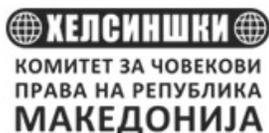


STRATEGIC LITIGATION OF CASES OF DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION

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LGBTI Support Center, Skopje, Macedonia, 2013



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STRUCTURE of the text:

1. **International sources for protection against discrimination, which also refer to protection from discrimination on the ground of SO (sexual orientation)**
 - 1.1. United Nations
 - 1.2. Anti-discrimination provisions in European legislation
 - 1.3. Anti-discrimination provisions in Macedonian legislation

2. **Terms and definitions of Strategic litigation of cases of discrimination on the ground of sexual orientation**
 - 2.1. DEFINITIONS CRUCIAL TO THE LITIGATION PROCESS
 - 2.2. HOW DOES STRATEGIC LITIGATION ACHIEVE ITS GOALS?
 - 2.3. HOW DO NON-GOVERNMENT ORGANIZATIONS DECIDE ON THEIR PRIORITIES FOR LITIGATION?
 - 2.4. PLANNING THE LITIGATION
 - 2.5. CASE SELECTION
 - 2.6. CASE STRATEGY AND MANAGEMENT
 - 2.7. POST-LITIGATION IMPLEMENTATION

3. **HOW TO WRITE A SUBMISSION FOR A CASE IN COURT PROCEDURE**

4. **WHAT ARE THE MACEDONIAN CONSIDERATIONS AND EXPERIENCES FOR LITIGATION IN CASES OF DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION?**

5. **ANNEX – Cases of discrimination on the grounds of sexual orientation and gender identity in practice in Macedonian society**

About the Helsinki Committee for Human Rights of the Republic of Macedonia

About the LGBTI Support Center

1. International sources for protection against discrimination, which also refer to protection from discrimination on the ground of SO (sexual orientation)

1.1. United Nations

Apart from the anti-discrimination standards generally known in the documents of the United Nations (UN), with which we would not burden this document¹, regarding prohibition of discrimination on the grounds of sexual orientation and gender identity – the Human Rights Council, on its 17th session (July 2011) adopted a Decision (with a Resolution) for preparation of a Report by the UN High Commissioner for Human Rights on the topic of Discrimination laws, practices and acts of violence against people on the grounds of their sexual orientation and gender identity. The Report was prepared and submitted to the Council in November that year.

Our document finds the legal section of the document important (up to p. 9), which defines the position of the UN bodies regarding prohibited grounds for discrimination. Hence, it is stated that the authors of the Civil Freedoms and Rights Pact, have deliberately left open the statement of prohibited grounds for discrimination with the phrase “and other status”, and even though sexual orientation is not directly mentioned, it is implied.

This became explicitly relevant after the resolution of the case *Toonen v. Australia* (1994), before the Human Rights Committee, where the Committee had stated that: the countries are obliged to protect individuals from discrimination on the ground of sexual orientation.²

Later on, the Committee for economic, social and cultural rights accepts the norm that the expression “and other status” implies sexual orientation.³

The prohibition of discrimination on the ground of sexual orientation is promoted in the interpretation of: the right to protection of the life, freedom and security of people, the prohibition of torture and protection of privacy from arbitrary arrest.

After the *Toonen* case of 1994, the UN Human Rights Committee adopted the legal standpoint that: laws that criminalize the private, consensual sexual act between two persons of the same sex – violate the right to privacy and non-discrimination. And what is also important, is that the Committee adopted another legal standpoint, i.e. that: criminalization of such acts with the justification with reasons of public health and public morals – IS NOT JUSTIFIED, BECAUSE IT IS NOT NECESSARY NOR IS IT PROPORTIONAL.

Ultimately, the standard of non-discrimination on the ground of sexual orientation also refers to the right to freedom of expression and assembly.⁴

Our document finds the Recommendations of the UN High Commissioner for Human Rights significant, stated in the quoted Report, as follows: the countries are obliged to quickly and effectively investigate all criminal acts and serious incidents against people, on the ground of their sexual orientation... as well as to create a legal system which shall punish the perpetrators of these criminal acts. It is recommended that the countries keep records of the situation with this type of discrimination and criminal acts. The countries are encouraged to create efficient anti-discrimination legislation and include sexual orientation on the list of prohibited grounds for discrimination.

¹ Summarized in *Discrimination laws and practices and acts of violence against individuals on their sexual orientation and gender identity*, Report of United Nations High Commissioner for Human Rights, A/hcr/19/41, GE.11-17075, pp.4-8.

² Communication No.488/1992 CCPR/C/50/D/488/1992, *Young v. Australia*, Communication No 941/2000, CCPR/C/78/D/941/2000.

³ E/C.12/GC/20, para. 32.

⁴ Explicit constitutional guarantees against discrimination on the grounds of sexual orientation exist in six countries. Other countries implement this via interpretation of the expression “and other grounds” by their courts. The general judicial practice adopts the standard for equal legal protection, including this ground.

45 countries explicitly prohibit discrimination on the grounds of sexual orientation in employment... etc. See Quoted Text Report page 16 and further.

1.2. Anti-discrimination provisions in European legislation

The concept of European anti-discrimination law contains references to the following basic institutes: definitions of direct and indirect discrimination; harassment and victimization of victims; instruction and incitement of discrimination; burden of proof during procedures regarding discrimination; adaptation of employment procedures (reasonable accommodation); defending the rights of the victim with the help of non-government organizations from that field; effective sanctions and compensation for victims of discrimination.

All these institutes are covered with two anti-discrimination Directives of the EU: the Directive Against Racial Discrimination and the Framework Directive Against Discrimination in Employment (2000)⁵, as well as in the “package” of instruments by the Council of Europe: The European Convention of Human Rights (ECHR), its Protocol 12, and the jurisprudence, i.e. the Decisions of the Human Rights Court in Strasbourg.

