

ALTERNATIVE REPORT ON THE IMPLEMENTATION OF THE PROVISIONS OF ICCPR RELATED TO LGBT PEOPLE IN KAZAKHSTAN

This report was prepared by the Kazakhstan Feminist Initiative "Feminita" and "AlmaTQ". Zhanar Sekerbayeva, Gulzada Serzhan, Alexander Ksan, Tatiana Chernobil participated in the preparation of this report, with the technical assistance of COC Netherlands and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA).

Executive summary

This report covers issues of discrimination and hate speech against lesbian, gay, bisexual, transgender (LGBT) people in Kazakhstan with focus on the lack of anti-discrimination legislation that would recognise sexual orientation and/or gender identity as protected grounds in civil and family law. The report highlights the humiliating legal gender recognition procedures for transgender people, which require sterilisation and forced institutionalisation. The report also provides information about negative gender stereotypes perpetuated by state institutions in Kazakhstan, as well as attempts at legalising polygamy on parliamentary level.

Recommendations

1. The State party should clearly and officially state that it does not tolerate any form of social stigmatization on the basis of sexual orientation, gender identity and gender expression, or hate speech, discrimination or violence against persons based on their sexual orientation, gender identity or gender expression. It should also take all the steps necessary to strengthen the legal framework protecting LGBT individuals from discrimination and violence and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim's sexual orientation or gender identity; *(based on the Human Rights Committee's Concluding Observations on Russia in 2015)*
2. The State party should adopt comprehensive anti-discrimination legislation, explicitly addressing all spheres of life and defining and prohibiting discrimination on any ground, including sexual orientation, gender identity and gender expression. The legislation should impose appropriate penalties for direct and indirect discrimination committed by both public and private entities, and should provide for effective remedies. *(based on the Human Rights Committee's Concluding Observations on Republic of Korea in 2015)*
3. The State party should take all necessary measures to counteract any negative gender stereotypes promoted on state-funded public platforms, regardless of whether they are justified by tradition or religion, and ensure that state-funded programs and campaigns represent women and girls in all their diversity;
4. The State party should publicly reject any attempts to legitimise the religious practice of polygamy that leads to a violation of women's rights in Kazakhstan.
5. The State party should take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilisation and coercive and forced institutionalisation; *(based on the Committee against Torture's Concluding Observations on Hong Kong in 2015)*

6. The State party should take effective measures to combat any form of social stigmatization, hate speech, discrimination or violence against persons based on their sexual orientation or gender identity. It should ensure the investigation, prosecution and punishment of such violent acts and should repeal article 120 of the Criminal Code in line with its obligations under the Covenant. *(based on the Human Rights Committee's Concluding Observations on Uzbekistan in 2015)*
7. The State party should publicly recognize that same sex partnerships must be treated equally before the law (as per Communication No.1361/2005, *X v Colombia*) and that same-sex couples are entitled to equal enjoyment of their rights. *(based on the Committee on Economic, Social and Cultural Rights' Concluding Observations on Mongolia in 2015 CESCR)*

General information

Kazakhstan positions itself as a country with a high level of tolerance. Indeed, there are positive trends developing in inter-ethnic communication and promoting religious tolerance. However, this is not reflected in levels of tolerance towards lesbian, gay, bisexual, and transgender (LGBT) citizens. There remains a lack of attention to the problem of homophobia and transphobia, as well as the harm caused by these attitudes to society in general. In 2015 two international human rights organizations, Human Rights Watch and Article 19, conducted separate research on the rights of LGBT persons in Kazakhstan¹. According to information obtained, the Kazakhstani authorities are reluctant to protect their citizens from hate-motivated violence because of their sexual orientation and/or gender identity (SOGI). Recent attempts to pass laws banning "gay propaganda" have been perceived as giving a "green light" to continued human rights violations against LGBT people, while at the same time shrinking space for free expression in the society at large.

Comments on the List of Issues

3. Please indicate whether steps have been or are being taken to adopt comprehensive anti-discrimination legislation that addresses discrimination, including in the private sphere; prohibits direct, indirect and multiple discrimination; contains a comprehensive list of prohibited grounds for discrimination, including sexual orientation and gender identity; and provides for effective remedies in judicial and administrative proceedings.

4. Please provide information on measures taken: (a) to address discrimination against, and social exclusion of, persons with disabilities, including limited access to inclusive education, delays and interruptions in the provision of social assistance and institutionalization of persons with mental disabilities; (b) to combat discrimination against persons based on their sexual orientation and gender identity; and (c) to combat social stigmatization of HIV-positive women.

