



ANALYSIS

CONSTITUTIONAL LAW OF GEORGIA ON THE INTRODUCTION OF AMENDMENTS TO THE CONSTITUTION OF GEORGIA

APRIL 16, 2024

Introduction

Upon request from local partners, the International Center for Not-for-Profit Law (ICNL) conducted a comparative analysis of the Draft Constitutional Law of Georgia on the introduction of Amendments to the Constitution of Georgia (hereinafter “the draft Law”), and its compliance with the international law and European standards (hereinafter “Analysis”).¹

The draft Law proposed amendments to Article 30² of the Constitution by introducing new paragraph 3 reading as follows: “The protection of family values and minors is guaranteed by the Constitutional Law of Georgia, which is an integral part of the Constitution of Georgia”.

The draft constitutional law³ itself consists of 8 articles that cover different spheres of life, where popularizing same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment is prohibited, and various types of activities involving LGBTQI+ persons⁴ are also prohibited. Each of those eight articles restricts different LGBTQI+ rights, protected by the key international and European human rights instruments.

¹ An unofficial translation into English of the Law has been used for the purpose of preparing this Analysis. We bring our apologies for any discrepancies in interpretation of the provisions of the Law caused by inaccurate transliteration and/or translation.

² Article 30 of the Constitution:

“The right to marriage, the rights of mothers and children

1. Marriage as a union into which a woman and a man enter for the purpose of creating a family is based on the equality and good will of the spouses.

2. The rights of mothers and children are protected by law”.

³ According to the internet publications this constitutional law has the name “On protection of family values and minors ” (<https://sputnik-georgia.ru/20240405/kogda-v-gruzii-primut-zakon-ob-LGBTQI+---predsedatel-parlamenta-nazval-sroki-287192440.html>).

⁴ In international documents, the acronyms LGBT, LGBTI or LGBTQI+ are most used. However, nowadays the acronym LGBTQI+ is an umbrella term that is often used to refer to the community as a whole. It includes Lesbian, Gay, Bisexual, Transgender, Queer, Intersex,

These amendments were initiated back in March 2024 by the ruling party ‘Georgian Dream – Democratic Georgia’, whose representative declared that they (initiators) “have to protect in a very fundamental way the values and our future generations from the expected irreparable results of pseudo-liberal propaganda”, and toward this end, they will soon initiate, in addition to constitutional amendments, “corresponding and more specific changes to laws numbering approximately several dozen”⁵.

This legislative initiative conflicts the current legislation of Georgia, which was reformed with the idea to bring the Georgian legislation into compliance with international human rights standards and implement the recommendations of international and European human rights bodies. For instance, the Report of the UN Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity written upon completion of his visit to Georgia in 2019 says, “The principle of equality is enshrined in Article 14 of the Constitution, and although it does not explicitly include sexual orientation and gender identity among the prohibited grounds for discrimination, the Constitutional Court of Georgia ruled in 2008 and 2014 that this list was not exhaustive and should be construed as including, among other things, sexual orientation.” Moreover, sexual orientation, gender identity and gender expression are prohibited grounds for discrimination under the Law on the Elimination of All Forms of Discrimination (Article 1) of 2 May 2014. Article 142 of the Criminal Code stipulates that violations of human equality based on, inter alia, sexual orientation and gender identity or expression are punishable by up to two years' imprisonment. Art. 53-1 of the Criminal Code provides that the commission of a crime motivated by intolerance on the basis of sexual orientation and gender identity, among other factors, is a circumstance that shall be considered an aggravating circumstance when sentencing for all relevant crimes provided for in the Criminal Code.”

Furthermore, this initiative runs counter to the process of Georgia’s integration into the European Union and fulfillment of obligations undertaken in connection with its accession to the European Union. Thus, on December 14, 2023, the Council of the European Union granted Georgia the status of an official candidate for accession to the European Union⁶. This event was widely celebrated in Georgia. 75% of the Georgian population supports the country's accession to the EU. However, for a successful transition to the next stage of the country’s accession to the European Union, Georgia must meet nine conditions (priorities). Among them is a condition regarding the protection of human rights⁷. The EU Council of Ministers stressed that Georgia must ensure full respect for fundamental rights, including media freedom and pluralism, freedom of opinion, assembly and expression, and protect LGBTQI+ people against intimidation, violence and discrimination⁸. The Council of Europe Committee “regretted” that the National Human Rights Strategy 2022-2030 does not adequately address the needs of the LGBTQI+ community, and called on the Georgian authorities to intensify the implementation of the Action Plan and involve all stakeholders in the process to ensure that the document defines comprehensive, inclusive and far-reaching measures to adequately address the needs of LGBTQI+ people and religious minorities⁹.

and Asexual. The additional "+" stands for all of the other identities not encompassed in the short acronym. This review will use the acronym LGBTQI+.