In our context, the Council of Europe Recommendation CM/Rec(2010)5 on measures for combating discrimination on the grounds of sexual orientation and gender identity is also relevant.

It should be mentioned that within the aforementioned system of legal instruments, the ground of **sexual orientation** is among the indisputably recognized grounds for discrimination. Moreover, such **discrimination** is defined as: **any difference, exclusion, limitation or preferences on the ground of the sexual orientation of the individual.**

On the other hand, the ground of sexual orientation is interpreted as a series of rights: namely, every individual has a sexual orientation and gender identity. Most people identify as heterosexual and their gender is aligned with their sex assigned at birth. However, one part of the population does not identify within the existing heteronormative matrix, i.e. they are people who have a sexual orientation different than heterosexual, or they identify with a gender different from the sex they were assigned at birth (lesbians, gay men, bisexuals, transgender people, intersex people, queer etc.). People with a different sexual orientation from the majority, around 10% of the population (according to some estimations), are persons whose rights are also guaranteed in line with the principle of equality and non-discrimination.

European anti-discrimination law also stipulates the accompanying sections of the grounds for discrimination. Namely, it states that there is recognized multiple discrimination, when a person is discriminated on several grounds (for example, Roma/gay, or special needs/lesbian etc.) and discrimination on the ground of perception (when someone is falsely perceived as gay or lesbian and is therefore discriminated).

This right defines the institute of harassment, incitement of discrimination or rejection to adjust the job position to the person with special needs (reasonable accommodation). The definition of harassment is important to us: it represents any violation of dignity and creating hostile, degrading, insulting, humiliating circumstances for the people perceived to have or who have a different sexual orientation or gender identity.

It is also important to state the provision defining the incitement of discrimination (frequently occurring throughout Macedonian social networks, and is sometimes indirectly stimulated by Government policies): namely, every situation or communication in which one is encouraged to discriminate, directly or with indirect negative qualifications for the victim – is punishable.

These grounds refer to the public and private sphere of social life (provide the same scope of protection for all grounds), in employment by agreement, military service, employment in the public or private sector, and so-called everyday discrimination.

⁵ See details in: Handbook on seeking remedies under the EU Non-discrimination Directives, European Commission, Directorate-Generale for Justice, July 2011.

1.3 Anti-discrimination provisions in Macedonian legislation

1.3.1. Constitution of the Republic of Macedonia

Civil and political freedoms and rights

Article 9

Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, colour of skin, national and social origin, political and religious beliefs, property and social status. All citizens are equal before the Constitution and law.

Article 54

The freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution.

The freedoms and rights of the individual and citizen can be restricted during states of war or emergency, in accordance with the provisions of the Constitution.

The restriction of freedoms and rights cannot discriminate on grounds of sex, race, colour of skin, language, religion, national or social origin, property or social status.

The restriction of freedoms and rights cannot be applied to the right to life, the interdiction of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as to the freedom of personal conviction, conscience, thought and religious confession.

1.3.2. Criminal Code of the Republic of Macedonia

Chapter 15

CRIMES AGAINST THE FREEDOMS AND RIGHTS OF HUMANS AND CITIZENS

Injury to the equality of citizens

Article 137

(1) A person who, based on a difference in gender, race, color of skin, national and social origin, political and religious belief, wealth and social position, the language or other personal characteristics or circumstances, takes away or limits the rights of humans and citizens, determined by the Constitution, by law or by ratified international covenant, or who based on all these differences gives citizens favors in contrary to the Constitution, some law or international ratified covenant, shall be punished with imprisonment of three months to three years.

(2) If the crime from paragraph 1 is committed by an official person while performing his duty, he shall be punished with imprisonment of six months to five years.

(3) If the crime from this article is committed by a legal entity, it shall be punished with a financial penalty.

Violation of the right to use the language and the alphabet

Article 138

(1) A person who takes away or limits the right of the citizens to use the language and the alphabet, guaranteed by the Constitution, by law or by international covenant, shall be punished with imprisonment of three months to three years.

(2) If the crime from item 1 is committed by an official person while performing his duty, he shall be punished with imprisonment of six months to five years.

(3) If the crime from this article is committed by a legal entity, it shall be punished with a financial penalty.

Endangering security

Article 144

(4) A person who by means of informational system shall threaten to commit a crime for which the punishment is five years or more, against another person due to belonging to a certain national, ethnic or racial group or religious community, shall receive a prison sentence of one to five years.

Chapter 34

CRIMES AGAINST HUMANITY AND INTERNATIONAL LAW

Racial and other discrimination

Article 417

(1) A person who based on the difference in race, color of skin, nationality or ethnic belonging, violates the basic human rights and freedoms, acknowledged by the international community, shall be punished with imprisonment of six months to five years.

(2) The punishment from item 1 shall apply also to a person who persecutes organizations or individuals because of their efforts for equality of the people.

(3) A person who spreads ideas about the superiority of one race above some other, or who advocates racial hate, or instigates to racial discrimination, shall be punished with imprisonment of six months to three years.

Approval or justification of genocide, crimes against humanity or war crimes

Article 407-a

(1) A person who, by means of informational system publicly denies, reduces, approves or justifies the acts from Article 403 to Article 407, shall be punished with imprisonment from one to five years.

(2) If the negation, reduction, approval or justification has been done with the intention to **encourage hate, discrimination or violence against a person or a group of people due to their nationality, ethnicity, race or religion, the perpetrator** shall be punished with imprisonment of a minimum of four years.

1.3.3. LABOR LAW

Official Gazette of the Republic of Macedonia, No. 158 from 09.12.2010

Prohibition of discrimination

Article 6

(1) The employer must not put the candidate for a job position (hereinafter: the candidate) in a position of inequality due to race, sex, age, health condition, special needs, religious, political or other views, membership in trade unions, national or social origin, family status, property standing, sexual inclination or other personal circumstances.