¹ Human Rights Watch, *That is When I Realised I was Nobody*, research on LGBT people in Kazakhstan, 23 July 2015, available at [<https://www.hrw.org/report/2015/07/23/thats-when-i-realized-i-was-nobody/climate-fear-lgbt-people-kazakhstan>]; ARTICLE 19, “Don’t Provoke, Don’t Challenge” The Censorship and Self-Censorship of the LGBT Community in Kazakhstan’, 2015, https://www.article19.org/data/files/KZ_LGBT.pdf

According to Art. 14 of the Constitution of the Republic of Kazakhstan² citizens are guaranteed equal rights and non-discrimination:

1. All are equal before the law and the courts.
2. No one shall be subjected to any discrimination on grounds of origin, social, official or property status, sex, race, nationality, language, attitude to religion, beliefs, place of residence or any other circumstances.

The concepts of sexual orientation and gender identity, clearly fall into the category of "other circumstances". However, in the academic and legal commentaries on the Constitution of the Republic of Kazakhstan³ there are no clarifications on this issue. There are no anti-discrimination institutions and procedures, as was noted by the United Nations Committee on Elimination of All Forms of Racial Discrimination during its consideration of the official report by Kazakhstan on the implementation of the International Convention on Elimination of All Forms of Racial Discrimination in 2010⁴. Moreover, in 2010 the Republic of Kazakhstan rejected a UPR recommendation to sign a joint statement on sexual orientation and gender identity, thus demonstrating internationally its official negative position towards the issue⁵.

The lack of legally bound normative definitions of "discrimination" on any of these grounds in the Constitution allows law enforcement authorities to interpret this constitutional provision as they see fit. This results in cases of indirect discrimination when a neutral rule of law leads to an unfavourable outcome for a person or a particular group of persons in comparison with others.

On May 6, 2015 the leadership of the Border Service of the Kazakhstan National Security Committee dismissed two female soldiers for kissing, days after unknown users posted on a social network a video from a monitor screen that broadcasted data from the outdoor surveillance cameras. On the video two women in their border guards forms, appearance clearly identifiable, were kissing next to a protected object. After some time management of the Border Service initiated disciplinary proceedings against the women and fired them, indicating "absence from workplace for 3 or more hours without a good reason" as official grounds for the dismissal. Following this the female soldiers appealed to the court demanding recognition of their illegal dismissal. The court responded to the appeal and declared their dismissal illegal⁶. In its judgment the Court did not refer to discrimination as a possible reason for the dismissal of women from military service, as the Border Service of Kazakhstan National Security Committee eliminated the link between the specified video and dismissal of women. However women themselves linked their dismissal with the video shared widely over social media networks and their sexual orientation.

² Constitution of the Republic of Kazakhstan, available at [<http://www.constitution.kz>]

³ Ibid

⁴ UN CERD report, 2010 <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4ef198bd2>

⁵ Report of Kazakhstan International Bureau on Human Rights and Rule of Law, *Preliminary overview of certain aspects of inequality and discrimination in Kazakhstan*, 2015. Accessible at: [<http://ihahr.org/sites/default/files/files/kazakhstan-diskriminaciya-2015-doklad.doc>]

⁶ Article in Today.KZ titled "Dismissed border service-women win court case in Atyrau", available at [<http://today.kz/news/proisshestviya/2015-08-27/624676-v-atyrau-uvolennye-zensiny-pogranicniki-vyigrali-sud/>]

These cases not only illustrate discrimination in the workplace on the grounds of SOGI, but also indicate a violation of article 24 of the Constitution guaranteeing remuneration for labor without any discrimination⁷. Article 6 of the Labour Code stipulates that no one shall be subjected to any discrimination in the exercise of labor rights on the basis of origin, social, official or property status, sex, race, nationality, language, attitude to religion, beliefs, place of residence, age or physical disability. The article does not include sexual orientation or gender identity as protected grounds⁸.

It is important to note that the indicators of experienced discrimination, as well as the number of incidents of discrimination in the workplace (wrongful dismissal, refusals of promotion) would be much higher, if many workers did not hide their sexual orientation or gender identity. Awareness of these serious risks and fear of further negative consequences lead many LGBT people in Kazakhstan to continue hiding their sexual orientation or gender identity at work.