⁵ <https://www.interpressnews.ge/ru/article/158921-gruzinskaia-mechta-initsiiruet-konstitutsionnye-izmeneniia-kasaiushchiesia-semeinykh-tsennostei/>

⁶ Taking Georgians’ pulse Findings from August 2022 face to face survey September 2022 Carried out for NDI by CRRG Georgia [Taking Georgians’ pulse Findings from August 2022 face to face survey \(English\).pdf](#)

⁷ The Government of Georgia has published an action plan for the implementation of the steps identified by the European Commission. The document presents nine steps, as well as the relevant activities to be implemented. All the listed activities must be implemented by the end of 2024. The plan was approved by the Government Commission for European Integration on November 27, 2023. The 9TH step: «Improve the protection of human rights including by implementing an ambitious human rights strategy and ensuring freedom of assembly and expression. Launch impartial, effective and timely investigations in cases of threats against safety of vulnerable groups, media professionals and civil society activists, and bring organisers and perpetrators of violence to justice. Consult and engage with civil society, allowing for their meaningful involvement in legislative and policymaking processes and ensure they can operate freely».

https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/COM_2023_690%20Communication%20on%20EU%20Enlargement%20Policy_and_Annex.pdf

⁸ [Выполнение Грузией рекомендаций Еврокомиссии \ JAMnews \(jam-news.net\)](#)

⁹ <https://civil.ge/ru/archives/574155>

In view of the above circumstances, this review will examine and analyze each and every article of the draft constitutional law to see if they comply with international legal instruments in the field of human rights and documents adopted within the European Union, since each of those articles contains a restriction of a specific LGBTQ+ right and identity.

The review will use the standards of the following international and European human rights documents:

- [the International Covenant on Civil and Political Rights](#) (ICCPR);
- [the Convention for the Protection of Human Rights and Fundamental Freedoms](#) (also referred to as the European Convention on Human Rights) (ECHR);
- the [Charter of Fundamental Rights](#), which sets out the basic rights that must be respected both by the European Union and the Member States when implementing EU law and
- the Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity 'Freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity', June, 19 - July 14, 2023, [A/HRC/53/37](#)
- the [29 Yogyakarta Principles](#) on the Application of Human Rights Law with Respect to Sexual Orientation and Gender Identity, adopted in 2006, and the [Yogyakarta Principles plus 10](#) (YP+10), which set of Additional 10 Principles and State Obligations in 2017¹⁰ (hereinafter - Yogyakarta Principles);
- the [Guide on the case-law of the European Convention on Human Rights of LGBTQ+I persons](#)¹¹, updated in August 2022.

Comparative Analysis

Before jumping on to the article-by-article analysis, let us note general problematic points common to all articles of the draft Law:

1. Each article contains discrimination based on gender identity and sexual orientation.
2. The draft Law prohibits propaganda (popularization) same-sex family or intimate relationships etc. along with unjustified restriction of the rights and freedoms of LGBTQ+ people.
3. The main justification for introducing the prohibition of "LGBTQ+ propaganda" is protection of family values and minors.
4. The draft Law ignores the existence of transgender people, as well as intersex people¹².
5. When listing the prohibited-to-popularize topics, the topic of incest was added for unknown reason.

¹⁰ Together, these documents provide an authoritative, expert exposition of international human rights law as it currently applies to the grounds of sexual orientation, gender identity, gender expression and sex characteristics. Although these two documents have not been adopted as an international standard, these principles are often cited in UN bodies, national courts, and many governments have made them a guiding tool for developing their policies in this area. The Commissioner for Human Rights has supported the Yogyakarta Principles and views them as an important tool for defining the obligations of states to respect, protect and realize human rights for all people, regardless of their gender identity. States must comply with these principles both as a legal obligation and as an aspect of their commitment to universal human rights.

¹¹ This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law under different Articles of the European Convention on Human Rights relating to the rights of LGBTQI+ persons. The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.

¹² [Управления Верховного комиссара ООН по правам человека](#) - Intersex people are defined by the UN High Commissioner for Human Rights office as people born with gender characteristics that do not fit in the typical definition of a male or female body. Sexual characteristics that determine sex include chromosomes, gonads, reproductive organs, genitals, and hormonal levels.

Based on the results of the analysis of problematic issues, we made the following conclusions.

1. Each article contains discrimination based on gender identity and sexual orientation.

The draft Law contains discrimination of LGBTQI+ people based on their sexual orientation and gender identity, which is prohibited by international and European law. The general principle of non-discrimination «all human beings are born free and equal in dignity and rights» is embedded in all international human rights instruments and it also applies to discrimination on the grounds of sexual orientation and gender identity.