(2) Men and women must receive equal opportunities and equal treatment in employment, career progress, training, education, requalification, salary, rewards, leave days, working conditions, working hours and termination of the job contract.

Direct and indirect discrimination

Article 7

(1) The prohibition of direct or indirect discrimination in cases of Article 6 of this Law refers to discrimination of the job candidate and the employee.

(2) Direct discrimination, within the meaning of Paragraph 1 of this Article, is every action conditioned with a ground from Article 6 of this Law, which had put, is putting, or might put the person in a less favorable position than other persons in comparable cases.

(3) Indirect discrimination, within the meaning of this Law, exists when a certain, seemingly neutral provision, criterium or practice, is putting or would put the job candidate or employee in a less favorable position due to a certain trait, status, determination or belief from Article 6 of this Law.

(4) Discrimination, within the meaning of Article 6 of this Law, is prohibited in regard to:

1) Employment conditions, including criteria and conditions for selection of candidates for performing certain work, in any branch of operation and all levels of professional hierarchy;

2) Career progress;

3) Access to all types and degrees of professional training, requalification and additional qualification for a position;

4) working conditions, work and all rights regarding employment, including equality of salary;

5) termination of the job contract and

6) the rights of members and actions within associations of employees and employers, or in any other professional organization, including benefits deriving from such membership;

(5) Provisions of collective agreements and employment agreements which determine discrimination on any of the Article 6 grounds, are void.

Exceptions from the prohibition of discrimination

Article 8

(1) It is not considered to be discrimination if a difference, exclusion or favorization regarding a certain position has been made, when the nature of the job demands it or when the job is being performed in conditions which make traits from Article 6 decisive and actual conditions for performing the job, under the condition that the goal intended to be achieved is justified and the conditions are sensible.

(2) All measures stipulated by this Law or another law, and the provisions of this Law and other laws, collective agreements and employment agreements which refer to the special protection and aid of a certain category of workers, particularly those for protection of persons with physical disabilities, senior workers, pregnant women and women using any maternity rights, as well as provisions referring to special rights of parents, foster parents and guardians are not considered to be discriminatory, nor may they be grounds for discrimination.

Harassment and sexual harassment

Article 9

(1) Harassment and sexual harassment are prohibited.

(2) Harassment and sexual harassment are discriminatory within the meaning of Article of this Law.

(3) Harassment, within the meaning of this law, is any unwanted behavior caused by any of the grounds in Article 6 of this Law, with the purpose or consequence of violating the dignity of the job candidate or employee, while causing fear or hostile, humiliating or offensive behavior.

(4) Sexual harassment, within the meaning of this law, is any verbal, non-verbal or physical behavior with sexual character, with the purpose or consequence of violating the dignity of the job candidate or employee, while causing fear or hostile, humiliating or offensive behavior.

Psychological harassment at the workplace (Mobbing)

Article 9-a

(1) Any type of psychological harassment (mobbing) at the workplace is prohibited.

(2) Psychological harassment (mobbing) at the workplace is discriminatory within the meaning of Article 6 of this Law.

(3) Psychological harassment (mobbing) at the workplace, within the meaning of this Law, is any negative behavior by an individual or group which is frequently repeated (minimum period of six months), and represents a violation of dignity, integrity, reputation and honor of the employees and causes fear or creates hostile, humiliating or offensive behavior, whose final aim might be job termination or job acquittal.

(4) One or several persons may be mobbing within the meaning of Paragraph 3 of this Article, regardless of their position (employer as a physical entity, responsible person or worker).

Compensation of damages due to discrimination

Article 10

In cases of discrimination from Article 6 of this Law, the job candidate or employee has the right to demand compensation of damages in accordance with the Law on obligations.

Burden of proof during disputes

Article 11

(1) If the job candidate or employee, during a dispute, **presents facts** proving that the employer had acted contrary to Articles 6 and 9 of this Law, the burden of proof is on the employer, to prove that there was no discrimination, i.e. that they had acted in accordance with Articles 6 and 9 of this Law, unless proven that the difference in treatment was due to the exceptions given in Article 8 of this Law.

(2) In a dispute due to actions contrary to Article 9-a of this Law, the burden of proof is on the individual or group charged for mobbing, unless proven that the difference in treatment was due to the exceptions given in Article 8 of this Law.

(3) Due to initiating a procedure for legal protection against mobbing, as well as testifying during the trial, the employee must not have aggravated working conditions directly or indirectly, i.e. they cannot be put in

a less favorable position, in particular with salary reduction, relocation to another position or prevention of job promotion or professional training.

Gender equality in advertisements for vacant job positions

Article 24

(1) The employer must not publish an advertisement for men only or for women only, unless that gender is a necessary condition for that job position.

(2) The job advertisement must not suggest that the employer considers a specific gender as an advantage, unless it is an exception as given in Paragraph 1 of this Article.

1.3.4. LAW ON SOCIAL PROTECTION

Article 20

Direct or indirect discrimination on the grounds of sex, race, skin color, nationality, ethnicity, social background, political views, religion, cultural origin, language, property and social status, disability and origin is prohibited, in order to realize the rights in the area of social protection, stipulated in this Law.

The prohibition in Paragraph 1 of this Article refers to public social welfare facilities established by the Government of the Republic of Macedonia, the municipalities, the City of Skopje and its municipalities, private facilities for social protection established by a legal or physical entity and civil associations and physical entities performing activities in the area of social protection, stipulated by this Law.

Article 21

Direct discrimination, within the meaning of Article 20 of this Law, is any act by which an applicant or beneficiary of social welfare was put in a less favorable position than other beneficiaries in comparable cases.

