, in accordance with Decree #167/N “On the Approval of Disciplinary Proceedings Against Teachers” issued by the Minister of Education and Science of Georgia on December 30, 2014<sup>220</sup>. School Disciplinary Committees are tasked with imposing punitive measures for disciplinary misconduct.

In order to evaluate the effectiveness of this mechanism, EMC addressed the Ministry of Education and Science of Georgia to provide statistical data and received a response that Disciplinary Committees have neither reviewed nor imposed liability on any school/teacher based on the suspicion of discriminatory or violent acts against a student on the grounds of sexual orientation of gender identity.<sup>221</sup> Despite the fact that, on the one hand, the mechanism may declare establishment of liability, the information supplied by the Ministry confirms the inadequacy of this instrument.

### 7.3.1.3. Evaluation of the Effectiveness of School Resource Officers in the Prevention of Bullying

In the framework of the “Safe School” program, the Office of Resource Officers was established under the auspices of the Ministry of Education and Science in 2010 as part of the latter’s efforts to promote safe school environments, . Resource Officers are responsible for ensuring safety at schools and acting as mediators in case of conflicts, as well as for evaluating and adequately responding to cases of violence and adequately. Officers also maintain an electronic database of violations that have occurred in their schools.<sup>222</sup>

EMC requested statistical information from the Office of Resource Officers and received a response that Resource Officers are not responsible for identifying cases of bullying in schools, since, according to the Office, this task would require an in-depth examination of the specifics and motives of each case that Resource Officers are not authorized to conduct.<sup>223</sup> The response from the Ministry clearly reveals that Resource Officers are solely responsible for prevention of and response to cases of physical violence among students and should not therefore be considered as an anti-bullying mechanism.

## 7.4. Conclusion

The above analysis of discriminatory practices in schools has demonstrated that schools, the educational system and legislative mechanisms in general are not effective in combating discrimination and bullying.

The introduction of sexual education classes in school curricula could serve as an effective method to combat discrimination and bullying at educational institutions. However, state authorities fail to understand the purposes of teaching this subject, which results from non-secular attitudes of the state and its loyalty to the dominant religious group and its religious and ethno-nationalist discourse. Therefore, at this stage, the majority of teacher corps is not ready to offer objective and academic response to pupils’ questions on the issues of sexuality and identity and, in these conditions, strengthens the existing stereotypes and creates spaces provoking violence.<sup>224</sup>

219. Ana Subeliani, “Homophobic Bullying in Public Schools”, 2015

220. See: <https://matsne.gov.ge/ka/document/view/2650526>

221. Electronic response of the Ministry of Education and Science of Georgia MES 0 15 00877599, 10/09/2015.

222. Law of Georgia on General Education, Article 483, see: <https://matsne.gov.ge/ka/document/view/29248#>

223. LEPL Office of Resource Officers of Educational Institutions, MES 11500967455, 24/09/2015

224. In *Interights v. Croatia* committee also notes that “The reproduction of such state-sanctioned material in educational materials not alone has a discriminatory and demeaning impact upon persons of non-heterosexual orientation throughout Croatian society, but also presents a distorted picture of human sexuality to the children exposed to this material. By permitting sexual and reproductive health education to become a tool for reinforcing demeaning stereotypes, the authorities have failed to discharge their positive obligation not to discriminate in the provision of such education, and have also failed to take steps to ensure the provision of objective and non-exclusionary health education”, European Committee of Social Rights, Decision on the Merits, *Interights v. Croatia*, No.45/2007 (30 April 2009), Para. 61, see: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC45Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC45Merits_en.pdf)

## 8. The Review of the Core Problems in Relation to the enjoyment of the Right to Health by LGBTI persons

### 8.1. Problem Description

All persons are entitled to the highest attainable standard of healthcare. The enjoyment of this right is possible through adequate state policies, specific strategies, healthcare programmes, and legislation. The inability of LGBTI persons to exercise the right to healthcare largely depends on ineffective state policies, which fail to guarantee prohibition of discrimination, ill-treatment, involuntary treatment and individualised services tailored to the specific healthcare needs of LGBTI persons.

LGBTI persons frequently encounter discriminatory treatment, humiliation, and violation of the right to private life and physical integrity by healthcare providers. Accessibility to healthcare services may also be undermined by a lack of awareness and discriminatory attitudes of medical personnel – negative stereotypes, lack of knowledge of specific needs of LGBTI patients and inadequate practice constitute major obstacles for LGBTI persons.

### 8.2. International Standards

The right to healthcare has been enshrined in Article 25 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights, according to which the right to healthcare is defined as “the enjoyment of the highest attainable standard of physical and mental health.” In its 14<sup>th</sup> General Comment on the highest attainable standard of health, the UN Committee on Economic, Social and Cultural Rights indicates that any discrimination in access to healthcare, including on the grounds of sexual orientation, confronts the principle of prohibition of discrimination of the Covenant<sup>225</sup>.

Additionally, the Yogyakarta’s 17<sup>th</sup> and 18<sup>th</sup> principles asserts the right to the highest attainable standard of health and protection from medical abuses. 17<sup>th</sup> principle notes that “everyone has the right to the highest attainable standard of physical and mental health, without discrimination of the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.”

### 8.3. National Legal Environment

Right to healthcare is a protected right in the Constitution of Georgia and prohibits any discrimination regarding the enjoyment of this right. The prohibition of discrimination is also enshrined in the Law of Georgia on the Protection of the Right to Healthcare, according to which, discrimination on the grounds of sexual orientation or negative personal attitude is prohibited.<sup>226</sup> Besides, the Law of Georgia on the Rights of Patients, which aims to protect the rights of citizens in the healthcare system, guarantees respect for the dignity of patients.<sup>227</sup>

#### 8.3.1. Analysis of Discriminatory Treatment by Healthcare Personnel

Several studies conducted by non-governmental organisations in Georgia confirm a discriminatory approach on the part of healthcare service providers towards LGBTI persons.<sup>228</sup> One of the qualitative assessments conducted in 2012 by the NGO “Tanadgoma” with a focus on gay men/MSM, shows that some of the participants have been subject to cynical, indifferent attitudes from medical personnel due to their sexual orientation or gender identity, or, at least, have heard about such cases from other gay men/MSM.<sup>229</sup> Having such expectations from medical personnel often leads to such destructive actions as misinforming the doctor, which can later affect the method-

225. UN Economic and Social Council, general comment N14 (2000), Para. 18. See: [http://www.nesri.org/sites/default/files/Right\\_to\\_health\\_Comment\\_14.pdf](http://www.nesri.org/sites/default/files/Right_to_health_Comment_14.pdf)

226. Law of Georgia on Healthcare, Article 6

227. Law of Georgia on the Protection of the Rights of Patients, Article 1

228. “Tanadgoma”, “HIV/AIDS and the Stigma and Discrimination against Men with Homosexual Relationships in Georgia”, 2012, see: <http://new.tanadgomaweb.ge/upfiles/dflfcon- tent/1/110.pdf>, Natia Gvianishvili, Healthcare Needs of Transgender People, WISG, 2015, Natia Gvianishvili, Situation of Transgender People in Georgia, WISG, 2015.

229. *Ibid*, p. 8

ology of treatment. In some cases, negative attitudes from medical staff prompt gay men/MSM to refuse medical assistance.<sup>230</sup>

Although a number of respondents in the study conducted in 2015 by the Women's Initiatives Supporting Group (WISG) note that they have never been subject to discrimination or negative treatment by doctors, this can be attributed to their refusal to seek medical care and instead engage in self-treatment. On the other hand, the respondents unable to change their appearance prefer to conceal their true gender identity from doctors.<sup>231</sup>

Misinformation of medical staff about sexual orientation and gender identity can contribute to this factor – studies carried out in 2012<sup>232</sup> and 2015<sup>233</sup> have revealed that healthcare personnel frequently possess only superficial and frequently inaccurate information about homosexual relationships.

Therefore, this confirms the unconditional necessity to conduct comprehensive training of healthcare personnel, as well as an in-depth review university teaching material in order to assess its compliance with modern international standards.

### 8.3.2. Practice of “Curing” “Incorrect” Sexual Orientation

Despite the fact that sexual orientation has been removed from the list of mental illnesses by the World Health Organization since 1990, it is still considered a disease and deviation by medical personnel in Georgia, as confirmed by various studies and reports.<sup>234</sup> Malpractice in the absence of clinical signs or the application of nonscientific methods to “cure” sexual behaviour are destructive for persons subject to such “healing” practices.

This “curative” practice becomes even more severe when applied to minors. Article 22 of the Law on the Rights of Patients provides that “medical practitioners are required to obtain informed consent of a patient, or, in case a patient is a minor or an incompetent individual - a relative or legally appointed guardian.” It appears that according to this provision, a minor<sup>235</sup> can only undergo medical treatment with informed consent<sup>236</sup> of a close relative or legal guardian and minors under 16 need consent of a parent or a legal guardian.<sup>237</sup> In reality, close relatives or, frequently, parents of minor patients are the ones who initiate<sup>238</sup> such medical intervention, which renders children vulnerable to non-voluntary “treatment” of homosexuality, also considering that the Georgian legislation does not fully protect children from such medical interventions.

### 8.3.3. Code of Ethics and the Complaints Mechanism

The Law of Georgia on Medical Practitioners establishes the liability of an independent medical practitioner related to violations of legal or ethical standards regarding the examination and treatment of a patient.<sup>239</sup> Statutory liabilities include written warnings and the suspension or termination of state certification.<sup>240</sup>

Decree #122 of the Minister of Labour, Health and Social Affairs approved the establishment of the Professional Development Council that examines statements/complaints regarding the activities of medical personnel and makes decisions with regard to professional liability.<sup>241</sup> The functions of the Secretariat of the Council are assigned

230. *Ibid*

231. Natia Gvianishvili, “Situation of Transgender People in Georgia”, Women's Initiatives Supportive Group (WISG), p. 19

232. “Tanadgoma”, “Needs assessment for MSM-friendly health services in Georgia”, Study of Attitudes of Medical Personnel while Providing Medical Services to MSM, 2012, see: <http://new.tanadgomaweb.ge/uploads/dflcontent/1/118.pdf>

233. Lela Serebryakova, Study of Attitudes of Medical Personnel towards Gay, Lesbian, Bisexual and Transgender Patients, 2015, p. 37, see: <http://www.feminizmi.org/wp-content/uploads/2015/06/Lela-Serebryakova-report-5.pdf>

234. CM/Rec(2010)5 Implementation Report, WISG 2012, p. 77-81

235. According to Article 12, Paragraph 6 of the Civil Code of Georgia, a minor under the age of seven shall be deemed to a person without legal capacity [a legally incompetent person]

236. Law of Georgia on Health Care, article 11

237. Law of Georgia on the Protection of the Rights of Patients, Article 42, Paragraph 2

238. Rights of LBT Women in Georgia, Shadow Report, WISG 2012, p. 79-81, see: [http://women.ge/wp-content/uploads/2012/05/WISG-LBT-CEDAW-shadow-report\\_eng.pdf](http://women.ge/wp-content/uploads/2012/05/WISG-LBT-CEDAW-shadow-report_eng.pdf)

239. Law of Georgia on Medical Practitioners, article 73, see: <https://matsne.gov.ge/ka/document/view/15334#>

240. *Ibid*, Article 74 (a)(b)(c)

241. Statute of LEPL State Regulation Agency for Medical Activities, Article 2 (l), see: <https://matsne.gov.ge/ka/document/view/77740>



to the State Regulation Agency on Medical Activities<sup>242</sup> which is authorised to examine<sup>243</sup> citizens' statements/complaints and impose professional liability<sup>244</sup> on medical practitioners.

EMC attempted to evaluate the effectiveness of this mechanism through obtaining statistical data from the Agency. According to this information,<sup>245</sup> within the period of 2012-2015, only one application was submitted to the Agency on 15<sup>th</sup> May, 2015, concerning the mistreatment of a transgender individual by a medical team doctor, based on which the Agency examined the quality of service provided to the patient in question. Due to violations identified during the examination, the case proceeded to the Professional Development Council, however, the resulting statement does not specify whether the doctor was held accountable, and therefore, the evaluation of the liability measure is impossible.

