

Human rights in relation to LGBTI people in the light of the modern public international law

ABSTRACT

Subject of research: The purpose of scientific research is to analyze human rights issues that affect LGBTI people. The jurisprudence of the European Court of Human Rights and the Amnesty International reports, which largely determines the general trend of recommendations for states that should introduce anti-discriminatory regulations and take legislative action to harmonize and introduce legislation, issues of rights for LGBTI people. LGBTI people insist on not discriminating against their sexual orientation in every sphere of national life, just at the national level. In some cases, the European Convention for the Protection of Human Rights and Fundamental Freedoms has proved very effective in the case-law of the Commission on Human Rights and the European Court of Human Rights in Strasbourg, and has had an impact on the subsequent revision of national legislation. We now have to think that we are just one step away from changing the case line and setting common European standards on sexual orientation. Undoubtedly, the topic discussed will be problematic for a long time. The reason for this is the cultural differences that occur in European countries, as well as the fact that issues related to family and marriages belong to the exclusive competence of the states.

Purpose of research: The jurisprudence of international bodies dealing with the protection of human rights affects the shape of the legal regulations of countries under the jurisdiction of these authorities (international courts or tribunals).

Amnesty International reports contribute to increasing awareness of human rights violations, aiming at enhancing the respect for human rights in the monitored countries.

The development of the fourth generation of human rights is the goal of ensuring non-discrimination against sexual minorities in relation to those for heterosexuals.

Methods: Analysis of legal acts and scientific achievements in the field of human rights in public international law

Keywords: human rights, right to sexuality, public international law

1. Introduction

The purpose of scientific research is to analyze human rights issues that affect LGBT people. The jurisprudence of the European Court of Human Rights and the Amnesty International reports, which largely determine the general trend of recommendations for states that should introduce anti-discriminatory regulations and take legislative action to harmonize and introduce legislation, issues of rights for LGBTI people. LGBTIs insist on not discriminating against their sexual orientation in every sphere of life in the country, precisely at national level. In some cases, the European Convention for the Protection of Human Rights and Fundamental Freedoms (of 4 November 1950, Journal of Laws (93) 61/284) has proved very effective in the case-law of the Commission on Human Rights and the European Court of Human Rights in Strasbourg, and has had an impact on the subsequent revision of national legislation. We now have to think that we are just one step away from changing the case line and setting common European standards on sexual orientation. Undoubtedly, the topic discussed will be problematic for a long time. The reason for this is the cultural differences that occur in European countries, as well as the fact that issues relating to family and marriages are the exclusive competence of the states.

The canon of sexual and reproductive rights in a specific, refers to the human rights of people of different sexual orientation, including lesbians, gays, bisexuals, transsexuals and intersexuals (LGBTIs), and the protection of these rights, even though they equally apply to heterosexuality. The right to sexuality and freedom from discrimination based on sexual orientation

is based on the universality of human rights and the inalienable nature of the rights of every person by virtue of being human.

The World Association for Sexual Health (organization information was taken from the official website of the organization: <http://www.worldsexology.org>, access date: 15 April 2017) recognizes that people with different sexual orientation, gender, gender identity and body language diversity require protection of human rights, also all forms of violence, discrimination, exclusion and stigmatization constitute a violation of human rights and affect the well-being of these persons, their families or communities. Interventions in clinical sexology are designed to promote, maintain and restore sexual health. The World Association for Sexual Health bases its mission primarily on promoting sexuality. It is a global organization that engages in professional support for the promotion, promotion and, above all, the development of sexology, with a strong emphasis on the development of sexual rights guaranteed to all (*erga omnes*).

2. Selected case law of the European Court of Human Rights

Discussing selected case law of the European Court of Human Rights¹ should begin with the indication of the Case of Goodwin v. UK which was a breakthrough judgment because the previous point of view of this Court has changed (Judgment Strasbourg 11 July, 2002, application no. 28957/95, source: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596>, access date: 06 May 2017). In this judgment for the first time from 1986² the Court determined that ensuring the rights to transsexual persons belongs to the obligations of the states (§ 86-88 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95). The Court indicated that *while is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the*

standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (...) since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (§ 74 Case of Goodwin v. UK, Judgment Strasbourg 11 July 2002, application no. 28957/95). In conclusion, the ECHR has referred to the meaning and interpretation of the Convention in a way that enables practical and up-to-date practice of its application, and covers this issue with its protection, highlighting the need for its dynamic interpretation aimed at development (wider: W. Burek, 2007, pp. 114-128, M. A. Nowicki, 2013, p. 701).