Indirect discrimination, within the meaning of this Law, is when a certain, seemingly neutral provision, criterium or practice puts the applicant or beneficiary of social protection in a less favorable position than other beneficiaries, on the grounds of sex, race, skin color, nationality, ethnicity, social background, political views, religion, cultural origin, language, property and social status, disability and origin, unless there have been determined criteria or practices which are objectively justified with a legitimate purpose, and the means for achieving that goal are appropriate and necessary.

Article 22

In cases of discrimination from Articles 20 and 21 of this Law, the applicant or beneficiary of social welfare services has the right to demand protection from an authority.

If a court procedure determines that the applicant or beneficiary had been treated differently than described in Articles 20 and 21 of this Law, the applicant or beneficiary has the right to demand compensation of damages from the discriminating entity.

Article 23

If the applicant or beneficiary presents facts during a trial, that Article 20 and 21 were not adhered to, in that case the burden of proof and the statement regarding those facts and findings falls on the public social welfare facility established by the Government of the Republic of Macedonia, the municipalities, the City of Skopje and its municipalities, private facilities for social protection established by a legal or physical entity and civil associations and physical entities performing activities in the area of social protection.

1.3.5. LAW ON PREVENTION AND PROTECTION AGAINST DISCRIMINATION

Article 2

The prevention and protection against discrimination shall be applicable for all physical and legal entities in the process of exercise of rights and freedoms guaranteed with the Constitution and the legislation of the Republic of Macedonia.

Article 3

Any direct or indirect discrimination, invocation and stimulation of discrimination and helping in discriminatory treatment on the grounds of sex, race, skin color, gender, belonging to a marginalized group, ethnic origin, language, citizenship, social origin, religion or confession, other types of belief, education, political belonging, personal or social status, mental and physical disability, age, family or marital status, property status, health condition or on any other grounds established by the law or by ratified international agreements (hereinafter: discriminatory bases).

Article 4

This Law shall be applied by all state bodies, bodies of the local self-government, legal persons with public authority and legal and physical entities in the area of:

- 1) work and labour relations;
- 2) education, science and sport;
- 3) social security, including the field of social protection, pension and disability insurance, health insurance and health protection;
- 4) judiciary and administration;
- 5) housing;
- 6) public informing and media;
- 7) access to goods and services;
- 8) participating and acting in trade unions, political parties, associations of citizens and foundations or any other organizations on participatory basis;
- 9) culture and
- 10) other areas determined by law.

Meaning of the terms used in this Law

Article 5

Certain terms used in this Law shall have the following meaning:

- 1. Affirmative measures** are activities of the competent state bodies, which are aimed to prevention and protection against discrimination, or decreasing or eliminating factual differences resulting from previous discrimination;
- 2. Architectural environment** are all public facilities available for use by the people and connected to meeting certain needs or providing certain services;
- 3. Discrimination** is any unjustified legal or actual, direct or indirect differentiation or unequal action i.e. permission (excluding, limitation or giving priority) related to persons or groups on the grounds of sex, race, skin colour, gender, belonging to marginalized group, ethnic origin, language, citizenship, social origin, religion or confession, education, political belonging, personal or social status, intellectual and body disability, age, family or marital status, property status, health condition or on any other grounds;
- 4. Discriminatory behaviour or acting** is any active or passive behaviour toward any person by the public authorities, as well as by legal and physical entities from the private and public sector within the public life, which creates grounds for unjustified privilege and non-privilege of any individual or which exposes to unjustified or degrading behaviour compared to other individuals in similar situation on any of the discriminatory bases.
- 5. Marriage** is a community of only one man and one woman in which the interests of both marital partners, of the family and the society are achieved.

6. Equality is a principle according to which all people are equal, i.e. balanced in the rights and obligations. Equality includes diversity, i.e. different persons shall be equally treated;

7. Effective protection is a presence of a system of available and usable mechanisms for initiation of a procedure in case of discrimination, presence of independent and objective structures which act on the complaints filed, based upon procedures provided beforehand and of sanctions for particular violation of rights provided beforehand.

8. Legitimate (objectively justified) aim is an aim which is in line with the Constitution and with the provisions of the international agreements, and which corresponds to the real needs, which is precisely defined and proportional to the effects which shall be achieved;

9. A Person is any physical entity, who resides on the territory of the Republic of Macedonia and any legal entity who is registered, i.e. conducts business activity on the territory of the Republic of Macedonia;

10. Legitimate interest is any justification of interest and active participation of a certain person in particular activities for the purpose of own concernment by the consequences of those activities, for the purpose of wider interest for certain social occasions, aroused beforehand, i.e. for the purpose of authorization provided for in the law on undertaking certain activities;

11. Marginalized group is a group of individuals united by a specific position in society, which are subject to prejudices, which have special characteristics that make them susceptible for certain types of violence and which have smaller opportunity for realizing and protecting their personal rights or are exposed to increased opportunity for further victimization and

12. Adjustment of the infrastructure and of the services is adopting appropriate measures required in some particular case, in order to provide to the person with intellectual and physical disability, access, participation and advancing in the labour process, unless these measures impose disproportionate encumbrance to the employers.

II. FORMS OF DISCRIMINATION

Article 6

(1) Direct discrimination on the discriminatory basis is any unpleasant acting, differencing, excluding or limitation which has or shall have a consequence of suspension, violation or limitation of the equal recognition or enjoyment in the human rights and basic freedoms, compared to the treatment of another person in the same or similar conditions.

(2) Indirect discrimination on discriminatory basis is any placement of a person or group in a less favorable position in comparison to other persons, by adopting provisions or criteria or by undertaking certain activities or practices that are neutral by contents, except when those provisions, criteria or practices result from justified aim, and the contents for achieving that aim are adequate and necessary.

Article 7

(1) Harassment and degrading behaviour is a violation of dignity of any person or group of persons, which derive from a discriminatory basis and which aims to and results in violation of dignity of certain person or creation of threatening, hostile, derogatory or fearful environment, approach or practice.