Moreover, the United Nations mechanisms have recognized that “certain groups are at particular risk of having their space all but vanish” and that special protections are necessary for those groups whose “marginalization exacerbates their inability to effectively exercise their rights.” These groups include lesbian, gay, bisexual, transgender and intersex (LGBTQI+) people and “groups and individuals who are targeted not because of their identity, but because they actively lobby for the rights of those most at risk of discrimination and retribution.”

Discrimination based on sexual orientation is directly prohibited by European directives, such as and EU Charter of Fundamental Rights (article 21) and Directive 2000/78/EC – or the Employment Equality Directive. According to the Principle 2 of the Yogyakarta Principles «The right to Equality and Non-discrimination» sexual orientation and gender identity are integral to each person’s dignity and humanity and must not be the basis for discrimination or abuse¹³.

‘International human rights law is clear that no “legitimate aim” for limiting the protection of human rights may be invoked to justify discriminatory practices. Where a prohibition singles out, for instance, expression or assemblies related to homosexuality for differential treatment, clear and objective evidence must be introduced to justify why the same prohibition does not extend to information pertaining to heterosexuality. It has not been possible for any State to cite objective evidence in support of the “legitimate aims” pursued by prohibitions on “homosexual propaganda” because no such evidence exists’¹⁴.

2. The draft Law prohibits propaganda (popularization) same-sex family or intimate relationships etc. along with unjustified restriction of the rights and freedoms of LGBTQI+ people.

Almost every norm of the draft Law violates international human rights standards, which are to protect all people despite their sexual orientation and gender identity (articles 16, 17, 18, 19, 21, 22,23, 24, 26 ICCPR, articles 10, 11 of the European Convention on Human Rights and article 1 of the Protocol #12 to it, articles 1, 11, 12, 21 of the Charter of Fundamental Rights). Some norms do not directly contradict international standards, but they are not in line with international “soft law” norms (for instance, prohibition to register same-sex marriage or adopt a child by same-sex marriage).

Three articles of the draft Law contain a ban on propaganda (popularization) of same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment. Introduction of such prohibition entails restriction of the three fundamental rights such as the right to freedom of peaceful assembly, expression and association.

While these three rights are fundamental rights, they are not guaranteed in absolute terms and may be subject to narrowly tailored limitations. Limitations on these rights must comply with the three-part test and be:

- provided by law,
- pursue a legitimate aim, and
- meet the requirements of necessity and proportionality.

¹³ Yogyakarta Principles, page 6 <https://www.refworld.org/ru/legal/resolution/icjurists/2007/ru/58135>

¹⁴ ‘Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality’, Article 19, 2013, p.25.

The bans on “LGBTQI+ propaganda” fail this test on all three parts¹⁵:

- **Provided by law:** *all limitations must conform to the principle of legality. It means they must “be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”*

The provisions of the draft Law are written with a vague language which is not clear enough to enable individuals to regulate their conduct in conformity with the law.

For instance, the lack of clarity in what constitutes “popularizing”. It is not clear what kind of actions will be considered as ‘popularizing same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment, or popularizing the non-use of sex-specific terminology’.

Article 5 of the draft Law is all through written in so bleary way that one can only guess what it is about: ‘any decision by a public authority or individual person that directly or indirectly restricts the usage of terms derived from [is linked to] one’s sex is void’. What does ‘the non-use of sex-specific terminology’ mean?

This creates two clear problems: (i) individuals cannot decide with any certainty whether their conduct is legal or not, thus having a chilling effect on potentially lawful expression, for instance; and (ii) the ambiguity of the provisions leaves too much discretion to state officials, police and prosecutors and may therefore be enforced arbitrarily.

Almost all articles violate the principle of legal certainty, which casts doubt on the legitimacy of the entire document.

- **Legitimate aim:** *all limitations must be in pursuit of a listed “legitimate aim.” Under the ICCPR these are: respect for the rights or reputations or others, the protection of national security or public order; or the protection of public health or morals.*

In Georgia attempts to justify prohibitions on “LGBTQI+ propaganda” are premised on protecting the rights of children and the protection of public morals (“Article 1. Paragraph 3 shall be added to Article 30 of the Constitution of Georgia with the following content: 3. The protection of family values and minors is guaranteed by the Constitutional Law of Georgia, which is an integral part of the Constitution of Georgia”).

According to the Human Rights Committee's General Comment No. 34 (hereinafter General Comment No. 34), “restrictions to protect the rights of others should not be interpreted, inter alia, as a means of limiting political debate”. Also, they must be supported by evidence and should not be speculative; for example, the ECHR has held that there was no scientific or social data “suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults.’”¹⁶

As discussed above, laws that discriminate based on sexual orientation and gender identity can never be justified on the basis of “public morals” and “protection of the rights of others” (please see more details below).