The threat of discrimination, including wrongful dismissal, means that people who have a non-heterosexual orientation are forced to bear an additional burden in the form of silence and isolation from the others, in order to avoid the negative consequences that may result from the recognition of their identity or sexual orientation. This fear, as well as obsession with silence on their orientation, can have its own negative consequences, affecting the relationships of LGBT people colleagues at work, sometimes leading to serious psychological issues.

Judicial practice on consideration of cases of discrimination based on "sexual orientation" and "gender identity" hate-motivated violence is missing, which is directly due to the fact that SOGI are not considered grounds for discrimination⁹. This results in lack of complaints by victims of hate crimes and violations of human rights on the basis of their SOGI, who prefer not to seek protection in Kazakh courts, realising the likely futility of such an initiative.

In April 2015 in the city of Ust-Kamenogorsk a man was murdered by his friends after revealing his homosexual orientation to them - they beat him to death. The court found both defendants guilty of the crime of "intentional infliction of death with extreme cruelty out of hooliganism." Although the defendants admitted in court that the murder was motivated by their hatred of homosexuals, the court did not reflect this in its judgement, indicating that the murder took place "out of feelings of hooliganism"¹⁰.

In 2013 the Almaty juvenile court found five members of the "Occupy-pedofilyay" movement guilty of extortion and sentenced its leader to four years of imprisonment in a penal colony, and the remaining members - to three years¹¹. The convicts engaged in kidnapping and illegal detention of

⁷ Constitution of the Republic of Kazakhstan, available at [<http://www.constitution.kz>]

⁸ Labour Code of the Republic of Kazakhstan (version of 23 November 2015 number 415-V, with changes dated 6 April 2016), available at [http://online.zakon.kz/Document/?doc_id=38910832#pos=1;-299]

⁹ Report of Kazakhstan International Bureau on Human Rights and Rule of Law, *Preliminary overview of certain aspects of inequality and discrimination in Kazakhstan*, 2015. Accessible at: [<http://ihahr.org/sites/default/files/files/kazakhstan-diskriminaciya-2015-doklad.doc>]

¹⁰ Article 19. *Methodological guidance on LGBT rights in Kazakhstan "I exist"*, 2016, p. 7.

¹¹ Mir 24 TV channel video item titled "Activists of Occupy-Pedofilyay in Almaty were sentenced to several years of imprisonment", 29 November 2013, accessible at [<http://mir24.tv/news/society/9400828>]

homosexuals, forcing them to talk about their sexual orientation before the camera¹². Threatening to distribute these videos on the Internet, members of the group extorted from its victims somewhere between 100 000 to 300 000 tenge (up to \$ 2,000 at the time). As in the previous case, the true cause of their crimes was not reflected in the court verdict and did not affect the sentence.

These cases are an example of how the lack of adequate legislation to protect against discrimination and hate crimes based on SOGI result in sentences inadequate to the gravity of committed crimes, and as a result - to injustice.

RECOMMENDATIONS

1. The State party should clearly and officially state that it does not tolerate any form of social stigmatization on the basis of sexual orientation, gender identity and gender expression, or hate speech, discrimination or violence against persons based on their sexual orientation, gender identity or gender expression. It should also take all the steps necessary to strengthen the legal framework protecting LGBT individuals from discrimination and violence and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim's sexual orientation or gender identity; *(based on the Human Rights Committee's Concluding Observations on Russia in 2015)*
2. The State party should adopt comprehensive anti-discrimination legislation, explicitly addressing all spheres of life and defining and prohibiting discrimination on any ground, including sexual orientation, gender identity and gender expression. The legislation should impose appropriate penalties for direct and indirect discrimination committed by both public and private entities, and should provide for effective remedies. *(based on the Human Rights Committee's Concluding Observations on Republic of Korea in 2015)*

Discrimination against women and promotion of negative gender stereotypes

Infringement on the equality of men and women can be noticed in the actions of other state institutions, indirectly endorsing and promoting gender inequality.

In its recommendations to Kazakhstan following consideration of the state report on implementation of the International Covenant on Civil and Political Rights (ICCPR) during its 102-nd session in 2010, the Human Rights Committee stated that "the State party should take necessary measures to eliminate the widespread negative stereotyping of women"¹³. However in the current reporting period the government has been observed as supporting and spreading negative stereotypes about women. It has contributed to perception of women as a tool for reproduction of population, as well as distribution of patriarchal negative stereotypes, when a woman is regarded as a "foster child", a weak daughter, who must be protected. Thus, women are denied the right to control their own lives and bodies, deprived of their own subjectivity.