(2) Sexual harassment is unwanted behavior of sexual nature, which is expressed physically, verbally or otherwise, and is aimed to cause violation of that person's dignity, especially in case of creating hostile, threatening, derogatory and humiliating environment.

Article 8

(1) Discrimination of persons with intellectual and physical disability refers to deliberate prevention from or obstructed access to health protection, i.e. deprivation of the right to health protection, regular medical treatment and medicine, to rehabilitation means and measures according to their needs, deprivation of the right to marriage and family establishment and other rights in the area of marriage and family relations, deprivation of the right to education, work and of the rights deriving from the labour relation.

(2) The discrimination of the persons with intellectual and physical disability persists in cases when measures for elimination of the limitations shall not be adopted, i.e. adjustment of the infrastructure and the space, use of publicly accessible resources or participation in public and social life.

Article 9

Discrimination shall be deemed any activity, with which any person directly or indirectly invokes, encourages, directs and stimulates another person to practice discrimination.

Article 10

Discrimination includes the unfavourable behavior towards any person, bearing negative consequences as a result of undertaking certain activities for protection against discrimination (has reported discrimination, initiated a procedure for discrimination and witnessed during the procedure).

Article 11

The disabling and limitation of the use of goods and services by any person or group of persons on any basis stipulated in Article 5 item 3 of this law represents discrimination.

Article 12

More severe forms of discrimination according to this law shall be discrimination towards a certain person on several discriminatory bases (multiple discrimination), discrimination performed several times (repeated discrimination), discrimination performed for a prolonged time (prolonged discrimination) or discrimination which severely strikes the discriminated person with its consequences.

III. EXCEPTIONS FROM DISCRIMINATION

Article 13

The affirmative measures adopted by state bodies, bodies of the local self-government, other bodies and organizations with public authorizations, state institutions or by natural or legal persons, shall not be deemed discrimination, which have been deemed as justified in the past, in the present or in the future, and which can be adopted until actual equality is not fully achieved:

- 1) for the benefit of any person, group of persons or community in order to eliminate or to diminish the actual inequalities, if the differencing is justified and proportionate to the aim and in order to ensure their natural development and effective exercise of their right to equal opportunities in comparison to other persons, groups of persons and communities, and
- 2) affirmative measures which aim to protection of the marginalized groups in order to eliminate or to diminish the actual inequalities, if the differencing is justified and proportionate to the aim and in order to ensure their natural development and effective exercise of their right to equal opportunities in comparison to other persons, groups of persons and communities.

Article 14

It shall not be deemed discrimination if:

- 1) the different treatment of persons which are not citizens of the Republic of Macedonia related to the rights and freedoms granted with the Constitution, with the legislation and international agreements to which the Republic of Macedonia is a party, and which directly derive from the citizenship of the Republic of Macedonia;
- 2) the different treatment of persons on the basis of characteristics related to any discriminatory ground, when the said characteristics, by the nature of the particular occupation or activity, or of the conditions in which it is carried out, constitute a genuine and determining requirement, the objective is lawful, and the requirement does not exceed the necessary level for its achievement;
- 3) the different treatment of persons on the basis of religion, belief, sex or other characteristics in relation to occupation carried out in religious institutions or organizations when, by reason of nature of the particular occupation or activity or of the conditions in which it is carried out the religion, belief, sex or other characteristics constitute a genuine and determining requirement, when the objective is lawful, and the requirement does not exceed necessary level for its achievement

- 4) the different treatment of the persons on the basis of religion, belief, sex or other characteristics in relation to education and training for the purposes of the carrying out of the occupation connected to certain religion;
- 5) if the participants or bodies of churches and religious communities, civil organizations, political parties, trade unions and other organizations registered and in line with the Constitution and legislation, shall act according to their own doctrine, beliefs and/or objectives set up in their statutes, programmes and/or regulations;
- 6) setting the marriage, illegitimate community and family exclusively as heterosexual community, i.e. of one man and one woman;
- 7) achievement of the principle of freedom of speech, public performance, opinion and public informing granted with the Constitution;
- 8) setting up requirements for minimum age, professional experience or length of service in the requirement procedures or in granting certain job-related benefits, when this is objectively justified for achieving a lawful objective, and the contents of this differentiation do not exceed the required level for achieving the objective and
- 9) setting up requirements for maximum age in recruitment procedures, which is connected to the need for training or to the needs of rational time limitations related to the retirement provided for in the law, when this is objectively justified for achieving lawful objective, and the contents of this differentiation do not exceed the required level for achieving the objective.

Article 15

It shall not be deemed discrimination if:

- 1) the special protection of pregnant women and mothers, stipulated by law, except when the pregnant woman or mother does not wish to use this protection and has notified the employer for the same in written form;
- 2) the measures provided for in the Law on Employment Promotion;
- 3) the different treatment of persons with disabilities during training and acquiring education to the effect of satisfying special educational needs aiming at equalization of the opportunities;
- 4) setting up requirements for minimum and maximum age for access to certain levels of training and education, when the same is objectively justified for achieving lawful objective, and the contents of this differentiation do not exceed the required level having regard to the nature of the training or education or the conditions in which the same are conducted and the contents of this differentiation do not exceed the required level for achieving the objective;
- 5) the measures aimed to providing balance in the participation of the men and women until these measures are required;
- 6) special measures which benefit the persons or the groups in less favourable situation result on any discriminatory basis in order to equalization of their opportunities, until these measures are required;
- 7) special protection, stipulated by law, of children without parents, minors, single parents and persons with disabilities;
- 8) measures for protection of originality and identity of the persons belonging to ethnic, religious and language minorities and their right to sustain and develop, individually or jointly, their own identity together with other members in their group and to stimulate conditions for promotion of that identity and
- 9) measures in the field of the education and the training which should provide participation of the persons from ethnic minorities until these measures are required.