Presenting other problematic issues concerning LGBTI people, you cannot get past the matter of the same-sex marriage. One of the most commonly cited case is *Schalk and Kopf v. Austria* (Case of *Schalk and Kopf v. Austria*, Judgment, Strasbourg 24 June 2010, application no. 30141/04). In this judgment European Court of Human Rights was extremely cautious in his judgment. The applicants stated that Art. 12 of European Convention for the Protection of Human Rights and Fundamental Freedoms (of 4 November 1950, Journal of Laws (93) 61/284) should not be interpreted only in such a way that marriage can be contracted exclusively by persons of the opposite sex. The applicants pointed out that both women and men are entitled to this right. In this regard the Court, however, took the view that Art. 12 of the Convention must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms used in it in their context and in the light of its object and purpose. In addition, one needs to refer to the historical context in which the Convention was adopted, in 1950 marriage was understood in the traditional sense that it is a union between partners of different sex. The favourable reference to the applicants' position could lead to a situation in which every different definition of marriage under domestic law constitutes a violation of Art. 12 of the Convention (Case of *Schalk and Kopf v. Austria*, Judgment, Strasbourg 24 June 2010, application no. 30141/04, § 55). In conclusion it should be noted that this right does not belong to non-derogable rights, however, none of the aforementioned

documents demonstrate specific restrictions in exercising this right. These restrictions, or rather competences in terms of regulating this right, lie with the states. The rationale for the above construction is the fact that that family is the basic social unit.

One of the latest breakthroughs judgments was the Case of Taddeucci and McCall v. Italy (Case of Taddeucci and McCall v. Italy, Judgment Strasbourg 30 June 2016, application no. 51362/09) which is new in the case law of the European Court of Human Rights on equal treatment of sexual couples. For the first time, the Court found a breach of the prohibition of discrimination on grounds of sexual orientation (Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in conjunction with Article 8 of the Convention), where it is stable same-sex partners do not enjoy the same rights as different-sex spouses, they take into account the fact that same-sex couples do not have access to marriage in accordance with the relevant national law. It is worth mentioning here the arguments of the Court, pointing to a new approach to the problem: *The Court reiterates that sexual orientation is a concept covered by Article 14. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, "particularly convincing and weighty reasons"³, particularly where rights falling within the scope of Article 8 are concerned. Differences based solely on considerations of sexual orientation are unacceptable under the Convention* (Case of Taddeucci and McCall v. Italy, Judgment, Strasbourg 30 June 2016, application no. 51362/09, § 89). The Court therefore concluded that, in deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, Italy had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

Emphasis on full consent and acceptance of the argument used in the judgment was concurring opinion, in which two judges (Judge Spano, joined by Judge Bianku), in a very concise manner, drew the substance of Article 8 of the Convention: *the fundamental principle of human dignity, which is one of the cornerstones of Article 8 of the Convention, guarantees to each and every individual the right to found a family with whomever they choose, irrespective of their sexual identity or sexual orientation.*

Case of Oliari and others v. Italy surely represents a cutting-edge judgment in the ECtHR case-law on rights of sexual minorities, as it recognizes a positive obligation upon the States to implement a general legal framework regulating same-sex relationships, regardless of the timing when such institution should be enacted or if civil unions already exist for different-sex couples. In so doing, *Oliari* moves forward with the line of reasoning previously explained in *Shalk and Kopf v. Austria* and *Vallianatos and others v. Greece* respectively (*Oliari and Others v. Italy: a stepping stone towards full legal recognition of same-sex relationships in Europe*, 16 September 2015, written by Giuseppe Zago, Researcher of Comparative Sexual Orientation Law, Leiden University, access date: 28 April 2017).