In March 2016 the Kazakh State Women's Pedagogical University hosted a round table with participation of the Spiritual Administration of Muslims of Kazakhstan and the "Tole bi" mosque on

¹² Tengri News online news outlet article titled "Activists of Occupy-Pedofilyay sentenced in Almaty", 30 November 2013, accessible at [<http://tengrinews.kz/crime/aktivistov-okkupay-pedofilyay-osudili-v-almaty-246459/>]

¹³ Comments of the UN Human Rights Committee on implementation of the International Covenant on Civil and Political Rights in Kazakhstan, available at [<http://www.adilet.gov.kz/ru/node/30636>]

the topic titled "If you want to save the nation - nurture the girls"¹⁴, where women were attributed to traditional roles bordering discrimination. For example, one of the speakers, Zeynep Akhmetova, said that "the purpose of women is motherhood, and in addition, every self-respecting wife should watch out for comfort in the house and respect the elders". Furthermore, a guest researcher Aigul Ismakova noted that it is not enough for women now "to be Muslim, you need to study the religion in-depth". She also shared the idea that "if mosques had honoured mothers working in designated rooms, it would be very useful for women, caregivers of the future of the nation"¹⁵.

Religious leaders use the rostrum of the State Women's Pedagogical University to successfully introduce negative stereotypes about women's role in society. For example on February 18, 2016, Chief Mufti of Kazakhstan, Yerzhan Mayamerov, delivered a lecture¹⁶ to the all-girl studentship of the university about the role of women reduced to only reproduction of the line as mothers and nurturers of children. Lectures such as this are organised on frequent basis at this State University with support from government, which by doing so is limiting the ability of women to fully participate in society.

On March 10, 2016 the same State University hosted an event called "Kazakh girl, we tell you ...", where director of "Asyl Arna" (the first Islamic television station in Kazakhstan that broadcasts in Russian and Kazakh languages) Mukhamedzhan Tazabekov delivered a statement that perpetuated the same negative discriminatory stereotypes about women's role.

Another example of negative stereotypes can be found in the "Strategy of gender equality in the Republic of Kazakhstan for 2006-2016"¹⁷. Of the 53 press items in the media that have been scheduled for publication by the National Commission on Women's Affairs, Family and Demographic Policy under the President of the Republic of Kazakhstan and funded from the state budget in 2015, 19 (or 36%) had an implicit or explicit discriminatory message that viewed women only within the family as a mother accompanying the men in their lives. Many other women according to this media plan do not even exist in Kazakhstan.

Legalisation of polygamy

Since 2001 the Kazakh parliamentarians have been discussing the possibility of legalising polygamy/polygyny. In 2007, yet another attempt was undertaken in this direction, and in 2008 - the MPs have proceeded to discussing the possibility of an amendment in this regard to the Law "On Marriage and Family"¹⁸. Although polygamy is to this day not legalised in Kazakhstan, it is quite a common social practice. This gives rise to a variety of questions about whether the status of these

¹⁴ Time KZ article titled "The taming of the disobedient", 23 March 2016, available at [<http://www.time.kz/articles/tulegennaya-inzheneriya/2016/03/23/ukroshenie-stroptivoj>]

¹⁵ Article on University's website titled "If you wish to save your nation, you must train your girls", available at [<http://kazmkpu.kz/kz/media-ortaly-1/zha-aly-tar-2/4116-lty-dy-s-kt-jmyn-dese-kyzy-dy-tarbiele>]

¹⁶ News post on the University's social media account, 25 February 2016, available at [https://vk.com/kazmkpu_kz?w=wall-98500429_164]

¹⁷ Media plan of the National Commission on implementation of the Address of the Kazakh President to the Nation *Nurly Zhol* and Strategy of gender equality for 2006-2016, available at [http://www.akorda.kz/upload/nac_komissiya_po_delam_zhenshin/3.2%20%D1%80%D1%83%D1%81%20%D0%BC%D0%B5%D0%B4%D0%B8%D0%B0-%D0%BF%D0%BB%D0%B0%D0%BD%2032-61.61.pdf]

¹⁸ Independent article titled "Noise and rage around polygamy" available at [http://n-europe.eu/article/2015/01/21/shum_i_yarost_vokrug_poligamii]

women should be legalised, as being outside the law they are deprived of the guarantees that follow from a marital relationship. The second, third wives have no legal, legitimate rights to the property of men. From this their dependence on men and discrimination only grow exponentially. Often this leads to a rather sharp conflict when a woman feels forced to apply extraordinary measures - often criminal acts in relation to the rival woman or even suicide.