2. Term and definitions of Strategic litigation of cases of discrimination on the ground of sexual orientation.

This document intends to determine the structural parts of the term strategic litigation of cases of discrimination on the ground of sexual orientation in the system of "doing justice" or the judicial system of the Republic of Macedonia.

Guided by this purpose, the text shall reflect on a series of basic terms referring to and being used in strategic litigation, as well as the basic legal documents (international and domestic) which are the foundation of the process or are related to it in any way.

The text shall also define the basic entities who are accountable or should be accountable to lead or participate in the strategic litigation process, NGOs and lawyers who develop legal cases that lead to progress in the protection against discrimination on the ground of sexual orientation of the individuals, as well as the basic criteria, techniques for selection of cases and prioritization of the goals to be achieved in the process.

The text shall end with a series of recommendations as an additions to the results of the suggestions herein, their socialization or training of various relevant target groups, organizations and individuals, due to practical implementation and capacity building.

2.1 DEFINITIONS SIGNIFICANT TO THE LITIGATION PROCESS

We shall start with a series of important definitions of the basic terms used in the litigation process: Strategic litigation and this text should serve as instruments for help and encouragement to the lawyers and NGOs, to think of and develop a practice for recognizing, selecting and legally developing cases of discrimination on the ground of sexual orientation.

Litigation may not always be the best concrete tool for combating discrimination, but a good litigation strategy will complement other strategies for combating, such as: campaigns, lobbying, human rights education and public mobilization.

STRATEGIC LITIGATION (SL) or impact-litigation is a method or technique using the legal (particularly the judicial) system of the country to create legal cases whose resolution (or establishment) shall have a broader influence for positive changes in the fight and awareness-raising against discrimination on the grounds of sexual orientation. The selected cases which shall be supported by the methods of strategic litigation should cause a broader impact in public, rather than the mere resolution of the individual case of the victim of discrimination.

The central focus of strategic litigation is causing positive changes in LAW or political reform, rather than resolving a certain case of discrimination (even though both may be goals). SL comprises techniques and methods of case selection, as well as planning and management, in order for the cases to be successfully developed and lead to the end.

As such, SL is an instrument in the field of public interest, with which the NGOs cause changes in public policies or promote the rights of vulnerable groups.

2.2 HOW DOES STRATEGIC LITIGATION REACH ITS GOALS?

With strategic litigation, the organization tries to create a **legal case** (precedent) via creating effective and implementing law in a legally well-founded and potent case, for a positive decision in a court procedure.

In the legal system, the creation of such a case may be a result of:

- interpretation of existing laws
- initiating changes in those laws.

A third situation is also possible, in which there is a reference to an international judicial instance (European Court of Human Rights or the Luxembourg Court of the EU) as a comparative benchmark, with whose practice the Macedonian legislation must be aligned.

Even when litigation has low chances of legal success, the organizations decide to continue with it, because this enables them to:

- point out problems with the rule of law in the country;
- use the case to raise awareness and degree of education regarding everyday discrimination in certain areas;
- document discriminatory practices;
- call upon the Government for accountability regarding tolerance of such practices in given areas;
- change public priorities and place rights of vulnerable people in the public focus.

2.3 HOW DO NGOs DECIDE ON THEIR PRIORITIES REGARDING LITIGATION?

During the creation of their own litigation strategy, NGOs can be lead by various priorities and goals. In theory, there are several types:

- SL oriented toward the CLIENT or the victim of discrimination (client-oriented);
- SL oriented by the financing centres and their demands (and competition with other NGOs for donor funding);
- SL preoccupied with the philosophy and values of the fight against discrimination (emphasized "idealistic" SL, or policy-oriented SL.

In all three different inspirations, the NGO creating the SL must do a prior elementary analysis of the relevance and possible influence of the selected and developed legal case. The selected case often creates advantages and problems for the organization. It may create serious legal and political effects and public effects (assisted by the media), in order to encourage marginalized social groups to fight and create pressure against the political elites and thus make changes in the legal system (especially if there is an epilogue in international courts). However, on the other hand, the litigated case (which shall probably happen with court cases for discrimination on the ground of sexual orientation and the entire complex of protecting LGBTI rights) not always has the majority of the public support. It will need to be pushed forward, and contrary to majority beliefs, even with open opposition, which influences the courts. This opposition might reach the level of a dark anti-campaign. The organization must be prepared for such a scenario with the public and must find a real case and client for support, as well as true partners among the media.

It is a particularly difficult situation in countries where the judiciary is not independent or there is weak legal protection of rights (as is in the Republic of Macedonia), where litigation will often fail to achieve the desired effects. In such cases, several techniques should be combined, ones of coordinated fight and pressure, and the organization should prepare them on time, simultaneously with the litigation process.

2.4. PLANNING THE LITIGATION

Planning the litigation process should cover viewpoints and assessments, as well as preparation for encountering several important circumstances and facts:

First, it should be assessed whether the selected case has a chance of success via litigation and in which legal forum shall it be litigated, i.e. will the goal be achieved with the litigation process;

Second, there should be an assessment of the influence of the case if successful, and which areas will be influenced the most;

Third, an assessment of the perception and reception of the case and the fight by the public (community perception) and the possible opposition by the public (public hostility);

Fourth, there needs to be a plan on collecting evidence for the case and the problems on that path (this is a very important operation which can often be rather complicated);

Fifth, an assessment of the legal awareness among discrimination victims regarding what had happened to them and whether they are ready to "go till the end" (a path that can sometimes be difficult for the victim);

Sixth, an assessment of the dangers of "revenge" and counter-pressure of the system against the organization or victim and prepare a strategy for public positioning in those cases (where above all, cooperation with the media is necessary);

Seventh, the financing sources should be assessed if the litigation is being prolonged;

Eighth, an assessment of actions in situations when the judges and prosecutors (lawyers) have insufficient education and practice to stand up to the challenge of delicate cases of discrimination on the ground of sexual orientation (even when they are willing to do so). In such cases, some trainings or international seminars (as well as translations of judicial practice and verdicts), experts may be offered to be engaged for assistance.