#### 8.4. Healthcare Needs of Transgender People

The existing healthcare system in Georgia uses an internationally recognised classification system ICD-10, which classifies transgenderism as a mental disorder.<sup>246</sup> However, the World Health Organization (WHO) is working to revise this classifier by the end of 2018.<sup>247</sup> The revision process has already resulted in significant changes, for example, Gender Identity Disorder (GID) has been replaced with Gender Incongruence (GI), and moved from the mental health to the sexual health sub-section.<sup>248</sup>

However, the existing healthcare system in Georgia assumes "a completely medicalised and pathologised approach towards transgenderism and does not recognise its wide range."<sup>249</sup>

Regarding sex reassignment surgery, from the medical standpoint, the process of changing a person's biological sex comprises three stages:<sup>250</sup> diagnosis of gender dysphoria, hormonal therapy, and surgery.<sup>251</sup>

Focus groups held by EMC with transgender people revealed that some want to undergo surgeries, including breast enhancement, mastectomy, penectomy or orchiectomy (surgical removal of the penis or testicles). However, some do not have the required financial resources. Some of the respondents have not made their decision regarding any type of surgical intervention, while others are reluctant to undergo surgery or hormonal treatment in order to avoid conflict in the family.

##### 8.4.1. Analysis of the Financial Accessibility of Surgical Intervention

One of the most problematic issues faced by transgender people is the unaffordability of sex reassignment surgeries, since these expenses are not covered by the state.

This indicates that the state does not prioritise the health of transgender persons, their social integration, protection against marginalisation and related mental well-being. By classifying these vital surgical operations as classic plastic surgery, the state fails to realise that bringing a transgender person's biological sex in congruence with the self-perceived gender can serve as the only way towards social and bodily integration, avoidance of marginalisation and protection against discrimination.

242. *Ibid*, Article 1, Paragraph 6

243. Statute of LEPL State Regulation Agency for Medical Activities, Article 2.3 (g), see: <https://matsne.gov.ge/ka/document/view/77740>

244. *Ibid*, Article 2.3 (z)

245. Letter of LEPL State Regulation Agency for Medical Activities, N02/68639, 11.09.2015

246. WHO, ICD-10, F64. see: <http://apps.who.int/classifications/icd10/browse/2016/en#/F80-F89>

247. WHO, The International Classification of Diseases 11th Revision, see: <http://www.who.int/classifications/icd/revision/en/>

248. ICD-11 Beta Draft, see: <http://apps.who.int/classifications/icd11/browse/l-m/en#/http%3a%2f%2fid.who.int%2fid%2fentity%2f1411470068>; In addition, in 2013 the World Professional Association for Transgender Health (WPATH) has reached a consensus on the diagnosis related to transgenderism and transsexualism, where the diagnosis has been reconceptualised, see: [http://www.wpath.org/uploaded\\_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf](http://www.wpath.org/uploaded_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf)

249. Natia Gvianishvili, The Healthcare Needs of Transgender People, a public policy document, WISG, 2015, p. 33

250. Identoba, International Standards and Best Practices of Legal Gender Recognition of Transgender People, 2012, p. 6-7

251. In practice, Georgia recognises a concept of a 'genuine transgender', which, according to information requested from the Ministry of Health, is based on a genetic, endocrinological, gynecological and/or urological, two independent psychiatric and two independent sexological exams, as well as psychological assessment. In addition, the person must be kept under a sexologist's observation for at least 6 months, with the latter holding the prerogative of issuing a relevant document. Response letter from the Ministry of Labour, Health and Social Affairs N01/77928, 12/10/2015

In one of its latest resolutions - 2048 (2015) - the Council of Europe has expressed concern related to the existence of financial barriers in sex reassignment procedures for transgender people. The Council of Europe has called on the states to make sex reassignment procedures accessible to transgender people, and ensure that these procedures be reimbursed within the public healthcare insurance scheme, while limitations related to compensation be legitimate, objective and proportional.

In the case of *Schlumpf v. Switzerland*,<sup>252</sup> the ECHR ruled the refusal to compensate the surgery costs of a postoperative transgender woman due to her age to be a violation of Article 8 of the Convention, since the state had failed to strike a fair balance between the interests of the insurance company and the claimant when dealing with one of the most intimate aspects of a person's private life.<sup>253</sup>

The ECHR also found a violation of Article 8 in the case of *van Kück v. Germany*. The plaintiff had requested her insurance company to reimburse her for hormonal treatment, but was unable to win the case in national courts that argued that transsexualism constituted an illness of deliberate cause, leaving the insurance company under no obligation to reimburse these expenses.

### 8.5. Healthcare Needs of Intersex People

The term 'hermaphrodite' was widely used in the medical field to denote intersex people in the 18th and 19th centuries. The term 'intersex' was established as a medical term in the 20th century. Prior to the modern classification of deviations from sexual development, the variations in sex characteristics of intersex people were grouped separately, including congenital adrenal hyperplasia, androgen insensitivity syndrome, gonadal dysgenesis, hypoadadism and unusual chromosomal composition, such as XXY (Klinefelter syndrome) or XO (Turner syndrome).<sup>254</sup>

Nowadays, according to the World Health Organisation, variations in sex characteristics of intersex people are grouped under a single classification of pathologies and disorders (disorders of sex development - DSD).<sup>255</sup>

The medical norms related to the biological organisms of 'men' and 'women' have established a practice of medical and surgical procedures in relation to intersex people, including genital 'normalisation,' even when such intervention has a cosmetic purpose and is not based on medical necessity.<sup>256</sup>

In the 2013 report, the UN Special Rapporteur on Torture (SRT) devoted a separate section to discussing the issues of intersex people. The report noted that children born with atypical sex characteristics are often subjected to irreversible sex reassignment procedures, unsolicited sterilisation, or unsolicited genital normalisation surgeries. These procedures are often performed without the children's informed consent (or with parental consent) in order to 'correct their sex,' which results in irreversible loss of reproductive ability and mental anguish.<sup>257</sup>

The UN Committee on the Rights of the Child also highlights the issues of intersex children. According to the Committee, "medically unnecessary surgical and procedures on intersex children [...] can cause severe physical and psychological suffering."<sup>258</sup> The Committee also considers the lack of redress and compensation and restoration of the initial condition as bad practice.<sup>259</sup>

The UN actively seeks to draw attention to the rights of intersex people. For this purpose, the UN Office of the High Commissioner for Human Rights (UN OHCHR) has published a fact sheet within the UN Free & Equal Human

252. ECHR, AFFAIRE SCHLUMPF c. SUISSE (Requête no 29002/06), see:

253. *Ibid*, Para. 115

254. Human rights and intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, April 15, p. 15

255. *Ibid*, p 22

256. Erik Schneider "An insight into respect for the rights of trans and intersex children in Europe", CoE, Para.144

257. A/HRC/22/53, 1 February 2013, Para. 77; Also, A/HRC/19/41, Para. 57

258. CRC/C/CHE/CO/2-4, Para. 42 (b)

259. *Ibid*.

Rights Campaign,<sup>260</sup> which compiles all the major facts related to intersex people, and also reflects the best practices of countries that have included ‘intersex’ in their anti-discrimination legislation (Austria, Malta).<sup>261</sup>

Georgia does not keep statistics related to the number of intersex children. In addition, no information is available on medical practices related to intersex children/adults.<sup>262</sup>

## 8.6. Conclusion

The full realisation of the right to healthcare for LGBTI persons is hindered by the lack of knowledge, lack of sensitivity, and discriminatory approach of medical personnel. The lack of affordability of sex reassignment procedures for transgender persons is a critical problem, requiring the state to take steps towards either complete or partial funding of surgical and other medical interventions.

The lack of visibility of intersex persons is a substantial problem. Their lives are often tabooed and shamed, which is caused by a lack of information about the medical interventions they are subjected to. Intersex persons discovering their sex characteristics at a relatively later age may become victims of the same interventions as children identified as intersex at birth.<sup>263</sup> Therefore, it is essential for the state to understand the needs of intersex children and adolescents, and to develop methodological guidelines to protect them from unwarranted medical interventions.

## 9. The Right to Social Security: Homelessness and Social Vulnerability of LGBTI Persons

### 9.1. Problem Description

The right to social security, due to its distributional characteristics, plays an essential role in the reduction and eradication of poverty, preventing social exclusion and promoting social inclusion.<sup>264</sup>

The legal acts regulating social security in Georgia do not discriminate against LGBTI people, however, the existing social security system in Georgia is generally not in line with internationally recognised standards. EMC’s 2014 report on the state policy towards homeless and socially vulnerable people pointed to the difficult social and economic conditions of socially vulnerable and homeless families, as well as continuous violations of their fundamental rights. The report critically analyses the state’s lack of understanding of and inaction towards their problems, thereby violating its obligations.<sup>265</sup>

Important to note is the fact that the state completely excludes the specific needs of the LGBTI community from social assistance and accommodation issues. Homelessness, an invisible outcome of the existing homophobia and transphobia, is the largest social problem for LGBTI persons. In most countries, rejection from the family is a major contributor to the rising level of homelessness. According to a survey conducted in the UK, 29% of lesbian and 25% of gay respondents reported being forced out of their homes after coming out. This rate is much higher

260. United Nation for LGBT equality, Free & Equal, fact sheet, Intersex. [https://www.unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)

261. *Ibid.*

262. A response letter from the Ministry of Health, N01/88512, 17.11.15. EMC also requested information related to the teaching of intersex issues at the Tbilisi State Medical University. The response stated that “intersex issues are included in the educational process both before and after receiving the diploma. The educational process includes modern textbooks on endocrinology and clinical psychology of children.” The letter also stated that the ‘intersexual’ human body is a rare but normal biological form. N02-03-28 / 90, 09.11.2015

263. Human rights and intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, April 15, pg. 14

264. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, Para. 3. See: <http://www.refworld.org/docid/47b17b5b39c.html>

265. Tamta Mikeladze, Nino Sukhishvili, Non-recognition, Inaction and Repression in Exchange for Accommodation, Human Rights Education and Monitoring Center (EMC), 2014, p.65

(45%) for transgender respondents.<sup>266</sup> A similar survey conducted in Canada revealed that 20% of young people<sup>267</sup> living in homeless shelters identified themselves as part of the LGBTQ2 community.<sup>268</sup> Therefore, no measure directed at overcoming homelessness can be successful without a comprehensive analysis of risk factors associated with social vulnerability.

## 9.2. International Standards

The right to social security is guaranteed by major international and regional human rights instruments,<sup>269</sup> including the UN Covenant on Economic, Social and Cultural Rights, according to which, State Parties “recognize the right of everyone to social security, including social insurance.”<sup>270</sup>

The right to social security includes access to monetary and in-kind benefits and the right to receive them without discrimination, in order to protect citizens from social vulnerability caused by illness, disability, injury, unemployment, old age, and lack of family support.<sup>271</sup> General Comment No. 19 of the Committee on Economic, Social and Cultural Rights highlights that the social security system must cover all persons, especially individuals belonging to the most vulnerable and marginalized groups.<sup>272</sup>

In this regard, the Council of Ministers recommends all states to pay adequate attention to the risks of homelessness faced by lesbian, gay, bisexual, and transgender persons, including adolescents and children, who may be particularly vulnerable to social marginalization, such as the exclusion from their own families. In this respect, relevant social services should be provided based on an objective assessment of the needs of every individual, without discrimination.<sup>273</sup>

## 9.3. National Legal Environment

Until recently, Georgia did not have a strategic document that would regulate and establish specific mechanisms for combating homelessness and issues relating to homeless persons. The only legal document that regulated social support was the Law on Social Assistance. Georgia has also taken international commitments in this regard; however, the country has made a reservation on Article 31, the right to housing, of the European Social Charter<sup>274</sup>. Therefore, Georgia does not recognize the obligation prescribed by this regulation.