- **The bans are not necessary or proportionate:** Since prohibitions on “LGBTQI+ propaganda” do not in fact pursue any legitimate aim and are clearly discriminatory in nature, it is clear that there is no case for the necessity of these provisions in a democratic society.

3. The main justification for introducing the prohibition of “LGBTQI+ propaganda” is protection of family values and minors.

¹⁵ Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality’, Article 19, 2013.

¹⁶ Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality’, Article 19, 2013, p.24.

Introducing these prohibitions, the drafters of the draft Law claim they protect family values and minors. In various countries, there are increasing attempts to justify bans aimed at restricting the rights of LGBTQI+ people and "homosexual propaganda" by protecting the rights of children and traditional family values.

"The Advisory Committee¹⁷ notes that traditional values are not defined, that they are varied and complex and scarcely referenced in international human rights law. In contrast to the ambiguity of "traditional values", the Advisory Committee note the "moral universality" of existing human rights protections, and that they reflect the full diversity of the cultures and societies involved in their drafting. Nevertheless, traditional values consistent with the UDHR may be a useful educational vehicle for enhancing domestic appreciation for international human rights norms. The Advisory Committee notes that international law requires States to bring traditional values into conformity with human rights standards, thus making clear the potential for disparity between the two. That "tradition is often invoked to justify maintaining the status quo, failing to admit the simple truth that traditions, cultures and social norms have always evolved over time" is noted, and that "a human rights-based approach, by contrast, often requires changes to the status quo in order to ensure compliance with international human rights standards."¹⁸

The Advisory Committee¹⁹ also notes, that human rights violations "justified by traditional, cultural or religious values often times target minority or disenfranchised groups that are not in a position to shape the dominant discourse defining the values of the overarching society or community."²⁰ It is also relevant to LGBTQI+ human rights defenders, who being particularly exposed to risk of violence and abuse of human rights.

Further, 'the international human rights courts have interpreted "public morals" as permitting narrow restrictions on graphic depictions of obscenity. However, prohibitions on "homosexual propaganda" ('popularization' – in the draft Law) do not distinguish between obscene expression and other forms of information regarding sex, sexuality, and gender identity. Decisions of international courts related to permissible restrictions on obscene content can therefore be distinguished from those decisions that impose what are essentially blanket prohibitions on the dissemination of information related to sex between persons of the same sex, sexuality, or gender identity'²¹.

Finally, international law requires a State to demonstrate that any restrictions to protect "public morals" (including traditional values) are necessary in a democratic society, but does not permit the invocation of "public morals" to "justify discriminatory practices" or "to perpetuate prejudice or promote intolerance."

4. The draft Law ignores the existence of transgender people, as well as intersex people

Every article of the draft Law violates the rights of transgender and intersex people "to live free from discrimination and violence (including in medical settings)". These rights have been affirmed by multiple United Nations (UN) bodies as well as regional human rights mechanisms from Africa, Europe and the inter-American system.

ECRI's²² report, published in March, highlighted that Georgia needs to put in place a clear legal gender recognition (LGR) framework. In 2022, several UN and Council of Europe entities, including the European Court of Human Rights called on Georgia to remedy this gap and introduce quick, accessible, and transparent LGR on the basis of self-

¹⁷ Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, A/HRC/22/71, 6 December 2012, at Part III.B.

¹⁸ 'Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality', Article 19, 2013. p. 20

¹⁹ Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, A/HRC/22/71, 6 December 2012, at Part III.B.

²⁰ 'Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality', Article 19, 2013. p. 21

²¹ 'Traditional values? Attempts to censor sexuality Homosexual propaganda bans, freedom of expression and equality', Article 19, 2013. p. 25

²² European Commission against Racism and Intolerance (ECRI)

determination. In 2022, the European Court of Human Rights ruled in three LGR cases against Georgia, establishing that the lack of a clear legal framework for LGR is a violation of Article 8²³.

In practice, based on information from recent Georgia's alternative NGO reports, the situation with LGR hasn't changed. Georgia remains unwilling to change the practice of LGR, although problems related to the mismatch between gender identity and gender marker remain. Unemployment, poor housing conditions, stigma and discrimination have already led to the tragic deaths of two transgender women.

5. When listing the prohibited-to-popularize topics, the topic of incest was added for unknown reason, which has nothing to do with the topic of LGBTQI+

Still, a lot of questions arise with respect to including incest into this draft Law. How is it related to the LGBTQI+ topic? Why is it in this law? Why is only incest prohibited? What about other abnormal sexual activity (bestiality, pedophilia, necrophilia etc.)?

The Article-by-article Analysis

Article 1 of the draft Law: “The legislation can regulate relationships only similar to marriage, which provides for the union of a genetically male and a genetically female who are at least 18 years old”.