Ninth, a plan - what to do in cases of inefficient sanctions or implementation of positive verdicts? That is when a verdict is reached and there is an attempt for the case to be forgotten! In such cases, the organization should plan monitoring for the execution of sanctions and pressure of the authorities during the execution. Once again, the public and the media should "be made friends" in the process.

2.5. CASE SELECTION

The good selection of a legal case to be developed and processed is important, because it sets the basis for the success of reaching the goals with the litigation, their maximum efficiency and use as a pressure tool.

The first selection criteria is **efficiency**. Namely, the organization must make efforts to focus available resources on a case having the greatest change of success, and to do so with an internal allocation of its own functionality and efficiency in case management. This principle is also important for the justification of expenditures before the donors.

Second, selection based on transparent criteria enables the organization to respond why it had rejected some offered cases, to maintain a reputation of righteousness and transparency in decision-making. Such selection often contains assessments and decisions regarding values, which is important for the objectives of the organization.

2.5.1. CRITERIA FOR CONCRETE CASE SELECTION

These criteria are developed due to consideration and identification of legal gaps or flaws in existing laws - which should be attacked and emphasized with the given case. Furthermore, they should accentuate the existence of bad practices or abuse of laws by the state organs during implementation of the laws.

The third dimension of the criteria is a well-balanced case of a victim of discrimination from the aspect of success of the goals of the litigation.

First, criteria related to the legal system:

- Existing laws are not being implemented or are being implemented badly and with difficulty;
- There is no alignment with international standards and court practice for the case;
- Bad judicial precedents in the field of the case;

- Selection of the Law(s) on the basis of which the procedure will be lead, as well as an assessment of the court procedure, practice and appeal practice;
- Assessment of possible existing and ongoing cases in the field of this case;
- Collecting judicial practice from regional courts and relevant international tribunals;
- Selection and assessment of criminal or civil procedures for the fight of the case. This should be done in particular, because both have advantages and faults. For example, the criminal procedure requires a higher standard of proof, the chances for success are smaller due to the low bottom line for the prosecution, while the punishment is stricter and clearer, while the procedure is shorter etc., while in civil procedures, the lawyer of the victim has greater control over the case, compensations for the victim are lesser, the standard of proof is lower, while the problems are: the expenses for the procedure are high, the threats against the defendant are low, the procedure might be prolonged etc.

Second, criteria related to the social context:

- Is there visible corruption in the judicial system and political interference in the decisions of the courts (are they independent);
- What is the practice of the state administration in the cases of discrimination (particularly the work of the "independent" body for combating discrimination);
- Risks for the organization regarding the litigation of sensitive cases (risk assessment and psychological readiness for combating);
- Assessments related to the expenses and duration of the process.

Third, criteria related to selecting the client (victim) and the case:

- The selection of personal circumstances of the client (victim) is important for the success of the litigation process, because it depends on the capability of the client to take risks, withstand the process and appear convincingly before the court. Their level of education would enable them to understand the process and build relations of trust with the lawyers and NGOs. Moreover, the personal history of the client is also important, in particular the aspects of previous incidents, processes lead, victimization, whether they have been a victim of hate crimes etc. This may help in court, but it may also be an obstacle, if the client is obsessed and seeking revenge etc.

The personal circumstances of the client are also important: are they employed, are they able to contribute themselves in financing the process; do they have a family that supports them; type of support they may or may not get from the environment; whether a success in court would influence his future life and in what manner (sometimes, a successful case can destroy the personal life of the client due to the public, reactions etc.).

Assistants in the case should analyze the situation - whether it is applicable to file a joint lawsuit, instead of an individual case, and how will this reflect to the goals of the advocacy.

Briefly said, the client should choose: from the aspect of the essence of relevant legislation (which is intended to be amended with the effects of the case); the procedural needs of the case (especially the quality of evidence which can be provided) and the potential for social influence.

2.6. CASE STRATEGY AND MANAGEMENT

The NGO legal team for the case must agree on a strategy for instructions for the client and an agenda of steps to be prepared and realized during the process, when started. This strategy is essential also for

establishing an example for the judicial practice, as well as receive a positive score in public, in reference to the case.

First, the strategic matter of the NGO and the expert team is the manner of alignment of the client's goals in the case with the broader goals the NGO intends to reach with the case. It may occur that the road to achieving those broader changes is damaging to the possibility of the client to renew his personal life after the case is completed. This should be explained to the client in the preparational process and afterwards, the role of the client and the NGO in key decision-making for the process should be agreed upon, in regard to determining what will be done, how and when).

In the strategy for processing the case, the following questions should be answered:

- Who are the potential supporters of the case, who might help the client and how;
- How determined are the opponents, how determined is the government to oppose, how important is this case in relation to its policies;
- Are there any other alternatives, or might they appear, and can they be used during the process;
- What are the strengths and weaknesses of the case;
- Is the court procedure being lead with experiences or is it new in the situation of the client and his case;
- What are the political consequences following from winning or losing the case, etc.

2.6.1 FURTHER STRATEGIES

Additional litigation strategies involve work of the organization with: the media; public support campaigns; working on receiving international support; involving government agencies in the case (Commission for protection against discrimination) etc.

It is particularly important that the litigation process receives support in the form of expert opinions of famous and prominent intellectuals and experts in the field of human rights, which would refer to that specific case. Additional AMICI CURIAE are important if coming from organizations or are persons who can influence the court and the public. It would be useful if the NGO starts networking for this case with other NGOs and receive support from them.