It is noteworthy, that 2014 saw the approval of Technical Regulations on Minimum Standards for Temporary Homeless Shelters,<sup>275</sup> which defined necessary criteria for the organisation and operation of a shelter. However, this regulation does not include the principle of prohibition of discrimination. It also does not cover the issues of accommodation for transgender and intersex people. At the same time, the document provides for only minimal security guarantees and does not include a comprehensive protection plan for shelter residents.

The country does not have a unified system of registration of homeless persons and does not conduct in-depth research on the root causes of homelessness. According to Article 18 of the Law on Social Assistance, local authorities provide shelter for homeless persons, keep a record of shelter residents, and provide the information

266. Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2nd edition, p. 101, see: [http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf)

267. In the LGBTQ2 abbreviation, ‘2’ refers to two-spirited - This term is used to describe the indigenous Americans, who are not identified as heterosexual or trans.

268. Lesbian, Gay, Bisexual, Transgender, Transsexual, Queer, Questioning and 2-Spirited (LGBTQ2) and Homelessness, see: <http://homelesshub.ca/about-homelessness/population-specific/lesbian-gay-bisexual-transgender-transsexual-queer>

269. Universal Declaration of Human Rights, Article 22; 25. The Convention on the Elimination of All Forms of Discrimination against Women, Article 11; 14 (c); Convention on the Rights of the Child, Article 26.

270. Article 9

271. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para. 2. See: <http://www.refworld.org/docid/47b17b5b39c.html>

272. *Ibid.*, para. 23

273. The European Council of Ministers Recommendation CM/Rec(2010)/5, para. 38

274. European Social Charter (revised), 3.V.1996

275. Government Resolution #131, 7 February 2014, Technical Regulations on Minimum Standards for Temporary Homeless Shelters, see: <https://matsne.gov.ge/ka/document/view/2240289>

on registered homeless persons to the Social Service Agency. However, the Law does not extend the obligation to register homeless persons beyond those staying at a shelter.<sup>276</sup>

Similarly problematic is the correct definition of a homeless person. The Law on Social Assistance defines a homeless individual as a “person without a permanent, established place of residence who is registered by the local authorities as homeless.”<sup>277</sup> This definition does not include homeless persons who do not own a home and live with acquaintances, in specialized institutions, or arbitrarily occupied spaces. According to the 2013 amendment to the Government Resolution N126 (April 24, 2010) on the Reduction of the Poverty Level and Improvement of Social Security Measures, the database of socially vulnerable persons rejects registration applications from seekers illegally occupying state-owned buildings. This provision forces families to choose between social assistance and physical accommodation. Although, the state makes the choice for them by institutionalizing a policy of non-recognition, which leaves socially vulnerable citizens either without social assistance or accommodation.

### 9.3.1. Analysis of Conditions in the Camp for the Homeless

In recent years, the Georgian government has recognised the hardships faced by homeless citizens during winter and since 2012 has been seasonally setting up a special camp intended for temporary residence.<sup>278</sup> Since 2013, the camp has been permanently located on Moscow Avenue in Tbilisi.<sup>279</sup> According to the report of the Public Defender, the camp comprises of tents intended for 240 people and as of 2014, they accommodated a total of 180 residents.<sup>280</sup> It is noteworthy, that only two LGBTI community members used the tents during the period,<sup>281</sup> and while no additional information is available, their numbers are likely to be higher.

Problems related to the accommodation of LGBTI people in these tents have been documented by the organisation Identoba: “In the winter of 2015, the NGO Identoba was contacted by two young gay homeless men who had been living in the subway to avoid freezing temperatures. Identoba members directed the individuals to the homeless camp on Moscow Avenue. The aggression expressed by camp residents made their stay very difficult.”<sup>282</sup> Despite the abuse, however, one of the men has chosen to remain in the tent, since the state has failed to provide any alternative. In order to evade repeated victimisation, LGBTI community members often avoid homeless shelters altogether.

It is important to realise that such camps cannot serve as long-term accommodation for homeless persons, especially considering their poor infrastructure and hygiene conditions. In this respect, It should be noted that The Tbilisi City hall opened a shelter in Lilo district in December 2015 which can cover the needs of 240 beneficiaries.<sup>283</sup>

## 9.4. Conclusion

State policy towards socially vulnerable, homeless families is either fragmented, or in some cases, completely indifferent. The state does not take adequate measures to study the root causes of homelessness and base its policy on the findings.

The state fails to recognise the correlation between the LGBTI community and homelessness, as well as the role of domestic violence in this correlation, resulting in the complete exclusion of this group from the planning of preventive and proactive mechanisms, which, in turn, condemns them to extreme marginalisation and poverty. Therefore, the state needs to understand the causes of homelessness as a social problem for the LGBTI community, and confront it with adequate, result-oriented measures.

276. Tamta Mikeladze, Nino Sukhishvili, *Non-recognition, Inaction and Repression in Exchange for Accommodation*, Human Rights Education and Monitoring Center (EMC), p. 56

277. The Law on Social Assistance, Article 4 (p)

278. CM/Rec(2010)5 implementation monitoring, Women’s Initiatives Support Group, WISG, 2012, p. 83

279. 13 March 2014 Government Resolution N416 on the amendments to the 13 December 2013 Government Resolution N1946 on Urgent Measures for Assisting Homeless Persons during the Winters of 2013-2014.

280. The Public Defender’s Report, 2014, p. 772

281. Liza Adeishvili, In Search of Georgia’s Gays/Stepchildren, magazine *Liberali*, 27 October 2015, see: <http://liberali.ge/articles/view/18933/saqartvelos-gerebi-tavshesafiris-dzie-bashi>

282. *Ibid.*

283. See: <http://netgazeti.ge/news/85420/>

## 10. Refugees and the Right of Asylum

### 10.1. Problem Description

The protection of the rights of refugees and asylum seekers is particularly relevant in the case of LGBTI persons. A homophobic and transphobic environment in many countries that is supported and institutionalised by the government forces LGBTI people to seek protection in other countries.

Recently, the international community has paid special attention to asylum applications submitted by LGBTI persons. This is confirmed by the guidelines of the United Nations High Commissioner for Refugees (UNHCR), which emphasize the need for a special approach towards persons seeking asylum due to persecution based on sexual orientation and gender identity. However, despite the efforts of international organisations, in many countries, the procedure of granting a refugee status to LGBTI persons often leads to repeat victimisation, when applicants are being subjected to discrimination by administrative bodies, largely as a result of deep-rooted societal stereotypes.

It is difficult to outline this problem in Georgia, as no asylum claims contingent on SOGI-based persecution have been registered in the country.

### 10.2. International Standards

The right to asylum is recognised in many international documents, including the Universal Declaration of Human Rights, according to which, “everyone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>284</sup> The World Conference on Human Rights held in Vienna in 1993 reaffirmed the importance of the right of asylum by stating that “everyone, without distinction of any kind, is entitled to the right to seek and to enjoy in other countries asylum from persecution, as well as the right to return to one’s own country.”<sup>285</sup>

The 1951 UN Convention on Refugee Status defines a refugee as a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>286</sup>

The guidelines of the UN High Commissioner for Refugees (UNHCR) define a particular social group as a “group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”<sup>287</sup> The guidelines also repeatedly affirm that persecution on the grounds of sexual orientation constitutes oppression of “a particular social group” that must be afforded equal protection as any other group.<sup>288</sup>

#### 10.2.1. Reasonable Fear of Persecution

The existence of a “reasonable fear of persecution” is an essential element of granting a refugee status. According to the UNHCR 1992 guidelines, “where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence.”<sup>289</sup>

284. The Universal Declaration of Human Rights, adopted by the General Assembly 217A. (III) Resolution, 10 December 1948, Article 14

285. Vienna Declaration and Programme of Action, adopted by the world conference on Human Rights in Vienna on June 25 1993, para.23

286. The 1951 United Nations Convention on the Status of Refugees, Article 1A2

287. UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A (2) of the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR / GIP / 02/02, para. 11-12. See: <http://www.refworld.org/docid/3d36f23f4.html> [accessed 2 November 2015]

288. *Ibid*, para. 6

289. UN High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1 January 1992, para. 55, <http://www.unhcr.org/3d58e13b4.html>

### 10.2.2. Requirement for “Discretion”

LGBTI asylum seekers often have their applications rejected on the basis that they could avoid persecution by concealing or hiding their sexual orientation or gender identity, which implies that they would have no reason to fear, as long as they remained “discreet” and cautious in terms of their visibility.<sup>290</sup> This policy of refugee “testing” was criticised by the ECHR as well as the UN High Commissioner for Refugees in Guideline N9. According to UNHCR Guidelines on International Protection No. 9, a country cannot deny refugee status on the basis that an applicant may have been able to avoid persecution by concealing his or her sexual orientation.<sup>291</sup> The question is not whether the seeker could lead a discreet personal life in his or her country, but rather that the concealment of sexual orientation can never guarantee that the person will not be subject to persecution in the future, or that his or her private life will not be disclosed by any means.<sup>292</sup> In addition, being compelled to conceal one’s identity for an extended period of time may also lead to mental health risks.<sup>293</sup>

### 10.2.3. Assessment of State Obligations in Relation to Refugees

After an individual manages to confirm a well-founded fear of persecution in their country of origin, the receiving state is obligated to either grant the applicant asylum or send them to a third country, where their life or health will not be threatened.<sup>294</sup>

The Council of Europe Recommendation CM/Rec(2010)5 states that “asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.”<sup>295</sup>

In addition, the refugee legislation also includes the principle of non-refoulement, used in cases when an individual’s life and health may be under substantial threat in his or her country of origin. This is a universal principle and a peremptory norm (*jus cogens*) of international law.

## 10.3. National Legal Environment

The Law on Refugee and Humanitarian Status, which replaced the 1998 Law on Refugees, was adopted only in 2011. However, it did harmonise Georgian legislation with European and international standards. At the same time, the Georgian government developed the Migration Strategy Action Plan for 2013-2015, covering the issues of minimum financial assistance and integration of refugees.<sup>296</sup> However, neither the Strategy nor any relevant legal acts contain provisions on the special needs of LGBTI people.

According to the Law of Georgia “On Refugee and Humanitarian Status”, refugee status may be granted to a person “who is not a citizen or a stateless permanent resident of Georgia, is currently in Georgia, has a well-founded fear of persecution for reasons of *inter alia* membership of a particular social group, and, due to such fear, cannot or does not wish to return to his or her country of origin or to enjoy the protection afforded by that country.”<sup>297</sup> The law does not contain any specific provisions related to LGBTI persons; however, as is the case in the Geneva Convention, LGBTI persons can be considered an example of the “particular social group” provision.

290. International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), Good Practices: Related to LGBTI Asylum Applicants in Europe, May 2014, pg. 13. available at: <http://www.refworld.org/docid/5433a8124.html>

291. UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and / or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, para. 31

292. *Ibid.*, para. 32

293. UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and / or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, para. 33

294. CM/Rec(2010)5, para. 43

295. *Ibid.*, para. 44

296. See: [http://www.migration.commission.ge/files/msap\\_2013-2015.pdf](http://www.migration.commission.ge/files/msap_2013-2015.pdf)

297. Article 2

According to the law, the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia (MRA) is the principal administrative mechanism tasked with the registration and further processing of asylum-seekers. The Ministry is also the primary source of statistics related to asylum seekers and refugees.

Apart from the Law on Refugee and Humanitarian Status, procedures for granting refugee status are also regulated and outlined by Order N100 (August 16, 2012) of the Minister of Internally Displaced Persons, Refugees and Accommodation. According to these regulations, after registering as an asylum seeker, an individual is granted a temporary identification document, which is a prerequisite of the rights and duties outlined in Article 18 of the Law.