This article, notwithstanding the norm in paragraph 1 of Article 30 of the Constitution of Georgia, which defines “marriage as a union entered into by a woman and a man with the purpose of creating a family, is based on the equality/owelty and good will of the intending spouses,” imposes even stricter ban on same-sex marriages in the country, clarifying that genetically authentic men and women are meant, while recognizing all other forms of union between a man and a woman illegal.

Constitutional law professor David Zedelashvili believes the lawmakers aim, through this article, ‘to eliminate any possibility to legally recognize the civil partnership’. And if they do recognize it, then such partnership, according to them, is permissible only for a man-woman couple, so they seek to legally prohibit partnerships between persons of the same sex. Thus, they are proactively trying to avoid recognition of same-sex unions and introduce a constitutional ban on civil partnerships»²⁴.

Although the question of whether or not to allow the same-sex marriage is left to EU states’ own discretion and is determined by national legislation, there are some exceptions to this rule.

Article 12 of the European Convention on Human Rights states that ‘the men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right’. The Guide on the case-law of the European Convention on Human Rights (hereinafter – the Guide) states that ‘Under the Court’s case-law as it currently stands, Article 12 applies to transgender individuals wishing to marry a person of the opposite sex (i.e. opposite to her or his newly assigned sex), as well as to same-sex couples wishing to marry or are already married. However, only a total ban on the former constitutes a violation of Article 12, and a total ban on the latter is currently up to Convention requirements’²⁵. This means that it would be a violation of the Convention if State prohibited the right of transgender people to marry a person of the opposite sex, but it would not be a violation if the state prohibited same-sex couples from marrying altogether.

²³ ‘LEGAL GENDER RECOGNITION’, 2024, https://www.ilga-europe.org/files/uploads/2024/02/2024_legal-gender-recognition.pdf

²⁴<https://sova.news/2024/03/25/eto-absurd-konstitucjonalist-o-planah-vlastej-gruzii-zashhitit-semejnye-czennosti/>

²⁵ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 74

In particular, ‘in *Christine Goodwin v. the United Kingdom* the Court held that it could no longer be assumed that the terms “men and woman” referred to in Article 12 necessarily referred to a determination of gender by purely biological criteria, since there had been major social changes in the institution of marriage as well as dramatic changes brought about by developments in medicine and science. Further, the Court held that the matter of regulating the effects of the change of gender in the context of marriage fell within the margin of appreciation of the Contracting State. However, the Court found no justification for barring a transsexual from enjoying the right to marry under any circumstance. ... Conversely, while in *Schalk and Kopf v. Austria* the Court found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex, it however considered that Article 12 does not impose an obligation on Contracting States to grant same-sex couples an access to marriage’²⁶.

As for civil partnerships/unions the approach of the Court is as follows. ‘Under the case-law, civil partnerships have an intrinsic value for same-sex couples in a stable relationship, irrespective of the legal effects, narrow or extensive, they would produce. Extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance, not as private individuals entering into contracts under the ordinary law, but on the basis of the legal rules governing civil unions, thus having their relationship officially recognized by the State (*Vallianatos and Others v. Greece [GC]*, 2013, § 81)’²⁷

Moreover, there are some international principles (so called ‘soft law’) on this issue that are recommended to be followed. For instance, Principle 24 of Yogyakarta Principles²⁸:

“Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on based on the sexual orientation or gender identity of any of its members’. ‘States shall ensure that laws and policies recognize the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members”.

Article 2. Adoption or foster care of a minor is allowed only by spouses married in accordance with the Constitution and Georgian legislation or by a heterosexual person

According to Article 7 of the European Convention on the Adoption of Children (Revised, Strasbourg 27.XI.2008) ‘the law shall permit a child to be adopted: a) by two persons of different sex who are married to each other, or where such an institution exists, have entered into a registered partnership together; by one person. States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship’.

Thus, State is not obliged but has a right to allow same sex couples who are married to each other or who have entered into a registered partnership together to adopt a child.

However, this article does not comply with the norms of international ‘soft law’, namely, with the Principle 24 “The right to found a family” of Yogyakarta Principles²⁹:

²⁶ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 75-76

²⁷ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 78

²⁸ Yogyakarta Principles, page 27

²⁹ Yogyakarta Principles, page 27

'Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members. ... States shall take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity'.

Also, there is a concern regarding the use of the term "heterosexual" in this article, which as far as we know does not exist in Georgian legislation. And if the legislators plan to introduce such a term, it would violate the international principles of legal certainty and non-discrimination. Thus, the application of such classification is likely to be associated with uncertainty and arbitrariness, as in practice, it is very difficult to give a precise definition of heterosexuality and there are no scientific approaches to its definition with the possibility to prove this fact legally. All this may eventually lead to large-scale violations of human rights and freedoms.