Religious institutions have become of great importance in the formation of marriage strategies. Currently, religious institutions have begun articulating their own positions, which are alternative to public policy, on the family and marriage. They were able to revive the mass type of marriage legitimisation - religious marriage. Muslim priests sanction second and subsequent marriages of men-polygamists, regardless of the man's responsibility before his current wife and children. This discriminatory practice against women - in a secular state, announcing equality for all - is unacceptable.

RECOMMENDATIONS

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| 3. | The State party should take all necessary measures to counteract any negative gender stereotypes promoted on state-funded public platforms, regardless of whether they are justified by tradition or religion, and ensure that state-funded programs and campaigns represent women and girls in all their diversity; |
| 4. | The State party should publicly reject any attempts to legitimise the religious practice of polygamy that leads to a violation of women's rights in Kazakhstan. |

Rights of transgender people

Transgender people in Kazakhstan face intense social prejudice and discrimination. Bigotry on the part of police, healthcare staff, and other officials can mean transgender people have few, if any, places to turn for refuge or services.

One of the most significant obstacles to the realisation of the rights of transgender people, including ensuring their protection from violence and discrimination - is the complexity of the legal procedure of recognition of their gender identity. When the gender marker of a transgender person in their ID documents does not correspond to their identity and/or appearance, officials subject them to humiliating and unjustified inspections. This is due to the recent changes in Kazakhstan legislation concerning transgender people¹⁹.

Previously, Kazakhstan allowed individuals to change their legally recognised gender under a Ministry of Health directive, Order No. 435, that dates back to 2003²⁰. The procedure required invasive and abusive processes, but it did not explicitly mandate genital surgery. During that period, people who wanted to change their legal gender had to receive a diagnosis of “gender identity disorder,” involving several medical tests and a 30-day psychiatric evaluation. Once the diagnosis was delivered, the person had to appear before a special commission to confirm the diagnosis.

¹⁹ Human Rights Watch, *That is When I Realised I was Nobody*, research on LGBT people in Kazakhstan, 23 July 2015, available at [<https://www.hrw.org/report/2015/07/23/thats-when-i-realized-i-was-nobody/climate-fear-lgbt-people-kazakhstan>]

²⁰ Order of the Minister of Health of Republic of Kazakhstan, June 3, 2003, № 435, ‘On the Guidelines of Medical Investigation of People with Gender Identification Disorders’

In 2009, a new health code²¹ introduced the “the right to sex change,” specifying sex reassignment surgery as a possibility. The government then considered the specific meaning and implementation of this right and drafted guidelines. The guidelines, passed in 2011, specifically added increasingly coercive and humiliating procedures to the previous requirements in order for the commission to confirm a diagnosis. In December 2011, to article 257 on “justification for the state registration of changes in name, patronymic, surname” paragraph 13 was added to the updated Code “On marriage and family», stating that transgender people can only change their name, surname and patronymic, according to the selected gender, after sex reassignment surgery. On March 31, 2015 order №187 of the Kazakh Minister of Health and Social Development was published on approving the medical examination and the rules for ‘sex change’ for persons with gender identity disorders²². The new procedure reads: gender reassignment medical measures are realised upon the results of the Commission’s decision, and include two stages: hormonal therapy and surgical correction.

The coercion by Kazakh authorities to mandatory surgical changes and the general complexity of the Kazakh gender recognition procedure has resulted in a significant decrease in the number of transgender people addressing the commission. Many transgender people do not undertake sterilisation as required by these new procedures and undergo sex reassignment surgeries either due to problems with their health, lack of finances or lack of desire to lose their reproductive abilities.

In 2015, the transgender people’s initiative group AlmaTQ conducted a survey of 41 transgender people in Kazakhstan. When asked what needed to happen to help them become more fully integrated in society, nearly two-thirds of respondents answered that they needed to change their legal gender on documents, while only two respondents had actually been able to do so²³.

For transgender people in Kazakhstan, as detailed below, the legal gender recognition procedure requires humiliating, invasive, and abusive procedures in order to change gender on official documents. Transgender people who attempted to go through the procedure described being harassed and insulted by officials, and coerced into having medically unnecessary procedures performed²⁴.