#### *Legal and Socio-Economic Guarantees for Asylum Seekers*

It is noteworthy that Georgian legislation also requires the state to ensure certain socio-economic and other legal guarantees to persons with refugee or humanitarian status, including freedom of movement, the right to education and healthcare.<sup>298</sup>

#### **10.3.1. Analysis of Existing Practice**

According to statistics provided by the MRA, a total of 4,221 persons have requested asylum in Georgia since 2012, of which, 131 individuals were granted the refugee status, while 996 were granted humanitarian status. The Ministry has not received any claims seeking asylum due to persecution on the basis of sexual orientation or gender identity in the country of origin.<sup>299</sup>

#### *Georgian Citizens Seeking Asylum in Other Countries*

There is no statistical or analytical information available in relation to the number of Georgian citizens who have filed requests for asylum in other countries due to persecution on the basis of SOGI.<sup>300</sup>

### **10.4. Conclusion**

Legal acts in Georgia regulating the protection of the rights of asylum seekers and refugees are fully in line with internationally recognised standards. However, an in-depth evaluation of the practical implementation of these legal regulations cannot be performed, due to the fact that no foreign citizen has so far requested asylum in Georgia due to SOGI-based persecution.

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298. Law of Georgia on Refugee and Humanitarian Status, Article 18.

299. Response letter N04 / 07/29043 from the Ministry of Internally Displaced Persons from the Occupied Territories, Refugees and Accommodation of Georgia, 11/11/15

300. *Ibid.*, According to informal sources, the number of Georgian citizens who have requested asylum in another country due to persecution on the basis of sexual orientation and gender identity is quite high. However, this information cannot be verified.



# ISSUES OF PARTICULAR SIGNIFICANCE

## 1. Legal Recognition of Gender

### 1.1. Legal Recognition of Gender for Transgender People

#### 1.1.1. Problem Description

Legal recognition of gender for transgender people is a worldwide problem. In many countries, transgender people are unable to obtain the identity documents compliant with their gender. As a result, they are subject to numerous restrictions, including marginalisation and extreme vulnerability to unemployment and homelessness.

Regulations in many countries set unreasonable and biased prerequisites for changing an individual's gender marker, including divorce, irreversible sterilisation, compulsory sex reassignment surgery and other medical procedures, which is a clear violation of international human rights standards.<sup>301</sup>

According to the organisation Transgender Europe (TGEU), requirements for sex reassignment surgery and sterilisation contradict the human right to bodily integrity.<sup>302</sup> Many transgender persons accept the risks associated with the surgery to simply ensure that their identity documents correctly reflect their gender. Moreover, these requirements exclude those transgender persons, who are unable to undergo surgical procedures or hormonal treatment due to health-related risks.<sup>303</sup>

#### 1.1.2. International Standards

Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe calls on all member states to develop quick, transparent, and accessible procedures for changing the name and gender marker in personal identity documents for transgender people.<sup>304</sup> The resolution also requires states to abolish any legal requirements for sterilisation and other compulsory medical procedures, including a mental health diagnosis as a prerequisite for gender identity recognition.<sup>305</sup>

The principles of inadmissibility of forced and otherwise involuntary sterilisation, as well as the elimination of discrimination are reaffirmed by the interagency statement of UN institutions, according to which “any form of involuntary, coercive or forced sterilisation violates ethical principles, including respect for autonomy and physical integrity, beneficence and non-maleficence.”<sup>306</sup>

The ECHR also deals with the legal recognition of gender identity for transgender people by differentiating between the pre- and postoperative stages. According to case law, a state's margin of appreciation is much wider when dealing with cases of preoperative transgender people compared to postoperative cases.<sup>307</sup>

The ECHR found a violation of Articles 8 (Right to respect for private and family life) and 12 (Right to marry) of the European Convention in the case of *Christine Goodwin v. the United Kingdom*.<sup>308</sup> The plaintiff was a postoperative transsexual who faced discriminatory treatment in the workplace related to retirement age and certain tax liabilities. Despite appeals, the Social Security Department refused to change the plaintiff's insurance number, which allowed future employers to access the plaintiff's personal data from the preoperative period. The ECHR

301. UN Human Rights Council, A/HRC/29/23, report of the UN High Commissioner of Human Rights, para. 69; 70.

302. Transgender Europe (TGEU) Transgender Policy, April 2009. see: [http://www.tgeu.org/sites/default/files/TGEU\\_policy\\_transgender\\_withRecommendations\\_final.pdf](http://www.tgeu.org/sites/default/files/TGEU_policy_transgender_withRecommendations_final.pdf)

303. Ibid.

304. Para. 6.2.1. see: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21736&lang=en>

305. Para. 6.2.2.

306. Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. see: [http://www.unaids.org/sites/default/files/media\\_asset/201405\\_sterilization\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf)

307. However, in an earlier case of *Rees v. the United Kingdom*, the ECHR did not rule the non-recognition of gender of a postoperative transgender person as a violation of the Convention. ECHR, Judgment of 17 October 1986

308. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI

also found a violation of Articles 8 and 14 (Prohibition of discrimination) of the Convention in the case of *L. v. Lithuania*, where sex reassignment surgery was not followed by changes in the plaintiff's identity documents.<sup>309</sup>

A recent ruling of the European Court of Human Rights on the case of *YY v. Turkey*<sup>310</sup> discussed the compatibility of Article 40 of the Turkish Civil Code, which sets sterilisation and permanent loss of reproductive ability as a prerequisite for the legal change of sex, with Article 8 of the European Convention. The ECHR found that sex reassignment surgery was of vital importance for the plaintiff's mental health, and concluded that the above prerequisite violated the right to respect for private and family life guaranteed by the European Convention.

### 1.1.3. National Legal Environment

Georgia is among the countries where legal recognition of sex is linked to medical procedures. There is no legal document regulating this issue in detail, which would establish adequate legal opportunities for transgender persons wishing to change their gender marker in their identity documents.

#### 1.1.3.1. Procedure of Name and/or Surname Change

The procedures for changing one's name and surname in Georgia are regulated by the Law on Civil Acts and Order N18 (January 31, 2012) of the Minister of Justice on the Approval of Rules for Registration of Civil Acts. Article 47 of the Order provides a standard list of documents required for a change of name and/or surname.

In practice, transgender people do not encounter difficulties in changing their names and/or surnames. They are able to change their names without any additional requirements.<sup>311</sup>

#### 1.1.3.2. Procedures for Sex Change

Article 78 of the Law on Civil Acts defines the list of circumstances that can serve as a basis for amending a civil act. One such circumstance is referred to as "sex change - when a person wishes to change their name and/or surname due to a change of sex." The law does not define "change of sex" for the purposes of this article. Based on established practice, in order to legally change one's sex, it is necessary to complete the full sex reassignment, including surgery.<sup>312</sup>

EMC requested the State Services Development Agency to provide a list of identity documents, where it is possible to change the sex marker. The Agency responded that there are no regulatory legal acts defining documents required for changing the sex marker or a list of specific civil acts where it is possible to amend these records.<sup>313</sup>

This lack of information makes it difficult to discuss what documents are needed in practice in order to change the sex marker in personal documents.<sup>314</sup> The absence of clear regulations also makes it difficult to discuss their constitutionality. It should be noted that on May 18, 2015, the Public Defender addressed the Ministry of Justice of Georgia and requested the elaboration and approval of procedures for changing the sex marker in civil acts.<sup>315</sup>

At the same time, in its recommendations, the CEDAW Committee has expressed concern over the existing restrictions in the process of acquiring identity documents, and called on the Georgian government to take appropriate measures to eliminate these restrictions.<sup>316</sup>

309. *L. v. Lithuania*, no. 27527/03, ECHR 2007-IV

310. *Y.Y. v. Turkey*, no. 14793/08, ECHR 2015

311. Council of Europe Committee of Ministers Recommendation CM/Rec(2010)/5 Monitoring Report, WISG, 2012

312. The Public Defender's 2014 Parliamentary Report, p. 693

313. A response letter N01/240295 from the State Services Development Agency of the Ministry of Justice, 05.10.2015

314. The State Services Development Agency of the Ministry of Justice did not provide EMC with a direct list of documents required for changing the records of gender. Within the same letter EMC requested information on the total number of sex-change requests received by the agency since 2012. The response stated that the agency database does not register sex-change requests under individual circumstances outlined in Article 78, instead they are registered under common ground (correction, change, addition). Therefore, the electronic database does not record "sex change" as a separate category, making it impossible to process this information. (Reply N01/240295, 05.10.2015)

315. See: <http://www.ombudsman.ge/ge/recommendations-Proposal/winadadebebi/winadadeba-iusticiis-ministrs-samoqalaqo-aqtebsshi-transgendertatvis-sqesis-chanaweris-cvilibastan-dakavshirebit.page>

316. CEDAW/C/GEO/CO/4-5, concluding observations on the combined fourth and fifth periodic report of Georgia, para. 34 (e), 35 (e)

## 1.2. Registration of a Child's Sex and Legal Recognition of Gender for Intersex People

According to the UN Free & Equal Fact Sheet, between 0.05% and 1.7% of the population is born with intersex traits.<sup>317</sup> Across Europe, birth registrations require the indication of sex, which is limited to the man/woman dichotomy. This requirement is based on the perception of sex as an important part of a person's identity, and its classification into two normative categories. In most countries, changing a baby's sex after it has already been registered constitutes a substantial challenge, while it is altogether impossible in some other countries.

Legal and medical norms related to the birth of an intersex child create a challenging situation for the child and parents alike. In some countries, a temporary delay in the registration of the child's sex is permitted if it is not immediately identifiable. For example, in Belgium, the sex of a newborn intersex child is registered in the period between one week and three months after birth. In France, this period is extended to three years in extraordinary cases (for example, birth of an intersex child), however, despite the option to wait, most parents still try to determine their child's sex/gender sooner, rather than later. Finland and Portugal are exceptions, since these countries do not have any deadlines for registering a child's sex.<sup>318</sup>

The genitalia of an intersex individual are not always classifiable as "male" or "female"; therefore, these individuals are easily identified as intersex at birth. However, in some cases, the identification of an intersex individual only becomes possible during adolescence or even later (e.g. absence of a menstrual cycle or sexual development that does not correspond to the sex assigned at birth). However, in some countries, the sex/gender marker field in birth certificates remains blank until a DSD is diagnosed. This means that the authority to assign sex is granted to medical professionals, and subsequently enforced by the law. Human rights activists fear that leaving the gender marker field blank may lead to "forced outings" of children and the stigmatisation of those individuals, whose sex remains undetermined.<sup>319</sup>

As for regulating the sex/gender marker fields in identity documents and passports of adults, some countries have chosen a non-binary model of classification, which includes the option of "X" or "Other" in addition to "Female" and "Male" (Australia, New Zealand, South Africa, Malaysia, Nepal).<sup>320</sup>

Consequently, international organisations call on countries to make legal changes and establish flexible procedures for intersex children and adults that allows their identity documents to reflect their sex/gender.<sup>321</sup>

### 1.2.1. Regulation of Birth Registration in Georgia

The rules for child registration at birth in Georgia are regulated by the Decree of the Minister of Justice on the Registration of Civil Acts,<sup>322</sup> according to which, the birth certificate (together with other case-specific documents) is the basis for registering the birth of a child.<sup>323</sup>

According to the Decree, a medical birth certificate, form N103/s-84 is a medical document serving as the basis for the registration of a person's birth.<sup>324</sup> Within five working days after birth, the medical institution sends an electronic message containing the birth certificate to the Agency, which registers the child's birth based on the electronic version.<sup>325</sup>

317. United Nations for LGBT Equality, "Free & Equal", Fact Sheet on intersex people. see: [https://www.unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)

318. Human rights and intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, April 2015, page 37

319. Human rights and intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, April 2015, p. 38

320. *Ibid.*, p. 40; Further reflection on the non-binary legal identity documents is necessary, since, according to organisations working on this issue, any recognition beyond the M/F dichotomy needs adequate planning and implementation with respect to human rights, since placing transgender and intersex people in the "third sex" category often strengthens the use of the binary gender approach instead of weakening it. see: Open Society Foundations (2014), License to be yourself: laws and advocacy for legal gender recognition of trans people, pg.23 (as cited in human rights and intersex people, Issue paper published by the Council of Europe Commissioner for Human Rights, April 2015, pg. 40).