Article 3. Any medical intervention related to changing a person's sex is prohibited

This Article 3 of the draft Law violates the rights of transgender people³⁰. Although the WHO has removed transgenderism from its list of diseases, a transgender-related condition (gender nonconformity, or gender dysphoria) can be a life-threatening condition that can lead to severe, untreatable depression and even death. Gender nonconformity is successfully treated through social transition (change of name and passport gender) and medical transition (hormone therapy, sex reassignment surgery). The overwhelming number of transpeople, having received the opportunity for social and medical transition, feel better and integrate into society³¹. If the draft Law is adopted in this form, doctors will not be able to prescribe hormone therapy and perform sex reassignment surgery, transpeople will not receive proper medical care, and will not be able to socialize in society.

Despite the fact that currently there are no legislative or administrative tools for legal gender recognition in Georgia, there were instances in the country when the Georgian authorities allowed legal gender recognition for a transgender people who successfully underwent gender reassignment surgery and secured respective medical certificate³². If the draft Law will be adopted such practice will be illegal.

Such prohibition of medical assistance to transition from one sex to another violate the principle of nondiscrimination (Article 14 of the European Convention on Human Rights), the right to respect for private and family life (Article 8 of the European Convention on Human Rights) and the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices (article 35 of the Charter of Fundamental Rights).

³⁰ A **transgender** person (often shortened to **trans** person) is someone whose [gender identity](#) differs from that typically associated with the [sex](#) they were [assigned at birth](#).^[1] Some transgender people who desire medical assistance to [transition](#) from one sex to another identify as [transsexual](#). The term *transgender* does not have a universally accepted definition, including among researchers. Accurate statistics on the number of transgender people vary widely, in part due to different definitions of what constitutes being transgender. Some countries, such as Canada, collect census data on transgender people. Generally, fewer than 1% of the worldwide population are transgender, with figures ranging from <0.1% to 0.6% (<https://en.wikipedia.org/wiki/Transgender>)

³¹ <https://www.change.org/p/%D0%B2%D0%B5%D1%80%D0%BD%D1%83%D1%82%D1%8C-%D0%BF%D1%80%D0%B0%D0%B2%D0%BE-%D1%82%D1%80%D0%B0%D0%BD%D1%81%D0%B3%D0%B5%D0%BD%D0%B4%D0%B5%D1%80%D0%BD%D1%8B%D1%85-%D0%BB%D1%8E%D0%B4%D0%B5%D0%B9-%D0%BD%D0%B0-%D1%82%D1%80%D0%B0%D0%BD%D1%81%D0%BF%D0%B5%D1%80%D0%B5%D1%85%D0%BE%D0%B4>

³² <https://civil.ge/archives/410406> On March 25, 2021 Georgian authorities allowed the first-ever legal gender recognition for a transgender person in the country. The Civil Registry Service of the Public Service Development Agency, a body established under the Justice Ministry, officially changed the gender marker from "male" to "female" upon request by a trans woman, who had also submitted a medical certificate of gender reassignment surgery.

For instance, Article 8 of the Convention states that “1. Everyone has the right to respect for his private and family life, his home and his correspondence.” According to the European Court of Human Rights’ practice “the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention. This has led the Court to recognize, in the context of the application of that provision to transgender persons, that it includes a right to self-determination, of which the freedom to define one’s gender identity is one of the most basic essentials. The right of transgender persons to personal development and to physical and moral security is thus guaranteed by Article 8”³³. ‘While Article 8 of the Convention cannot be interpreted as guaranteeing an unconditional right to gender reassignment surgery, transgenderism is recognized internationally as a medical condition which warrants treatment to assist the persons concerned (Christine Goodwin v. the United Kingdom [GC], 2002, § 81; Y.Y v. Turkey, 2015, § 65). The health services of most of the Contracting States recognize this condition and provide or permit treatment, including irreversible gender reassignment surgery³⁴.‘Nevertheless, gender reassignment surgery can be subjected to State regulation and supervision on health-protection grounds and States have a wide margin of appreciation in relation to the legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment’³⁵.

The European Court of Human Rights used the European Convention on Human Rights in a number of important decisions, declaring that states should provide transgender people an opportunity to undergo surgery for a complete gender reassignment, and that such surgery should be covered by insurance as a medically necessary treatment. The court also ruled that states must recognize gender reassignment on identity documents³⁶.

From international standards perspective, Article 3 of the draft Law does not comply with the norms of international ‘soft law’, namely, Principle 17 “The right to the highest attainable standard of health” of Yogyakarta Principles³⁷: “Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right. States shall take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity; facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support”.

Article 4. The documents issued by the state or local authorities shall indicate only the female or male sex corresponding to his/her genetics.