Due to difficulties with the legal recognition of their gender identity transgender people can not find work, as in order to get employment in Kazakhstan one must present an official document. Transgender people face additional inspections and possible allegations of fraud, if they do not outwardly conform to the sex specified in their official documents. In addition, some transgender people who have passed a gender recognition procedure in the Republic of Kazakhstan, were faced with unfair dismissal and discrimination in the workplace.

On January 26, 2015, one transgender man, “Z.”, was forced to resign from the Interior Department (ID) of Almaty by the senior management. The plaintiff worked as police staff for over 10 years. In November 2014, he underwent surgery to change his sex for which he received state funding from the Ministry of Healthcare, in accordance with Article 88 of the Code of Public Health and

²¹ Code on People’s Health and System of Healthcare of the Republic of Kazakhstan, 2009, art. 88

²² Order of the Ministry of Health and Social Development, published on Tengri News available at [<https://tengrinews.kz/zakon/site/index>]

²³ Human Rights Watch, *That is When I Realised I was Nobody*, research on LGBT people in Kazakhstan, 23 July 2015, available at [<https://www.hrw.org/report/2015/07/23/thats-when-i-realized-i-was-nobody/climate-fear-lgbt-people-kazakhstan>]

²⁴ Ibid

Healthcare System, which stipulates that “people who have gender identity disorders, with the exception of those who have psychiatric disorders, have the right to change their sex”²⁵. Following the surgery, the plaintiff applied for the change of his personal ID and came back to work. However, at work he began facing pressure from his supervisor as well as human resources staff who informed the plaintiff that Interior Department senior management were shocked by the story.

New rules²⁶ on gender marker change in Kazakhstan have deprived transgender people from their right to lead a full social life. The need for continuous disclosure of their gender identity in a transphobic society has led a majority of AlmaTQ’s respondents to constant stress and their inability to socialise. Forced sterilisation and surgical correction prevent transgender people from establishing families and violate their reproductive rights, while discrimination in the workplace, in education and healthcare lead to deterioration of their financial position and health.

Numerous international bodies have called for the clear separation of medical procedures from legal procedures in gender recognition processes, including the Council of Europe. The Yogyakarta Principles note that: “No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity²⁷”. The UN Special Rapporteur on Torture has called upon all states “to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation... when enforced or administered without the free and informed consent of the person concerned.” He also called upon states “to outlaw forced or coerced sterilisation in all circumstances and provide special protection to individuals belonging to marginalised groups²⁸”.

RECOMMENDATION

5. The State party should take the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilisation and coercive and forced institutionalisation; *(based on the Committee against Torture’s Concluding Observations on Hong Kong in 2015)*

Hate speech against LGBT people in Kazakhstan

Article 174 of the Kazakh Criminal Code contains provisions prohibiting the incitement to social, national, ethnic, racial, class or religious hatred. Gender identity and sexual orientation are not included in the list of grounds for which incitement is prohibited. Additionally, paragraph 3 of

²⁵ Code of the Republic of Kazakhstan dated 18.09.2009 number 193-IV "On people's health and the health care system" with changes and amendments as of 01.01.2016, Article 88 "The rights of citizens", paragraph 3

²⁶ Resolution of the Government of the Republic of Kazakhstan dated December 7, 2011 № 1484

²⁷ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Principle 3, <http://www.yogyakartaprinciples.org> (accessed April 18, 2016)

²⁸ United Nations Special Rapporteur on Torture, “Report on Torture in Healthcare Settings,” 2013, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed April 18, 2016)

Article 20(2) of the Kazakh Constitution prohibits propaganda of social, racial, ethnic, religious, birth status and ancestry superiority, as well as the cult of cruelty and violence. These two provisions theoretically could be interpreted to prohibit the incitement of hatred and propagation of the cult of cruelty and violence targeting LGBT people; however, given the lack of protections for LGBT people in other laws, this seems unlikely.