321. United Nation for LGBT Equality, "Free & Equal", Fact Sheet on intersex people. see: [https://www.unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)

322. Decree #18 of the Minister of Justice on the Registration of Civil Acts, January 31, 2012, Chapter II, Birth Registration.

323. *Ibid.*, Article 16.

324. Joint Decree #01-5/n-#19 of the Minister of Labour, Health and Social Affairs and the Minister of Justice on the Approval of Rules for the Requisites and Forms of Medical Certificates of Birth and Death, January 31, 2012, Article 1.

325. *Ibid.*, Article 2.3.

The form N103/s-84 annexed to the Decree of the Minister contains a required field for the newborn's sex marker. However, the rules for filling out the form do not include exceptions for specifying the sex register. In fact, the rules are silent on how to fill out the sex marker field, which points to the prevalence of a binary approach towards gender that does not allow for even a hypothetical existence of variations beyond the normative genders.

Even though there is lack of information in healthcare institutions, it is likely that intersex children and their parents find themselves in a stigmatising environment, generated not only because of the existing stigma, but also due to incomplete and often inaccurate information that also misleads the child's parents.

### 1.3. Conclusion

The amendment of the legal sex/gender records constitutes a serious problem for transgender and intersex people, which is a clear violation of the rights to self-determination, bodily integrity and health. Poor performance of bureaucratic systems and complicated procedures are an additional source of stress for transgender and intersex individuals. The state must take adequate steps to eradicate this systemic flaw, so that transgender and intersex people have the opportunity to properly exercise their rights.

## 2. Legal Rights of Gay/MSM and Transgender Sex Workers

### 2.1. Problem Description

Gay/MSM and transgender sex workers are the most vulnerable group in Georgia. Unlike cisgender female sex workers, transgender people are more visible, which leads to their exposure to more severe violence. The homophobic and transphobic environment that is present in all spheres of life in a patriarchal culture does not afford them equal opportunity to develop and enjoy the benefits and opportunities offered by the state. The inequality of available opportunities and the imbalance of starting positions, expressed in the lack of access to employment and adequate accommodation, often result in poverty, homelessness, and the decision to commercialise one's body.

The current legal order, policies, discrimination and stigmatising social attitudes present in many countries push sex workers into closed spaces, where they remain beyond the coverage of HIV prevention, treatment and support programmes. The healthcare services that are available to sex workers lack sensitivity and fail to meet human rights standards.<sup>326</sup>

State policies often focus on the elimination and criminalisation of prostitution, consequently completely ignoring the root causes of the demand for commercial sex in society. In reality, demand for sex work may stem from socio-cultural norms and individual circumstances, e.g. social isolation and damaging gender roles, including the desire for domination, which may manifest in the form of violence towards and exploitation of sex workers.<sup>327</sup> Therefore, it is essential for state programmes on HIV/AIDS and STI prevention to not only focus on the needs of sex workers, but also those factors that lead to sex work in specific communities.

### 2.2. International Standards

There is no international consensus on the ideological significance of sex work or whether sex work can be considered as legitimate work. However, UN institutions agree that sex work is inherently stigmatised in many societies, especially men and transgender sex workers, who are subject to intersectional persecution in all spheres of life.

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326. UNAIDS Guidance Note on HIV and Sex Work, March 2009, pg. 5, see: [http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf)

327. *Ibid.*

The UN notes that sex workers, including HIV-positive individuals, are entitled to the right to be engaged in society without economic, cultural and social marginalisation. The sensitivity and awareness of employees of health and social services, law enforcement and the judicial system need to be increased.<sup>328</sup>

The practice employed by many countries of non-recognition of vulnerable groups and the criminalisation of MSM and sex workers reduces their accessibility to various services. To this end, the UN institutions - UNDP, UNFPA, UNAIDS - recommend that nations intensify their efforts to decriminalise sex work and eliminate unfair use of provisions and regulations that do not criminalise sex work.<sup>329</sup>

No person should be obliged to enter into sex work as a result of insecurity, poverty, or coercion.<sup>330</sup> The UN supports gender-sensitive programmes that are aimed at eradicating poverty, and the implementation of an employment policy centered on the interests of marginalised groups.<sup>331</sup> However, important to note is that all adult sex workers have the right to determine whether to remain in or leave sex work.<sup>332</sup> State policies and programmes should focus more on educating sex workers to enable them to make informed decisions.<sup>333</sup> Such programmes should also address the inequality and barriers faced by sex workers, and take into account the fact that many young people engage in sex work in order to financially support their families, sometimes becoming sole providers.

The United Nations High Commissioner for Human Rights notes that: “Development strategies should empower citizens, especially the most marginalised, to articulate their expectations towards the State and other duty-bearers, and take charge of their own development.”<sup>334</sup>

Amnesty International has developed a Decision that obligates states to respect, protect, and fulfill the human rights of sex workers.<sup>335</sup>

### 2.3. National Legal Environment

The Georgian legislation does not criminalise prostitution.<sup>336</sup> However, Article 172<sup>3</sup> of the Code of Administrative Violations subjects it to administrative liability, punishable by fine or 15 days of administrative detention. The fine for this offense is set to equal half the minimum wage, which, according to the presidential decree, amounts to 20 GEL.<sup>337</sup>

The analysis of established practice shows that law enforcement agencies in Georgia often conduct special police measures that force sex workers to leave their place of work aiming at the prevention of prostitution and other possible offenses.<sup>338</sup> During these events, police officers frequently and arbitrarily use repressive measures and

328. *Ibid.*, p. 16

329. John Godwin, *Sex Work And The Law In Asia And The Pacific*, UNDP 2012, p 7, see: <http://www.undp.org/content/dam/undp/library/hiv/aids/English/HIV-2012-SexWorkAnd-Law.pdf>

330. UNAIDS Guidance Note on HIV and Sex Work, March 2009, pp.21-22, see: [http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf)

331. *Ibid.*

332. *Ibid.*, p 17

333. IPPF, UNFPA, Young Positives, Global Coalition on Women and AIDS (2007) *Change, Choice and Power Young Women, Livelihoods and HIV Prevention*. (As cited in UNAIDS Guidance Note on HIV and Sex Work, March 2009, p. 17)

334. Office of the United Nations High Commissioner for Human Rights, frequently asked questions on a human rights-based approach to development cooperation. New York and Geneva: United Nations, 2006, p. 26, see: <http://www.ohchr.org/Documents/Publications/FAQen.pdf>

335. Amnesty International, *Decision on State Obligations to Respect, Protect, and Fulfill the Human Rights of Sex Workers*, see: <https://www.amnesty.org/en/policy-on-state-obligations-to-respect-protect-and-fulfill-the-human-rights-of-sex-workers/>

336. According to human rights defenders, the term ‘prostitution’ contains negative connotations and should not be used. This report uses this term only when it cites or uses the language of a specific legal act.

337. Presidential Decree of June 4, 1999 on the Amount of Minimum Wage. The Decree was amended by the Presidential Decree N 767 (December 26, 2006), according to which, the amount of minimum wage (work remuneration) that is used to determine the amounts of sanctions, fines and other legal offense payments was set at GEL 40. Therefore, half of the minimum wage is GEL 20.

338. This is confirmed by individual in-depth interviews with gay and transgender sex workers held by EMC.

impose administrative penalties, such as fines and administrative detention for violating public order and/or failure to obey police orders, which is regulated by administrative<sup>339</sup> as well as criminal laws.<sup>340</sup>

In 2014, the Public Defender received repeated claims from transgender sex workers related to possible cases of pressure and homophobic attitudes from the police.<sup>341</sup> “They failed to understand why they were ordered by the police to leave their place of gathering, since they did not violate public order.”<sup>342</sup> The Patrol Police Department of the Ministry of Internal Affairs issued an explanation stating that the police routinely perform preventive measures in high-risk areas of Tbilisi, including in the area in the vicinity of the city circus.

Even though prostitution in itself is not criminalised, the use of a place of residence for the purpose of prostitution is punishable under the Criminal Code.<sup>343</sup> Experts state that such crimes could contain signs of trafficking, therefore, police actions, such as routine patrolling of high-risk areas can sometimes be justified; however, the use of preventive mechanisms must also have strict limitations.<sup>344</sup>

EMC obtained information from respondents on cases of violence from third parties (customers, passers-by). Even though, in such cases, sex workers contact the police, response is ineffective. An overwhelming majority of respondents negatively evaluate the role of law enforcement representatives in the prevention of violence. The respondents claim that not a single crime committed against them has been qualified as a hate crime. In addition, the majority of transgender sex workers report that they are not granted victim status due to their gender identity, which points to a discriminatory attitude of law enforcement officers towards gay/MSM and transgender sex workers.

### 2.3.1. Access to Healthcare Services, Prevalence and Prevention of HIV/AIDS

Georgia belongs to the group of countries with low prevalence of HIV/AIDS, which is estimated at 0.07% of the adult population.<sup>345</sup> However, over the years, the number of infected people in risk groups has increased substantially, putting Georgia at high risk of an HIV epidemic.<sup>346</sup> Groups, such as men who have sex with men (MSM), injecting drug users (IDUs), and female sex workers are especially vulnerable to an epidemic.<sup>347</sup> The Georgian government is funding HIV prevention programmes for high-risk groups of MSM, IDUs, and commercial sex workers within the National HIV/AIDS Strategic Action Plan for 2011-2016.<sup>348</sup>

The WHO monitoring of the implementation of the National HIV/AIDS Strategic Action Plan has identified weaknesses of the aforementioned programme, largely related to the identification and treatment of risk groups.<sup>349</sup> WHO recommends that Georgia examine the structural barrier to seeking treatment, which requires more information and de-stigmatisation education in the healthcare system.<sup>350</sup>

339. The Administrative Code of Georgia, Article 173

340. The Criminal Code of Georgia, Article 353.1. An administrative offense is punishable by a fine from GEL 250 to GEL 2,000 or up to 15 days of administrative detention. A criminal offense is punishable by fine, or restriction of freedom for up to three years, or a prison term of two to five years.

341. The Public Defender’s Parliamentary Report, 2014, pp. 693-694

342. *Ibid.*

343. The Criminal Code of Georgia, Article 254

344. Individual in-depth interview with Giorgi Gotsiridze, GYLA, 25.09.2015

345. World Health Organization, HIV/AIDS treatment and care in Georgia, Evaluation report 2014, p. 2, see: <http://pmcdc.ge/sites/default/files/HIV-AIDS-treatment-and-care-in-Georgia.pdf>

346. *Ibid.*

347. A Brief Overview of HIV Policy, NO. 1|30 June 2014, see: [http://www.geoyouth.ge/upload/files/GHPP\\_Policy\\_brief\\_\\_Georgian\\_July\\_2014.pdf](http://www.geoyouth.ge/upload/files/GHPP_Policy_brief__Georgian_July_2014.pdf)

348. Georgia National HIV/AIDS Strategic Plan for 2011-2016, August 2010, see: [http://ecuo.org/media/filer\\_public/2013/01/11/2010geohiv-aidsnsp2011-1016october202c2010.pdf](http://ecuo.org/media/filer_public/2013/01/11/2010geohiv-aidsnsp2011-1016october202c2010.pdf)

349. World Health Organization, HIV/AIDS treatment and care in Georgia, Evaluation report 2014, see: <http://pmcdc.ge/sites/default/files/HIV-AIDS-treatment-and-care-in-Georgia.pdf>

350. *Ibid.*, p 11

## 2.4. Conclusion

In terms of legal rights, transgender and gay sex workers are the most vulnerable group within the LGBTI community. This group is marginalised by the state, family, society, and law. The street is often the only place where they can express themselves,<sup>351</sup> albeit under the circumstances of permanent and continuous oppression.