This article 4 of the draft Law obliges the state or local authorities to indicate only the female or male sex corresponding to his/her genetics in the documents they issue. This topic is not clearly regulated by international law. There are still debates and mixed interpretations about what gender is, how it relates to gender and gender identity, and how this should be reflected in legal documents.

“The intersex movement supports voluntary and opt-in non-binary and multiple sex classifications, described in the statement of the Third [International Intersex Forum](#). The Open Society Foundations published a report, License to Be Yourself in May 2014, documenting "some of the world's most progressive and rights-based laws and policies" enabling changes to gender markers on official documents. The report comments on the recognition of third

³³ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 55

³⁴ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 56

³⁵ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 58

³⁶ The report of Commissioner for human rights ‘Human rights and gender indentity’ July 29, 2009. Council of Europe. 5 ЕСПЧ, дело “Ван Кюк (Kück) против Германии”, постановление от 12 июня 2003 года. 6 ЕСПЧ, “В. против Франции”, постановление от 25 марта 1992 года, и “Кристин Гудвин (Christine Goodwin) против Соединенного Королевства”, постановление от 11 июля 2002 года.

³⁷ Yogyakarta Principles, page 22

classifications, stating: From a rights-based perspective, third sex / gender options should be voluntary... Those identifying as a third sex / gender should have the same rights as those identifying as male or female.

The Asia Pacific Forum of National Human Rights Institutions recognized the right of individuals to non-binary or third sex classifications, but stated that, "creating a third, separate category for the registration of people born with an intersex trait ... would risk segregating and potentially stigmatizing intersex people³⁸. It would also remove their right to determine their own sex or gender."³⁹

The European Court of Human Rights has admitted that it has not yet had the opportunity to determine the issue of legal gender recognition of intersex persons, given that the only case it decided on the matter was rejected for non-exhaustion of domestic remedies (P. v. Ukraine, 2019).

In practice, the passports and identification documents of Austria, Germany, Malta, Portugal, Iceland, Australia, New Zealand, USA, Argentina, Canada, India and several other nationalities have adopted "X" as a valid third category besides "M" (male) and "F" (female), at least since 2003.

Article 5. Any decision by a public authority or individual person that directly or indirectly restricts the usage of terms derived from [is linked to] one's sex is void.

As stated earlier, this article contradicts the principle of legal certainty. It is not clear what the drafter meant by 'Any decision by a public authority or individual person that directly or indirectly restricts the usage of terms derived from [is linked to] one's sex is void' and what exactly the "directly or indirectly restricts the usage of terms derived from [is linked to] one's sex" means? Perhaps this is a translation problem (from Georgian to English). We found two other versions of this article in open sources: "Any decisions by civil servants or private individuals prohibiting their wards from using terms to designate male and female genders shall be considered null and void" and "Any decision by a government agency or private individual that restricts the use of explicit sexual concepts, directly or indirectly, shall be void". However, they don't clarify the meaning of the article and even gave rise to whole bunch of new questions.

For instance, the content of the text still does not make it clear what exactly shall be recognized as void? What terms are we talking about? In what cases will this article be applied? To whom does it apply? What does it mean "directly or indirectly restricting the use of terms?" Why the words related to gender and sex cannot be used? So, there is no way to analyze this article.

Article 6. It is prohibited to hold any type of gatherings, aimed at popularizing same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non- heterosexual person, medical interventions related to sex reassignment, or popularizing the non-use of sex-specific terminology.

This article 6 restricts the right to freedom of assembly, guaranteed by article 21 of ICCPR and article 11 of European Convention on human rights. However, due to the vague wording provided for in this article ("...any assembly aimed at ..."), virtually any assembly where the number of participants outnumbers one person, including meetings of members of formal and informal associations, can be subject to this prohibition. It means that this article also restricts the right to freedom of association protected by Article 22 of the ICCPR and Article 11 of the European Convention on Human Rights. Moreover, this article limits the right to freedom of expression guaranteed by Article 19 of the ICCPR and Article 10 of the European Convention on Human Rights.

³⁸ Intersex people - people with congenital variations in sex characteristics, that is, people who are born with sex characteristics that do not exactly meet the typical definitions of a male or female body, including reproductive anatomy, reproductive organs, and hormonal characteristics or chromosome patterns.

³⁹ https://en.wikipedia.org/wiki/Legal_recognition_of_intersex_people#Third_sex_or_gender_classifications

This conclusion was based on the fact that the ban on popularization is not consistent with the three-part test set out in the articles listed in the previous paragraph. A detailed analysis of such inconsistency of the restrictions with the three-part test is described earlier in this review.

The European Court of human rights has repeatedly held that the State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness. This provision sometimes requires positive measures to be taken, even in the sphere of relations between individuals. According to the Court's case-law, freedom of assembly, as enshrined in Article 11, protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that the demonstration is seeking to promote. However, participants must be able to put on a demonstration without fear of being physically attacked by their opponents. (*Berkman v. Russia*, 2020, § 54; *Association ACCEPT and Others v. Romania*, 2021, § 140)⁴⁰.