The Court emphasizes its earlier case-law on Art. 8 of the Convention. The Court pointed out that, although the primary objective of Art. 8 is to protect individuals from arbitrary interference by public authorities, and it may impose certain positive obligations on the State to ensure effective enforcement of rights protected under the law, which may include measures to ensure respect for private or family life, even in the sphere of interpersonal relations between together (Case of *Oliari and Others vs. Italy*, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 159). *The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance* (Case of *Oliari and Others vs. Italy*, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 160).

The Court later referred to the margin of appreciation of the state, generalizing the scope of this margin. After all, how can the State benefit from it? This is what the Court has attempted to establish in order to ensure that states nevertheless perceive the problems of the individual more broadly and try to balance the interests of individuals and of the entire state community. *In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted⁵. Where, however, there is no consensus within the*

member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider⁶. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights⁷ (Case of Oliari and Others vs. Italy, Judgment Strasbourg 21 July 2015, applications no. 18766/11 and 36030/11, § 162).

To summarize the cited case law of the European Court of Human Rights, it should be emphasized that its argumentation on discrimination against persons with different sexual orientation: for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised”. Where sexual orientation is in issue, there is a need for particularly convincing and eighty reasons to justify a difference in treatment regarding rights falling within Article 8 (Case of E.B. v. France, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 91), and that the differences based on sexual orientation require particularly convincing and weighty reasons” by way of justification. Where a difference in treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (Case of Vallianatos and Others v. Greece, Judgment Strasbourg 7 November 2013, applications no. 29381/09 and 32684/09, § 77).

In conclusion judgments of the European Court of Human Rights provides some groundbreaking approach in the context of LGBTI people, however, because of the margin of appreciation granted to States, they do not give full satisfaction in protecting those individuals to the extent that they claim it.

3. Respect for the rights of LGBTI people on the basis of the Reports Amnesty International

Monitoring of respect for human rights is extremely important in given the image of human rights in almost whole world. Monitoring can be carried out by a variety of entities, including non-governmental organizations. The

definition of monitoring was provided by the University of Minnesota, indicating that “*Monitoring*” is a broad term describing the active collection, verification, and immediate use of information to address human rights problems. Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with Government authorities to obtain information and to pursue remedies, and other immediate follow-up. The term includes evaluative activities at the UN headquarters or operation’s central office as well as first hand fact-gathering and other work in the field. In addition, monitoring has a temporal quality in that it generally takes place over a protracted period of time (University of Minnesota, *Training Manual on Human Rights Monitoring*, point 27, see more about monitoring: Nowicki M., Fialova Z., Warszawa 2000; H. Kasprzak, J. Kopczuk, Warszawa 2009, pp. 576-592).

Thanks to the human rights monitoring conducted by Amnesty International, we can see what state steps are taken to ensure the rights of LGBTI people, or what violations are still committed by individual states. However, as we know, the reports cover only about 160 countries out of all, but still the reports give us an idea of what is going on in the world. The information presented in the report is divided into regions of the world and then described in each country.

Amnesty International’s actions are designed to lead - without violence – to improving respect for human rights, the elimination of discrimination, and systemic changes in the functioning of state institutions.

Pointing out only the outline of the issues presented in the latest report, it is worth mentioning that the overall assessment of the rights of lesbian, gay, bisexual, transgender and intersex people is taking a breakthrough and change, but they do not progress as The assumption of the fourth generation of human rights could indicate. The report has shown many examples, specific violations to be condemned.

By dividing only the continents, as the most important information gathered in Europe, it can be stated that there was a progress in the rights of lesbians, gays, bisexuals, transgenders and intersex (LGBTI) people. For example in Report 2016/2017 (Amnesty International Report 2016/2017 *The State of the World’s Human Rights*, pp. 16-55) Amnesty International pointed out that France adopted a new law scrapping

medical requirements for legal gender recognition and Norway granted the right on the basis of self-identification, this non-governmental organizations notice similar moves were under way in Greece and Denmark. Going further investigated that a number of countries moved to respect the rights of same-sex couples and second-parent adoptions, for example Italy and Slovenia adopted legislation recognizing same-sex partnerships. At the opposite end of the spectrum, consensual same-sex acts remained criminal offences in Uzbekistan and Turkmenistan. In Kyrgyzstan, draft legislation to criminalize “fostering a positive attitude” towards “nontraditional sexual relations” was still under discussion in Parliament, and a constitutional amendment banning same-sex marriage was approved in a referendum in December. There was also push-back from increasingly organized, sometimes state-supported, conservative groups. Amnesty International reported that proposals for referendums to change constitutional definitions of marriage and family to explicitly exclude same-sex couples were blocked by the President in Georgia, but allowed to be put to Parliament by the Constitutional Court in Romania.