While the purpose of prohibiting incitement, in accordance with international law, should be to protect minorities and vulnerable groups, the vague provisions included in Kazakhstan's legislation, fall far short of the high threshold for 'incitement to hostility, discrimination or violence', established in international law, allowing for inconsistent, or even counter-productive, application. Indeed, Kazakhstan has a track record of applying criminal incitement provisions in order to restrict freedom of expression of critical groups, and to persecute minorities.²⁹

Public discourse around LGBT people, propagated by traditional media, by public officials, and on social media, is often negative, discriminatory, or sensationalist. Such speech serves to reinforce negative attitudes towards LGBT people, reinforcing self-censorship. Mass media coverage of LGBT stories and issues is rare but, where it does exist, it is often negative or sensationalist. A lack of professionalism among journalists when covering these issues result in distortion of facts or censorship of key points made by LGBT people. Consequently LGBT people are unwilling to speak to the media, reinforcing the censorship and self-censorship cycle outlined above.

The majority of publications on LGBT issues, according to media monitoring conducted by ARTICLE 19 and partners, are sensationalist, aimed at grabbing headlines, with few examples of serious professional journalism.³⁰ There are cases of independent media outlets covering LGBT issues in a more sensitive manner, for example some of the coverage of a symbolic marriage ceremony between two lesbian women in Karaganda³¹. Language used in mainstream media articles was, however, typically reflective of negative and discriminatory societal attitudes, rather than challenging them in a factual and sensitive manner.

A19 media monitoring established that some of the worst examples of homophobic speech in Kazakhstan are propagated by government officials – including ministers and parliamentarians. Such speech by influential public figures is particularly concerning, as they are able to influence public decision and establish rhetorical frameworks by which LGBT identities are perceived.

Examples of discriminatory speech by politicians and public figures include:

- Calls by parliamentarians of the ruling Nur Otan party to criminalize homosexuality, which they describe as immoral and a crime against humanity.³² One MP, Aldan Smayil stated: *"If we don't take actions now, we will not stop this [homosexuality]. There are now 20 gay*

²⁹ Human Rights Watch, 'World Report 2015: Kazakhstan', <https://www.hrw.org/world-report/2015/country-chapters/kazakhstan>

³⁰ ARTICLE 19, "'Don't Provoke, Don't Challenge'" The Censorship and Self-Censorship of the LGBT Community in Kazakhstan', 2015, https://www.article19.org/data/files/KZ_LGBT.pdf

³¹ Different Marriage: She and She. <http://www.voxpopuli.kz/main/1074-drugaya-svadba-ona-i-ona.html> (accessed 05/11/2015)

³² Kazakhstan: Parliament Becomes Scene of Homophobic Rants, 28 May 2013, <http://www.eurasianet.org/taxonomy/term/3882>

clubs in Almaty and 4 in Astana! It is shameful!... We should pass a law, which will criminalise them”³³

- A characterization of LGBT identities as a neo-colonial plot designed to reduce the Kazakh population, by Vladislav Kosarev, General Secretary of the Communist People’s Party of Kazakhstan, which currently holds 7 out of 98 seats in parliament. The statement was made to a journalist writing about LGBT people in Kazakhstan. *““Why are you trying to make people think that there are actually such poor relationships in our country? Homosexuality should not exist. It should be recognised as a deformation of human consciousness... it is planting misanthropic relationships, which neo-colonialism is pushing in all countries in order to reduce the population”*”³⁴
- An analogy between LGBT identities and fascism, to illustrate how ideas abominable to society can be legitimized, put forward by Imangali Tasmagambetov, then Mayor of Astana (now Minister of Defence) at a forum of educators in August 2014. He was urging the need to be vigilant against online technologies that seek to brainwash children and normalize amoral ideas: *“...given modern information technologies [it is possible to] both generate and destroy moral values, especially among the younger generation... This is how it works: a phenomenon, which was earlier unacceptable, is brought up for discussion. It is masked by arguments about freedom of speech, freedom of expression and national interest. After some time... people then perceive [this phenomenon] as something regular and appropriate. Ultimately the public... accepts new laws protecting something, which was absolutely unbelievable some time ago. You can remember fascism that led to war and death camps”*. He then continued to cite “non-traditional sexual orientation”, as a prime example that has been entirely normalized in many Western States. *“It has not just become a political standard in some developed countries. It has been so transformed that the senators of California State approved a mandatory training course to study the history of successes made by gays and lesbians. I assume that you can see how it is “promoted” on international mass media. It is reasonable to ask: What is next?”*³⁵