The state fails to respond to cases of third party violence against this group in a timely, effective, and adequate manner. Moreover, the state itself is often the oppressor, resorting to violence and discrimination of sex workers. This calls into question the entire law enforcement system and portrays it as the main source of discrimination, homophobia and transphobia.

## 3. LGBTI Persons in the Penitentiary System

### 3.1. Problem Description

The results of homophobia and transphobia can be seen most clearly in the hierarchical distribution and class division of the penitentiary system. Violence in such a system is structural in nature. All actors of the system oppress members of the LGBTI community based on the established norms and culture. In fact, they establish their authority through the practice of continuous abuse.

The practice of inmate segregation in Georgian prisons, which the government justifies by the need to protect certain individuals, gives rise to new instances of marginalisation, without any possibility of re-socialisation. The practice of segregation, which in reality should ensure security, raises the risks for psychological and physical (including sexual) violence in the Georgian penitentiary system. This in turn may lead to self-destructive behaviour in prisoners, including suicide. This is further exacerbated by the state's unwillingness to recognise the grave human rights situation of the LGBTI community, which leaves segregated and discriminated prisoners without any effective means of protecting their rights or restoring their legal status.

In order to combat this systemic inequality, the state needs to introduce an effective, research-based policy that will expose integral causes of oppression and discrimination through multidisciplinary methods, and elaborate measures to be implemented in the future.

### 3.2. International Standards

Provisions guaranteeing the protection of dignity and security of persons deprived of liberty as well as provisions prohibiting torture and inhuman treatment are enshrined in a number of international instruments,<sup>352</sup> including the International Covenant on Civil and Political Rights, which states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent human dignity."<sup>353</sup> According to Article 7 of the Covenant, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." A similar provision is also included in Article 3 of the European Convention on Human Rights, according to which, the prohibition of torture is an absolute right, the violation of which cannot be justified under any circumstances.

In addition to the above, the Yogyakarta Principles also include the principle of protection of the dignity of LGBTI prisoners, and urge all states to avoid further marginalisation of prisoners based on their sexual orientation and gender identity.<sup>354</sup>

351. "When I was engaged in commercial business, so to speak, I felt comfortable inside and out... Yes, there was pressure, violence, I was all torn up, but apart from that I was comfortable, [...] where I work now I feel uncomfortable... I don't wear heels, I don't wear a dress, I don't wear makeup [...] I have to act masculine when I have absolutely no desire to, but in order to survive, provide for my family and be more or less well, I have to shift from my comfort zone into a zone of discomfort." (a transgender woman) a focus group with transgender people, 17.07.2015

352. The UN General Assembly, Standard Minimum Rules for the Treatment of Prisoners, Paragraph 6 (1); 9 (2); Also, the European Prison Rules, Recommendation Rec (2006) 2 of the Council of Europe Committee of Ministers, Article 18, Paragraph 6-7.

353. Article 10.1.

354. The Yogyakarta Principles, N9.

According to the UN document, the classification and placement of LGBTI prisoners must be carried out in a way that best guarantees their safety. In other words, LGBTI inmates must not be placed in cells together with individuals who may jeopardise their security.<sup>355</sup> Therefore, state programmes must consider incorporating so-called ‘protective segregation’ or protective custody to be used at an inmate’s request or by the prison administration based on risk assessment.<sup>356</sup>

The ECHR, like international instruments, considers protective custody to be a legitimate measure in case of LGBTI prisoners. For example, in the case of *Stasi v. France*,<sup>357</sup> the ECHR did not find a violation of Article 3 of the Convention, since the prison administration had used all possible measures in order to protect the inmate from violence based on sexual orientation. The Court rendered a different decision in the case of *X v. Turkey*. This case was of critical importance, since it was the first instance the ECHR had found a violation of Article 3 together with Article 14 of the Convention, linked to an individual’s sexual orientation. According to the case, the applicant was a 23-year-old gay prisoner, who had requested transfer to a different cell after being subjected to harassment and intimidation from his heterosexual cellmates based on his sexual orientation. Despite the applicant’s request to be transferred to a prison cell with other gay prisoners, he was placed in solitary confinement. The ECHR stated that even though there was some basis that required protective measures, it did not suffice to justify the applicant’s complete exclusion from the prison community. Therefore, the Court found a violation of Article 3 of the Convention, since the applicant’s placement in solitary confinement had caused him physical and mental suffering and violated his dignity. As for Article 14 of the Convention, the Court stated that the defendant was unable to convince the Court that the complete isolation of the applicant was done for the dominant purpose of ensuring his security. The ECHR concluded that the principal reason for the prisoner’s exclusion was in fact his sexual orientation.

### 3.2.1. Placement Issues of Transgender and Intersex Prisoners

Decisions on the classification/placement of transgender and intersex people in penitentiary institutions must be made on a case-by-case basis.<sup>358</sup> The allocation of prisoners based on their biological sex increases the risk of their exposure to physical harm and promotes their extreme vulnerability.<sup>359</sup>

It must be emphasised that it is impossible to provide comprehensive, categorical guidance on the allocation of transgender and intersex people in prisons, since these statuses include a wide range of variations and physical characteristics that cannot be subject to a single universal procedure. Therefore, it is crucial that decisions on allocation are taken with the consideration of the prisoner’s individual wishes.<sup>360</sup>

## 3.3. National Legal Environment

In Georgia, prisoner rights and duties, as well as their treatment, are regulated by the Prison Code, stating that “the enforcement of detention and imprisonment in Georgia is performed on the basis of principles of legality, humanism, democracy, equality before the law, and individualization of punishment.”<sup>361</sup> The state ensures the protection of the legal rights and freedoms, as well as the legal, social, and private security of the accused and the convicted, and enforces their detention and imprisonment.<sup>362</sup>

The Georgian government has approved the 2015-2016 Action Plan for the Prohibition of Torture and Inhuman and Degrading Treatment. The Action Plan contains specific measures for ensuring the protection of prisoners

355. United Nations Office On Drugs And Crime (Unodc) Handbook On Prisoners With Special Needs, Criminal Justice Handbook Series, 2009. p. 115, see: [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Prisoners\\_with\\_Special\\_Needs.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf)

356. *Ibid.*, p. 116

357. ECHR Judgment on *Stasi v. France* (application no. 25001/07), see: <http://hudoc.echr.coe.int/eng?i=001-107134>

358. Transgender Prisoners, Identity, and Detention: Policy Recommendations Human Rights Watch March 1, 2006, p.5, see: [http://outcast-films.com/films/cu/transgender\\_prisoners.pdf](http://outcast-films.com/films/cu/transgender_prisoners.pdf)

359. United Nations Office On Drugs And Crime (Unodc) Handbook On Prisoners With Special Needs, Criminal Justice Handbook Series, 2009. Pg. 115-116, see: [https://www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Prisoners\\_with\\_Special\\_Needs.pdf](https://www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf)

360. *Ibid.*

361. Article 1.2.

362. Article 13.1.



from torture (para. 1.7.), including setting into motion further organisational and institutional measures in order to respond to the needs of vulnerable groups (para. 1.7.2.). However, the Action Plan does not list the Ministry of Corrections as one of the institutions tasked with carrying out these measures. In fact, no measures aimed at improving the situation of vulnerable groups have been carried out so far. In order to increase the visibility of the LGBTI group, it is essential that the Action Plan also separately mention their needs and the risks of violence they face. By doing so, the state would demonstrate its readiness to pay separate attention to the inmates that are constantly exposed to violence and discrimination.

### 3.3.1. Protection of Personal Data of Prisoners

In Georgia, personal data is protected on the basis of the Law on Personal Data Protection, which forbids the processing of special category data,<sup>363</sup> except under extraordinary circumstances.<sup>364</sup>

The rules for registering and processing personal data are also determined by special bylaws, in particular, Decree N82 of the Minister of Corrections on the Approval of the Rules for Managing the Registries and Personal Cases of Accused/Convicted Persons, according to which, case management is performed by special registry departments in each relevant institution.<sup>365</sup> According to the Decree, each case file of an accused/convicted person consists of two parts and its registration takes place according to an established sample.<sup>366</sup> It must be noted that the Decree does not impose any prohibitions on the storage and processing of certain categories of personal information, thus creating risks for proper protection of personal data in closed systems.

In 2015, a new Law on the Special Prison Service was adopted. One of the main objectives of this law is providing penitentiary institutions with information and analytical software, data processing and analysis, and the maintenance of registries and personal files of the accused/convicted persons.<sup>367</sup> The law has set up an Analytical Department under the Special Prison Service.<sup>368</sup> The statute for this department has been approved by Decree N56 of the Minister of Corrections.<sup>369</sup>

According to experts, the new law creates even more ambiguity in terms of personal data protection, since it gives broad powers to the Analytical Department to process any information, without specifying the type.<sup>370</sup>

### 3.3.2. Analysis of Degrading Treatment and Segregation Practices

Interviews with experts confirm the practice of segregation of inmates in prisons based on sexual orientation.<sup>371</sup> The main reason for segregation is an inmate's real or presumed sexual orientation, which forces the inmate to be placed at the lowest level of a prison's informal hierarchy, which is still maintained in the penitentiary system and continues to serve as the basis for the distribution of authority among prisoners. Gay and bisexual persons and MSM hold the lowest and, therefore, the most disadvantaged position in this hierarchy, and are referred to using a derogatory term - 'katmebi' (chicken).

Apart from an individual's actual or presumed sexual orientation, the type of crime for which the individual is serving a prison sentence may also become the reason for being included in this group. A crime against sexual

363. Data related to a person's racial or ethnic origin, political opinion, religious or philosophical beliefs, membership of professional organisations, health, sex life or criminal records, as well as biometric data that allows for a person's identification with the aforementioned characteristics.

364. The Law on Personal Data Protection, Article 6.

365. Decree #82 of the Minister of Corrections, 10 May 2011, on the Approval of the Rules for Managing the Registries and Personal Cases of the Accused/Convicted Persons, Article 5; 6.

366. *Ibid*, Article 12.3.

367. Article 5 (f) (g), see: <https://matsne.gov.ge/ka/document/view/2835511>

368. *Ibid*, Article 2.1.

369. Decree N56 of the Minister of Corrections, 25 June 2015, on the Approval of the Statute of the Analytical Department of the Ministry of Corrections, see: <https://matsne.gov.ge/ka/document/view/2885613>

370. Article 10, 1, A

371. Identoba, individual in-depth interview with Nino Bolkvadze, 24/09/2015; Initiative for the Rehabilitation of Vulnerable Groups, interview with Anton Kelbakiani, 14/10/2015; National Mechanism of Prevention, interview with Nika Kvaratskhelia, 12/08/2015

freedom and inviolability (Chapter XII of the Criminal Code) is one example. However, if the person has been subjected to an act of forced or symbolic sexual violence (referred to as “spoiling”), similar results ensue.<sup>372</sup>

A study conducted by Identoba (a total of 28 respondents, including 17 prisoners and 11 former prisoners) found that a set of unwritten rules are being observed in penitentiary establishments. According to these rules, the so-called “katmebi” (“chickens”) and “kaibichebi” (“tough guys”) cannot coexist in the same cell, eat food together, use the same tableware, or shake hands.<sup>373</sup> The study also found that most inmates referred to as “chickens” consider this segregation unfair. However, they also believe that managing a prison without the segregation is impossible.<sup>374</sup>

The prison administration tends to be inactive in this process. In fact, the administration often shares the sub-cultural norms set by the dominant prisoners, and assumes the same discriminatory attitude.<sup>375</sup> “Identoba” respondents emphasise the need to strengthen prison administrations, since in their view, only the administration is able to gradually change the situation.

### 3.4. Conclusion

The institutional culture in penitentiary establishments, which reinforces and strengthens the hierarchical sub-culture, has a substantial negative impact on LGBTI prisoners, which can be identified by self-destructive behavior and suicide attempts, which becomes important when current security measures and suicide prevention programmes are ineffective.