In contrast, in the African region, the Report shows that there is still discrimination and marginalization among the weakest social groups: including women, children and lesbian, gay, bisexual, transgender and intersex people. LGBTI people, or those perceived to be so, continued to face abuse or discrimination in countries including Botswana, Cameroon, Kenya, Nigeria, Senegal, Tanzania, Togo and Uganda.

The report further identifies further violations of LGBTI rights by providing the following information: legislative and institutional progress in some countries – such as the legal recognition of same-sex marriage – did not necessarily translate into better protection against violence and discrimination for LGBTI people. Across the Americas, high levels of hate crime, advocacy of hatred and discrimination, as well as murders and persecution of LGBTI activists persisted in countries including Argentina, the Bahamas, the Dominican Republic, El Salvador, Haiti, Honduras, Jamaica, the USA and Venezuela. Amnesty International also stresses those situations that are positive, for example they notice that in the Dominican Republic the electoral process during the year saw several openly LGBTI candidates run for seats to increase their political visibility and participation.

On the other hand, in Asia, the report shows that spontaneous demonstrations of assassination and other attacks have occurred in Bangladesh, where authorities arrested nearly 15,000 people in a delayed response to blog attacks, atheists, foreigners and lesbians, gays, bisexuals, Transgender and intersex (LGBTI). In the context of the above, further developments have been highlighted, such as the fact that the Government has often violated the obligation to pursue accountability, such as arbitrary and secret detention. In particular, the disturbing situation in Sri Lanka has been highlighted, where LGBTIs are facing harassment, discrimination and violence. The high level of impunity persisted against perpetrators of violence against women and girls.

Amnesty International has been criticized by many countries, such as the Democratic Republic of the Congo, the People's Republic of China, Vietnam, and Russia, which attacked Amnesty International mainly for the fact that the reports of this non-governmental international organization are only one-sided reporting. On the other hand, it should be acknowledged that Amnesty International, in monitoring human rights, does not use a methodology that could defend some of its very subjective statements. Moreover the assumption of monitoring, which should be reflected in the reports should be objectivity in presenting the facts set, the information collected, unfortunately in the case of Amnesty International is not so far (see: University of Minnesota, *Training Manual on Human Rights Monitoring*; Nowicki M., Fialova Z., Warszawa 2000; H. Kasprzak, J. Kopczuk, Warszawa 2009, pp. 576-592).

Human rights are evolving over time, and their catalog is expanding in the internal legal systems of states and in international law (it is worth remembering that international law defines a minimum standard of human rights protection for nations of different traditions and cultures; Freedoms are included in these universally recognized catalogs by national law).

New laws and freedoms are being formulated, looking for procedures that more effectively guarantee their adherence, and through various techniques, counter the violation by rulers of officially recognized human rights today. Since the tendency to limit the rights of individuals is an immanent feature of power, including the power of majority, it seems that social action for human rights will always be needed. Today it is evident that the more mature the democracy is, the stronger and more numerous

are the organizations that protect the individualism and uniqueness of the human person against the rulers of the rulers.

4. Summary

Today, the fundamental rights of LGBTI people are still violated, encompassing for example right to life, physical integrity and the right to health. Moreover, it is still noted a gross discrimination, intolerance and violence against these persons (Dr Carsten Balzer, Dr Jan Simon Hutta, 2011, p. 5). For example, we can indicate recent reports from Chechnya Amnesty International on torture and murder of homosexuals (<https://amnesty.org.pl/akcje/czeczzenia-zatrzymaj-porwania-i-zabojstwa-osob-lgbti>).

Different countries have different cultural influences on the legislation they introduce. They may come from deeply rooted traditions, but also, as in the United Kingdom, from the design adopted in the Parliament, where Lords Spiritual is in the House of Lords, with a specific position and legislative influence (see more: Johnson P. and Vanderbeck R. M., 25 April 2017).