The government has failed to adequately respond to such expression. Where such speech clearly constitutes incitement to hatred, discrimination or violence, appropriate sanctions should be employed. The selection of sanctions should be guided by an assessment of the severity of the offence. ARTICLE 19 argues that it is preferable to employ civil and administrative law sanctions, given the necessity test (Article 19(3) of the ICCPR), which requires that the least intrusive effective remedy should be employed when restricting speech.³⁶ Moreover, the experience of many jurisdictions shows that civil and administrative law sanctions are better suited as responses to the harm caused by “hate speech.”³⁷ Only in the most serious cases of incitement, when the authorities

³³ In Kazakhstan, they suggest imprisoning gays and lesbians, 24 May 2013, <http://www.rosbalt.ru/exussr/2013/05/24/1132907.html>

³⁴ *he Kazakh Gays Complaining About Their Uneasy Life*, 13 March 2013, <http://tengrinews.kz/show/kazahstanskie-gei-jaluyutsya-na-neprostayu-jizn-230029/>

³⁵ *Tasmagambetov Discovered a Brainwash Conspiracy, August 2014*, <http://news.nur.kz/kk/327719.html>

³⁶ ARTICLE 19, ‘Prohibiting incitement to discrimination, hostility or violence’, December 2012 <https://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf>

³⁷ For example, in Brazil, it has been documented that criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied effectively in civil proceedings. See, Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America*, 32 U. Pa. J. Int’l L. 805 2010-2011

conclude that the particular incitement has reached the highest level of severity, should States impose criminal sanctions. However, if speech does not meet the threshold to be classified as hate speech, banning the expression of such opinions is likely to be counter-productive, reinforcing negative opinions to LGBT people, rather than promoting equality. As such, proper consideration of the facts of the case is essential.

In any case, as recommended in the Camden Principles on Freedom of Expression and Equality, pressure should be put on politicians and other leadership figures in society to refrain from statements that promote discrimination or undermine equality.³⁸ Instead, they should be encouraged to use the platforms that their positions afford them to promote tolerance, including by contesting discriminatory statements or behaviour.

RECOMMENDATION

6. The State party should take effective measures to combat any form of social stigmatization, hate speech, discrimination or violence against persons based on their sexual orientation or gender identity. It should ensure the investigation, prosecution and punishment of such violent acts and should repeal article 120 of the Criminal Code in line with its obligations under the Covenant. *(based on the Human Rights Committee's Concluding Observations on Uzbekistan in 2015)*

Family

Family and civil law are an area in which LGBT people in Kazakhstan face indirect discrimination the most due to lack of legal regulation. The only legal form of marital union in Kazakhstan is marriage defined as "the union of man and woman" (pp 1, Art. 1 of the Law of Republic of Kazakhstan on Marriage and Family)³⁹. Non-recognition of relations between same-sex partners by the Kazakh law is the main cause of violation of their equality in civil law.

For example, a same-sex partner can only inherit under a specified will. Upon termination of the actual cohabitation partners, their personal and related property rights are not regulated by law. It should be noted that in this case the property relations are the only area in which same-sex partners can gain a certain degree of recognition due to possibility of contractual conditioning.

Same-sex unions entered into in other countries are not recognised in Kazakhstan due to non-recognition of this form of relationship as such by family law. The legislation of Kazakhstan does not provide any privileges to foreign same-sex partners of Kazakhstani citizens during application for a long-term visa, residence permit or citizenship.

The joint adoption or adoption of children by same-sex partners is not allowed, although legislation allows the adoption / adoption of the child by one of the partners (Art. 80 of the RK Law on Marriage and Family). Homosexuality de jure is not a barrier to adoption of children. But due to the fact that the selection of adoptive parents is carried out by the guardianship authorities, who take into account, inter alia, moral and other qualities of a potential guardian, the likelihood of allowing adoption of a child by a person of homosexual orientation is extremely low.

³⁸ ARTICLE 19, The Camden Principles on Freedom of Expression and Equality, April 2009, <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>

³⁹ Law of the Republic of Kazakhstan dated December 17, 1998 No321-I "On Marriage and Family" (with alterations and amendments as of 27.07.2007)

Non-recognition of same-sex partnership-based kinship leads to discrimination against LGBT people when giving testimony in court, when visiting one's partner in prison, as well as in hospitals.

RECOMMENDATION

7. The State party should publicly recognize that same sex partnerships must be treated equally before the law (as per Communication No.1361/2005, *X v Colombia*) and that same-sex couples are entitled to equal enjoyment of their rights. *(based on the Committee on Economic, Social and Cultural Rights' Concluding Observations on Mongolia in 2015 CESCR)*