It must be emphasised that the principal challenge in detention facilities is not protective segregation (separating a prisoner from the abuser in order to ensure the safety of the latter), but rather the discriminatory use of this segregation. As a result, the safety of LGBTI prisoners in the Georgian penitentiary system is ensured through their permanent marginalisation and at the expense of their dignity. This deprives them of the possibility to serve their sentence in a humane and violence-free environment, and, given the lack of personal data protection, also deprives them of any possibility of re-socialisation after having served their sentence.

The Georgian government must understand the responsibility that lies with prison administrations, and the necessity of transforming their sensitivity, knowledge and attitudes, which requires planning and in-depth work.

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372. Anton Kelbakiani, *Criminal Subculture in the Penitentiary System*

373. Nino Bolkvadze, *Assessment of the Needs of MSM Prisoners in Georgian Correctional Facilities with respect to HIV Prevention*, magazine ‘May 17’, p. 159

374. *Ibid.*, p. 167

375. “[The reasons may be that] first - [prison personnel] also believe that contact with these prisoners is inadmissible, and second - the fear that if the other prisoners witness it [interaction with disadvantaged inmates], they will no longer take [prison staff] seriously, and they are scared not to disrupt the balance too much and later not to sour relations with others, so that they don’t have problems with management.” In-depth interview with Tato Kelbakiani, Initiative for the Rehabilitation of Vulnerable Groups, 12/08/2015

## RECOMMENDATIONS

### **For the Government of Georgia:**

- Include issues related to sexual orientation and gender identity (including Intersex-related issues) as a separate chapter in national action plans and strategies. The chapter should outline effective and comprehensive measures against violence, discrimination and unequal treatment towards LGBTI people;
- Regulate hate speech and religious neutrality, adopt relevant effective monitoring mechanisms and system of responsibilities, including in the Law of Georgia on Public Service.

### **For the Parliament of Georgia:**

- Implement adequate amendments in the anti-discrimination legislation strengthening the Public Defender as a mechanism of legal protection and identifying effective moral remedy instruments through the courts. For this purpose, the Public Defender should be armed with the competence to sanction the perpetrator of discrimination through the court. The limitation period to appeal to the court on the cases of discrimination should be increased to allow simultaneous application of the Public Defender and the court as anti-discrimination mechanisms. In the cases of discrimination, private persons liability to submit information to the Public Defender should be determined;
- Include adequate amendments in labour legislation in order to clearly regulate discrimination and workplace harassment;
- Elaborate the code of ethics and relevant reaction mechanisms for the cases of usage of hate speech by members of parliament.

### **For the Ministry of Internal Affairs and the Prosecutor's Office of Georgia:**

- Take concrete and systemic steps to combat hate crimes, including measures to ensure correct qualification of offenses; including offenses based on SOGI and ensure effective, independent and timely investigation;
- Develop special guidelines on the identification of hate crimes and methodological orientation of investigation;
- Ensure relevant qualification of hate crimes and identification of discriminative motives in the cases;
- Establish a special unit, equipped with competent staff with relevant knowledge and sensitivity, to work separately on hate crimes;
- Establish/refine the statistical database and methodology on hate crime;
- Ensure the protection of the safety of sex workers and eliminate the existing repressive and discriminative police practices;
- Take effective measures to identify, prevent, and eliminate domestic violence towards LGBTI persons;
- Identify SOGI motives in domestic violence cases and adequately reflect them in statistical data.
- Ensure effective and timely investigation of the cases of violence during the gatherings of LGBT community members and activists on May 17, 2012 and 2013, as well as the facts of violence related to these events.

### **For the Chief Prosecutor's Office**

- Ensure the preparation and publication of comprehensive guideline on the fight against hate-motivated crimes;
- Create a specialized unit/department to fight against hate-motivated crimes;

- Ensure systemic and consistent training of the personnel of the Prosecutor's Office on the issues of SOGI, hate-motivated crimes and prohibition of discrimination;

#### **For the Ministry of Education and Science of Georgia:**

- Create unified anti-bullying policies, strategy documents, and methodology for maintaining statistical data;
- Use effective and proactive monitoring mechanisms to identify the facts of bullying and discrimination in public schools;
- Ensure access to support services for students/pupils who are victims of homophobic and transphobic bullying;
- Systematically train teachers on issues of gender identity and sexual orientation;
- Comprehensively and systemically revise educational materials/curricula to identify examples of gender stereotyping or discrimination;
- Refine teacher accountability mechanisms;
- Ensure relevant reflection of information on sexual orientation, gender identity and sex characteristics in educational materials.

#### **For the Ministry of Labour, Health, and Social Affairs of Georgia**

- Work in coordination with the Ministry of Education and Science, in order to ensure the review of medical education materials that include discriminatory and homophobic/transphobic terms and definitions;
- Ensure the regulation of medical transition so that transgender persons have access to comprehensive medical service in compliance with international standards;
- Take effective steps to cover the transition process of transgender persons through public health insurance;
- Coordinate with the Ministry of Justice to implement new administrative practices, based on which transgender persons are not required to be subject to medical/surgical intervention;
- Refine the teaching methodology and guidelines related to intersex persons, so that any stigmatisation of the group is avoided;
- Research and analyse the practices of medical treatment of intersex persons;
- Ensure legislative prohibitions of "conversion therapy" related to sexual orientation;
- Identify the needs of LGBTI persons in state social policies and plan relevant response mechanisms;
- Ensure quick and efficient mechanisms to provide accommodation to victims of SOGI-based domestic violence, taking into account the needs of LGBTI persons;
- Plan effective steps to study the root causes of homelessness and identify risk groups, necessarily ensuring the inclusion of LGBTI groups;
- Take timely, effective, and comprehensive measures related to the right to adequate housing for homeless persons, in coordination with other agencies, including local municipalities;
- Establish shelters, taking into account the needs of each group, especially LGB, transgender, and intersex persons.

#### **For the Ministry of Corrections of Georgia:**

- Ensure systemic training of persons employed in the penitentiary system on the issues of sexual orientation, gender identity, and sex characteristics;
- Take effective steps for the protection of personal information of individuals placed in detention facilities;
- Take effective steps to diminish existing prison hierarchies and criminal subculture in the penitentiary system;
- Ensure the protection of the safety of LGBTI inmates and eliminate their unjustified segregation.

## ADDITIONAL INFORMATION

### 1. Reports and recommendations issued by international and regional organisations

#### 1.1. The US Department of State Report on Georgia

In early 2016, the US Department of State published a report on Human Rights Practices for 2015 in Georgia. The report contains a separate chapter on sexual orientation and gender identity-based violence, discrimination and other degrading treatment practices, and positively assesses the recent legislative amendments, including making hate motive an aggravating circumstance in the Criminal Code. However, the report highlights the lack of effective implementation of the provisions<sup>376</sup>, which is partly attributed to a lack of political will to confront such criminal acts, as well as insufficient police training.

The report reviews existing prejudices about LGBTI persons in society, which force LGBTI community members to hide their sexual orientation to protect themselves from violence and harassment. This issue is also related to a lack of confidence in and fewer referrals to police regarding cases of discrimination and violence, which, in turn, is triggered by a fear of homophobic backlash by police officers and threats to reveal personal information about the LGBTI victims.<sup>377</sup>

The US State Department report also focuses on the first instance judgment with regard to the case of the murder of a transgender woman, Sabi Beriani, where the defendant's actions were considered as "necessity defence".<sup>378</sup> The report notes the activists' concern regarding crimes against LGBTI persons, since the acquittal verdicts as well as disproportionately light sentences imposed on defendants have a negative impact on the LGBTI community. The absence of state accountability, and a sense of impunity, even in "the most obvious cases of homophobic and transphobic crimes", undermines the motivation of LGBTI victims to appeal/ report crimes to law enforcement agencies, the Public Defender, and NGOs<sup>379</sup>.

#### 1.2. ECRI Report on Georgia

On March 1<sup>st</sup> 2016, the Council of Europe's European Commission against Racism and Intolerance (ECRI) published a report on Georgia, where the Commission focuses on the systemic shortcomings of state policy against homo/transphobic crimes. The report notes that violence against LGBTI persons is essentially a large-scale problem and has been manifested in attacks in public and private spaces, as well as in restrictions on the freedom of assembly and activities aimed against non-governmental organisations. The Commission notes that due to the homo/transphobic climate in the Georgian society, LGBTI community members, who are subject to violence, frequently refrain from referring to law enforcement agencies owing to the danger of disclosing the victims' sexual orientation and gender identity, lack of support, repression, and in many cases, discriminatory attitude of the police.<sup>380</sup>

ECRI asserts that State response to hate motivated crime is not adequate. The report emphasises the dysfunctional nature of Article 53, paragraph 3<sup>1</sup> of the Criminal Code of Georgia and notes that no cases have been qualified under this Article, in spite of the presence of a clear motive.<sup>381</sup> According to the report, law-enforcement agencies did not respond to group attacks against LGBTI persons with adequate measures, which would lead to the pun-

376 Georgia- Country Reports on Human Rights Practices for 2015 United States Department of State, Bureau of Democracy, Human Rights and Labor, p. 45, see: <http://www.state.gov/documents/organization/253061.pdf>

377 Ibid.

378 Ibid. p. 46

379 Ibid.

380 The European Commission against Racism and Intolerance report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016, para. 53, see: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Georgia/GEO-CbC-V-2016-002-ENG.pdf>

381 Para. 63

ishment of the perpetrators and prevent any similar incidents.<sup>382</sup> Accordingly, the Commission calls on the government to carry out in-depth monitoring of the methods applied by police in the investigation and identification of possible hate motive. As an additional recommendation, the report advises the courts to discuss motive at the beginning of the trial.<sup>383</sup>

The Commission proceeds to point to the insufficiency of activities aimed at raising awareness regarding the designation of hate motive as an aggravating circumstance in the Criminal Code, and recommends to the Government to inform the general public about bias-motivated incidents as criminal conduct and to encourage victims to lodge complaints in such cases. The Commission particularly highlights the educational environment, and calls on the Government to carry out awareness-raising programmes in schools and universities to overcome existing homo/transphobic hate.<sup>384</sup>

ECRI emphasises insufficient training for judiciary and law enforcement officers, as well as prosecutors working under the Ministry of Internal Affairs and recommends that the state improve and scale up training activities for the judge corps and law enforcement agencies. Moreover, in order to improve the effectiveness of the trainings, ECRI also calls on the authorities to conduct periodic impact assessments and adjust the activities as necessary.<sup>385</sup>

In order to promote the institutional combat against hate motivated crimes, ECRI clearly indicates that the Government should set up a specialised unit within the Ministry of Internal Affairs, which will deal specifically with homo/transphobic crime. In the process of establishing this unit, the State should ensure the involvement of relevant experts, the Public Defender, NGOs and international organisations.<sup>386</sup>

The Commission criticises the May 17, 2013 (IDAHOT) events, and notes that, despite the fact that government officials condemned the violent acts, their public statements did not call for tolerance and respect for LGBT persons. In some cases, LGBT organisations were portrayed as instigators and blamed for the violence that took place.<sup>387</sup>

The Commission asserts that such statements containing hate speech and rhetoric are inherently problematic and notes that the extent of hate speech against LGBT persons is wide and includes insults, as well as hateful comments expressed by politicians, journalists or the Georgian Orthodox Church.<sup>388</sup>

ECRI stresses the insufficiency of actions undertaken by the state to overcome homo/transphobic and recommends that the Parliament elaborate a norm prohibiting homo/transphobic assault, and equip it with specific enforcement measures and/or sanctions, which can be employed in case of violation of the requirement. ECRI also notes that all political parties should take a firm stance against homo/transphobic discourse.<sup>389</sup>

### 1.3. Universal Periodic Review (UPR)

Under the framework of the 31<sup>st</sup> session of the Human Rights Council's (HRC) Universal Periodic Review (UPR), the Georgian government presented a final statement, which included answers in relation to the acceptance of the recommendations that the State required time to elaborate on.<sup>390</sup> According to the UN Universal Periodic Review (UPR) Working Group report published on February 23, 2016,<sup>391</sup> Georgia accepted all key recommendations, including on the effective implementation of anti-discrimination legislation and strengthening of existing legal remedies. Georgia adopted all major recommendations from Sweden,<sup>392</sup> regarding amendments to the Law on the

382 Para. 73

383 Para. 62

384 Para. 70

385 The European Commission against Racism and Intolerance report on Georgia (fifth monitoring cycle) Adopted on December 8, 2015, published on March 1, 2016, para. 67, see: <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Georgia/GEO-CbC-V-2016-002-ENG.pdf>

386 Para. 68

387 Para. 72

388 Para. 35

389 Para. 46

390 See: <https://emc.org.ge/2015/12/04/upr-srhr/>

391 See: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/GESession23.aspx>

392 See: *Ibid.* Para. 118.2

Elimination of All Forms of Discrimination and granting the Public Defender the right to impose fines and other sanctions (118.2).