International instruments for protection of human rights aim to protect every people and to eliminate any and all forms of discrimination. LGBTI people, whose rights have been violated, are granted protection on the basis of the right to privacy. Rights of LGBTI people, in the light of Article 8 of the European Convention of Human Rights (Journal of Laws (93) 61/284) belongs to the sphere of privacy and is subject to protection on the basis of this Article (A. Śledzińska-Simon, 2010, p. 159). However, despite such an interpretation, the Tribunal leaves a big margin of freedom in this respect to the states which is manifested by a conservative position of this Court.

By examining the rights of LGBTI people, it must be stated that, since the European Court of Human Rights recognizes the protection of private and family life under the Convention for the Protection of Human Rights and Fundamental Freedoms, Member States must therefore provide for a way of guaranteeing their rights under domestic law. Therefore, for many years, there is a need to harmonize the approach to LGBTIs globally because of their different approaches. The solution would be to create a convention that would address the issue comprehensively and at the same

time be universal and universal. As regards the legal nature, the spectrum of emerging issues is enormous and encompasses both civil law and civil, administrative and administrative proceedings, as well as criminal law, or even constitutional principles, and, of course, human rights. Although there are already many solutions in this area, both under national law and under international law, there is still no full acceptance and full regulation by which LGBTIs continue to be exposed to discriminatory acts.

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Endnotes

- ¹ Wider on the ECHR judicature related to transsexual persons, among others in: K. Osajda, 2009, pp.35-41, W. Burek, 2007, pp. 114-128,
- ² That year was rendered the first judgment related to a transsexual person who demanded his/ her rights under Article 8 the Convention for the Protection of Human Rights and Fundamental Freedoms *Journal of Laws* (93) 61/284), *Case of Reese v. UK*, Judgment Strasbourg 17 October 1986, application no. 9532/81.
- ³ See also *Case of X and Others v. Austria*, Judgment Strasbourg 19 February 2013, application no. 19010/07, § 99; *Case of Smith and Grady v. the United Kingdom*, Judgment Strasbourg 27 September 1999 applications no. 33985/96 and 33986/96, § 90; *Case of Lustig-Prean and Beckett v. the United Kingdom*, Judgment Strasbourg 27 September 1999, applications no. 31417/96 and 32377/96, § 82; *Case of L. and V. v. Austria*, Judgment Strasbourg 9 January 2003 applications no. 39392/98 and 39829/98, § 45; *Case of E.B. v. France*, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 91; *Case of Karner*, Judgment Strasbourg 24 July 2003, application no. 40016/98, § 37 and *Case of Vallianatos and Others v. Greece*, Judgment Strasbourg 7 November 2013, applications no. 29381/09 and 32684/09, § 77.
- ⁴ See also *Case of Salgueiro da Silva Mouta v. Portugal*, Judgment Strasbourg 21 December 1999, application no. 33290/96, § 36; *Case of E.B. v. France*, Judgment Strasbourg 22 January 2008, application no. 43546/02, § 93 and 96 and See also *Case of X and Others v. Austria*, Judgment Strasbourg 19 February 2013, application no. 19010/07, § 99.
- ⁵ See also *Case of Christine Goodwin*, Judgment Strasbourg 11 July 2002, application no. 28957/95 § 90; *Case of Pretty v. the United Kingdom*, Judgment Strasbourg 29 April 2002, application no. 2346/02, § 71. <http://hudoc.echr.coe.int/eng?i=001-60448>
- ⁶ See also *Case of X, Y and Z v. the United Kingdom*, Judgment Strasbourg 22 April 1997, application no. 21830/93 § 44; *Case of Fretté v. France*, Judgment Strasbourg 26 February 2002, application no. 36515/97, § 41; *Case of Christine Goodwin*, Judgment Strasbourg 11 July 2002, application no. 28957/95 § 85.
- ⁷ See also *Case of Fretté v. France*, Judgment Strasbourg 26 February 2002, application no. 36515/97 § 42; *Case of Odièvre v. France*, Judgment Strasbourg, 13 February 2003, application no. 42326/98, §§ 44-49; *Case of Evans v. the United Kingdom*, Judgment Strasbourg 10 April 2007, application no. 6339/05, § 77.