Moreover, Article 6 of the draft Law does not comply with the norms of international 'soft law', namely, with the Principle 20 "The right to freedom of peaceful assembly and association" of Yogyakarta Principles⁴¹:

'Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognized, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

States shall:

- take all necessary legislative, administrative and other measures to ensure the rights to peacefully organize, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;
- under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights, etc.

Article 7. It is prohibited to distribute any production, program, or material, with the content that aims to popularize same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment, or popularizing the non-use of sex-specific terminology.

Article 8. It is prohibited to provide any kind of information in the educational process of a public or private educational institutions aimed at popularizing same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment, or popularizing the non-use of sex-specific terminology.

These articles restrict the right to freedom of expression, guaranteed by article 19 of ICCPR and article 10 of European Convention on human rights. This conclusion was based on the fact that the prohibition of popularization of same-sex family or intimate relationships, incest, adoption etc. is not consistent with the three-part test set out

⁴⁰ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTIQ+ persons), August 31, 2022 (the Guide), par. 105

⁴¹ Yogyakarta Principles, page 25

in the Article 19 of ICCPR and Article 10 of ECHR. A detailed analysis of such inconsistency of the restrictions with the three-part test is described earlier in this review.

In essence, these articles impose a complete ban on the discussion of LGBTQI-related topics and the dissemination of information such as same-sex family or intimate relationships, incest, adoption, or foster care of a minor by a same-sex couple or a non-heterosexual person, medical interventions related to sex reassignment, or popularizing the non-use of sex-specific terminology, as part of the educational process or in the creation of any materials, programs, or products. Moreover, this prohibition is not limited by any framework and conditions.

If we refer to the practice of the European Court, we can see that such unlimited prohibition does not comply with Article 10 of the European Convention on Human Rights. Namely, the European Court of human rights “has not ruled out that the silence imposed on applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of a policy in place, could constitute an interference with freedom of expression”⁴².

‘In *Bayev and Others v. Russia*, 2017, § 69, a case examined under Article 10, according to the Court, a legislative ban on the promotion of non-traditional sexual relations among minors is an example of a predisposed bias on the part of a heterosexual majority against a homosexual minority which cannot, of itself, justify interferences. The Court also found that that the legal provisions at play did not serve to advance the legitimate aim of the protection of morals, and that such measures were likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of the rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, those provisions were open to abuse in individual cases. Above all, by adopting such laws the authorities reinforced stigma and prejudice and encouraged homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. There had therefore been a violation of Article 10 of the Convention”⁴³.

It is also worth mentioning Principle 38 of the Additional Principles and State Obligations⁴⁴ (hereinafter - Yogyakarta Principles plus 10), which articles 6, 7 and 8 of the draft Law do not comply with.

Yogyakarta Principles plus 10 is a set of nine Additional Principles and 111 Additional State Obligations covering a range of rights whose articulation has emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics. Principle 38 *“The right to practise, protect, preserve and revive cultural diversity”* says: *“everyone, individually or in association with others, where consistent with the provisions of international human rights law, has the right to practise, protect, preserve and revive cultures, traditions, languages, rituals and festivals, and protect cultural sites of significance, associated with sexual orientation, gender identity, gender expression and sex characteristics. Everyone, individually or in association with others, has the right to manifest cultural diversity through artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used, without discrimination based on sexual orientation, gender identity, gender expression or sex characteristics. Everyone, individually or in association with others, has the right to seek, receive, provide and utilise resources for these purposes without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics. States shall ensure the right to practice, protect, preserve and revive the diversity*

⁴² The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 93

⁴³ The Guide on the case-law of the European Convention on Human Rights (Rights of LGBTQI+ persons), August 31, 2022 (the Guide), par. 94-95

⁴⁴ The [Yogyakarta Principles plus 10](#) (YP+10), which set of Additional 10 Principles and State Obligations in 2017⁴⁴.

of cultural expressions of persons of all sexual orientations, gender identities, gender expressions and sex characteristics on the basis of the equal dignity of and respect for all”.

CONCLUSION

Georgia's draft constitutional law amending the Georgian constitution could infringe on the rights of the LGBTQI+ community and the broader civil society sector and place barriers in front of its funders by vesting the state with wide discretion to limit a range of rights, including the rights to association, peaceful assembly, and expression.

It also could have the effect of restricting the ability of LGBTQI+ persons to express their identities and participate in public and political life; denying them the opportunity to assert other fundamental rights, such as the right to education and the right to health. This limits public discourse and denies all people the full diversity of information regarding sexual orientation and gender identity.

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