By accepting these recommendations, on the one hand, Georgia admitted the inefficiency of the anti-discrimination mechanism and its weak functions, and, on the other hand, the State pointed out in its oral report that issues regarding the enhancement of anti-discrimination mechanisms will be included in the National Human Rights Action Plan for 2016-2017.

It should be noted that Georgia has agreed to accept crucial recommendations that will substantially contribute to the protection of the rights of LGBTI persons, and foster a discrimination- and violence-free environment. In particular, the State took the responsibility to fulfil recommendations issued by Great Britain and Northern Ireland concerning the development and implementation of a strategy to monitor, investigate, and prosecute hate crimes, giving the Public Defender relevant powers and resources to take action against perpetrators of hate crime (118.32).

Moreover, the Government accepted Uruguay's recommendation concerning redoubling of state efforts to ensure the realisation of the rights of LGBTI persons and effectively combat all forms of social stigmatisation of homosexuality, bisexuality and transsexuality, as well as hate speech, discrimination and violence based on sexual orientation or gender identity (118.9).

The State noted but did not accept entirely the most significant recommendation issued by Sweden, regarding the establishment of a specialised police unit, under law enforcement agencies, for effective investigation and identification of hate crimes (118.10). The State justified this by citing the need to respond to such cases with complex measures, as well as asserting that the unit will be overloaded if required to operate on a country-wide scale. The State noted that one centrally located specialised police unit will not be a productive mechanism for effective and efficient investigation of hate motivated crimes. Accordingly, the Ministry of Internal Affairs has made a commitment to provide specialised training for police officers in all regional police departments<sup>393</sup>.

## 2. The legal and political analysis of significant changes on the national level

### 2.1. Right to private and family life

Anti-LGBT discourse in Georgia notably increased during the first quarter of 2016, as is most clearly evidenced by the proposed constitutional amendments regarding the gender-specific definition of marriage and the discussions around a related referendum. On March 14, 2016, the Bureau of the Parliament of Georgia registered a Constitutional draft law "On the Amendment of the Constitution of Georgia", signed by 80 MPs,<sup>394</sup> aiming to introduce "a more clear-cut wording of the first part of Article 36 of the Constitution". On March 28, the Central Election Commission registered the following referendum question submitted by the initiative group: "Do you want same-sex marriage to be allowed in Georgia?"<sup>395</sup> Later, however, the CEC withdrew the registration of the referendum question due to its non-compliance with the provisions of the Election Code of Georgia and the Organic Law "On Referendums"<sup>396</sup>.

According to the initiative, "marriage, a consensual union of a man and woman aimed at creating a family, is based on the equal rights of spouses". The explanatory note appended to the draft law stipulates that "in order to avoid the misinterpretation of the essence of the Constitutional provision, it is recommended that the latter be

393 A/HRC/31/15/Add.1, Para. 118.10

394 See: <http://www.parliament.ge/ge/saparlamento-saqmianoba/biuro/biuros-sxdomebi/parlamentis-biuros-sxdoma14032016.page>

395 See: <http://www.cesko.ge/ge/mediatvis-4-ge/pres-relizebi-13-ge/28-martis-sxdomis-shedegebi28.page>

396 "The referendum concerns not only the understanding of public opinion regarding the issue presented by the initiative group, but also, due to the existing formulation of the topic, people will make a decision regarding the adoption of this principle as law, which clearly contradicts the Organic Law of Georgia "On the Election Code") Article 172, paragraph 2 "a") and Organic Law of Georgia "On Referendums" (Article 3, paragraph 2 "a"). See Decision N212/2016 of the Central Election Committee: <http://www.cesko.ge/uploads/other/33/33705.pdf>

worded in a way that would clearly convey the connotation of the provision and eliminate much of society's queries and concerns with regard to the interpretation".<sup>397</sup>

It is essential to note that the issue on the Constitutional amendment regarding marriage has surfaced on several occasions on the political arena,<sup>398</sup> and, as a rule, it has been a part of a pre-election campaign. It should be noted that the LGBTI community and organisations have never raised the issue of marriage equality in the Georgian legal and political agenda.

According to the April 26 decision rendered by the Bureau of the Parliament, parliamentary factions and committees began deliberations on the Draft Normative Act.<sup>399</sup> In addition, according to Parliamentary Decree 4911-II issued on March 18, , on the basis of Article 102, paragraph 2 (of the Constitution) and Article 1, paragraphs 2 and 4 (Rules of Procedure of Parliament), a 15-member Organising Committee was established in order to set up public discussions regarding the Constitutional amendment<sup>400</sup>, which provided discussion forums in various cities and regions in Georgia; however it is noteworthy that, due to security risks, local community members did not have the opportunity to engage in the discussions and expressly state their opinion.

In addition, the leading parliamentary committee in discussing the draft bill (Human Rights and Civil Integration Committee) endorsed the constitutional amendment and supported its preparation for the first reading plenary session of the Parliament<sup>401</sup>.

Considering that Georgia's legal framework does not afford legal mechanisms/benefits and other personal and property rights for same-sex partnerships, the proposed initiative, which aims at narrowing and abolishing the unrestricted definition of marriage in the Constitution, can be considered as an attempt at a substantial deterioration of constitutional standards and the legal status of LGBTI persons in Georgia. Restricting constitutional rights to serve political interests and eradicating resources for possible rights recognition in the future is unjustifiable. It is clear that this initiative does not stem from the desire to protect the family unit, but rather from an aspiration to preclude the recognition of LGBTI persons as a social group and constitutes an attempt to disregard their rights. While democracies move forward in terms of legal recognition of LGBTI partnerships and the cultivation of social inclusivity,<sup>402</sup> Georgia's adoption of the Constitutional amendment serves to promote further restrictions, prohibitions, and expanding discrimination towards the LGBTI community.

The Venice Commission believes that constitutional norms, which deal with fundamental rights, are of paramount significance and should be open to debate and amendment, regardless of whether they expand/reinforce certain rights or, in some cases, whether they restrict their content. However, the above should be implemented with caution and should be subject to strict requirements, based on which, these amendments should not undermine the functionality of the provisions, which support the commitment to protect the rights of individuals and minorities against the tyranny of the majority.<sup>403</sup> Restrictions of constitutional amendments must be justified by the need for the preservation of democracy and must rule out decision-making beyond the framework of democracy.<sup>404</sup>

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397 Explanatory Note "On the Amendment to the Constitution of Georgia", raft Constitutional Law, See: <http://info.parliament.ge/file/1/BillReviewContent/119368?>

398 See in detail: <http://Netgazeti.Ge/News/101418/>

399 Decree N. 396/9 of the Bureau of the Parliament of Georgia regarding the commencement of deliberations on the normative draft bill, see: <http://info.parliament.ge/file/1/BillReviewContent/118548?>

400 Concluding protocol of the public discussion, see: <http://info.parliament.ge/file/1/BillReviewContent/119322?>

401 See leading Committee review: <http://info.parliament.ge/file/1/BillReviewContent/119318?>

402 For detailed information, see Chapter III, Section 4 of the study report.

403 (Venice Commission) Report on Constitutional Amendment, Adopted by the Venice Commission at Its 81st Plenary Session, Para. 177 (Venice, 11-12 December, 2009)

404 NGO statement regarding the constitutional amendment on defining marriage as a union between a woman and a man: <https://emc.org.ge/2016/04/27/emc-39/>



It is important to note that the discussions around the proposed constitutional amendment, as well as the upcoming elections, have largely fuelled the homo/transphobic rhetoric among politicians and political parties, clearly and openly expressing anti-gay sentiments, replete with derogatory terms.<sup>405</sup>

It should also be noted that in the first quarter of 2016, non-governmental organisations documented several physical assaults on members of the LGBTI community<sup>406</sup>. The increasing number of attacks could be linked with the anti-gender and anti-gay rhetoric that emerged towards the end of 2015 in connection to the definition of marriage. It should be emphasised that the authorities do not fully comprehend the connection between hate speech and homo/transphobic crime. The State not only fails in its attempts to take adequate measures to prevent the replication of hostile attitudes against certain groups in public, but, in some cases, it even encourages hate discourse.

Given that homo/transphobia constitutes an institutional problem on the social and political arena, and LGBTI persons continue to experience harassment, discrimination and systemic violence, instead of proposing and implementing targeted solutions to existing issues, the government, via the constitutional initiative, promotes homo/transphobic discourse, neglects the existing legal framework (established by the European Convention on Human Rights) and contributes to the further marginalisation of different social groups.

## 2.2. Freedom of assembly and freedom of expression

On May 17, 2016, the International Day against Homophobia and Transphobia (IDAHOT), the LGBTI community was once again unable to exercise its constitutionally guaranteed freedom of expression and peaceful assembly. Plans for IDAHOT celebrations by an independent group of activists near the former building of the Parliament of Georgia, were thwarted after the Mayor's office informed the organisers that the avenue and other central areas had already been occupied by other organisations (mostly those affiliated with the Orthodox Church and in relation to the celebration of "Family Sanctity Day", instituted by the Patriarch Ilia II in 2014). Activists informed City Hall that a demonstration would take place near Pushkin Square, another central area in the capital, but the Ministry of Internal Affairs asserted that security guarantees could not be obtained.<sup>407</sup>

The attempt of the Georgian Orthodox Church and ultra-right-wing conservative groups to commandeer May 17<sup>th</sup> can be seen as an attempt to expel LGBTI persons from public spaces in a display of power, and to enshrine a reminder of previous years' experiences.

The State's failure to ensure safety and security for LGBTI persons and protect their right to peaceful assembly once again has clearly demonstrated increasingly homo/transphobic attitudes in society, which are frequently tolerated and, in some cases, encouraged by the State's ineffective policies. In this regard, it must be noted that the court acquittals and the ongoing ineffective investigation of the events of May 17, 2013 engender an environment of impunity for homo/transphobic social, political and clerical groups and lead to the strengthening of existing nuclei of violence.

405 Majoritarian MP Tamaz Mechiauri: "It is simply cynical that such a demonstration stems from Kutaisi - the city from which King [David] Aghmashenebeli began the unification of Georgia, and now some people are to 'turning gay' starting from here"; "No, I do not understand. If LGBT-specific insults are punishable, then the Patriarch has fewer rights?" Majoritarian MP Omar Nishnianidze: "Waving flags and these exhibitions are not welcome in my home town [of Kutaisi]." Member of the faction, "Georgian Dream – Conservatives", Merab Kachakhidze: "As for the gentlemen sporting beards and unable to create families [...] I would advise the following: if you are so passionately in love with your significant other, and you have no way of legalising this [relationship], leave for [your partner's] county, he is surely a foreigner, right?"

406 See: <http://netgazeti.ge/news/111277/>

407 See: <http://liberali.ge/news/view/22562/17maisi--ra-igegmeba-homofobiada-da-transfobiastan-brdzolis-msoflio-dghes>