It is also important, if possible, to finance research in the field the case is about (this is what our text specifically is), which help in identifying an entire series of questions important for the case. However, what is key for the litigation process is to take a position in public media, as well as public support. A part of that fight for the public also comprises lobbying among the politicians for receiving support in a specific way, on the locations of public debate (Parliament and ministries).

There is a separate strategy for the fight to receive support by the community from which is the client. It is being examined from the aspect of benefits from a successful case, as well as how to mobilize it for public support (of their community member).

2.7 POST-LITIGATION IMPLEMENTATION

The success of the litigation process is certainly dependent on the success of the case in court. There are cases when even an unsuccessful court epilogue has had a social and legislative post-festum success, if the litigation was well and aggressively promoted in public and made a "scandal". The case, even if unsuccessful in court, has still changed the perception of the public and shortly after had an effect of change of certain legal solutions and in public relations toward victims of discrimination from the community to which the client belongs. However, there is nothing more successful than a success of the case itself and therefore victory in

court has a significant impact on the overall success. Still, not entirely and not always. First, there might be resistance to the realization of the verdict and an attempt to "forget" the case. This is why the NGO must build a mini-strategy for monitoring the implementation of the verdict and maintain relations to field organizations for full implementation of the case results.

Promotion of the case in the media is always necessary and useful.

3. HOW TO WRITE A SUBMISSION FOR A CASE IN COURT PROCEDURE

The person who believes their rights have been violated by discrimination is authorized to file a submission before the relevant court in line with the Law on legal proceedings, and in regard to the provisions from the Law in the field of the discrimination committed.

The procedure is urgent.

The petitum of the submission contains the following demands:

- To determine that the defendant has violated the right to equal treatment of the plaintiff, by undertaking or not undertaking actions which have lead or may have lead to violation of the right to equality;
- **To prohibit further discrimination or to eliminate the consequences of the committed discrimination;**
- **To compensate the material and non-material damages;**
- **To publish the verdict in the media.**

The burden of proof falls on the defendant.

When a party in a court procedure claims that their right of equal treatment has been violated, they are obliged to present facts which make their claim credible.

*This means that the victim only needs to present facts from which it may be **presumed that there has been discrimination**. In accordance with European anti-discrimination Directives, in civil procedures **the burden of proof falls on the defendant, and in criminal procedures, on the plaintiff** (it is not clearly defined how this institute of proof is treated in administrative procedures).*

Joint submission against discrimination

Associations and foundations, facilities or other civil society organizations, which have a justified interest or work with the collective interests of a certain group may file a submission and stand as co-litigants in the court procedure. The petitum may demand that discrimination against the entire group is recognized, same as in the case of a single person. Accordance by the discriminated person is necessary.

Criterion „3+1“

This criterium helps in the analysis of the factual state: whether there is direct discrimination based on which the protection from discriminatory behavior and consequences should be planned.

1. Need to portray a less favorable treatment, outcome, consequence

I wasn't given the job because (they presumed that) I'm gay;

I get paid less due to the same reason;

I couldn't enter the bar last night due to the same reason;

The insurance company refused to sign an agreement with me due to the same reason.

2. Elements of the 3+1 criterium

There is a need to find a comparator: another person in a similar situation, but with a different, usually dominant or majority basis.

This is not needed in cases of harassment, victimization, instruction for discrimination or lack of reasonable accommodation.

I'm a lesbian, and she is not.

I'm a lesbian, he is heterosexual.

I am Roma and homosexual, he is a Macedonian and heterosexual, etc.

3. There is a possibility to use a comparator from the past or a hypothetical comparator, or to compare treatment in reference to an ideal minimum of standards for treatment.

A previous employee who received a higher salary for the same position.

In cases when there is a comparator in the case of a similar employer, and not the defendant employer, then the comparator may be constructed (fabricated) as the carrier of a standard treatment (the way the employee should be treated).

For example: No one should be treated like that, without respect and human dignity etc.

3.1. Elements that should be comprised in every complaint for discrimination

Who did it?

What did they do?

To whom?

When?

Where?

How?

What is the result of that action?

Who is responsible for that action?

Anyone who saw it, heard it or who can testify?

Are there documents, statistics, expert opinions in favor of proving the claim?

What is the protected ground of the victim: race or ethnicity, age, special needs, sexual orientation, religion or belief?

Is it true, alleged, associated, multiple?

Who is the comparable person or group with which the treatment received by the victim may be compared?

Discrimination may be determined with insight into the ideal minimum standards of treatment, for example, behavior with respect toward human dignity and pride.

Is the case within the frame of (European) anti-discrimination law and national anti-discrimination law?

4. WHAT ARE THE MACEDONIAN CONSIDERATIONS AND EXPERIENCES FOR LITIGATION IN CASES OF DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION?

The experiences with discrimination on the grounds of sexual orientation in Macedonia are ignorant, tragic, moderate and full of prejudices, hate and violence.⁶

⁶ See particularly in the Reports of the Helsinki Committee in Macedonia, Shadow Report on the implementation of the Council of Europe Recommendation CM/Rec(2010)5, etc.

There is no specific legislation for protection of the rights of transgender people, and sexual orientation is only included in a few laws.⁷ It is not listed as a ground for discrimination - directly, and the courts and the Commission for protection against discrimination do not consider or apply it as a ground, neither indirectly nor as implied (even though they are obliged to, in line to European legislation in this area) in the Law for prevention and protection against discrimination.

The Reports of the Commission for protection against discrimination there is no data on cases of discrimination on this ground.⁸

In the practice of the Republic of Macedonia, there is an institutional obstruction of the visibility of discrimination on the grounds of sexual orientation. It is being spread, by government and pro-government media services and encourages spreading hate and hate speech toward LGBTI people. There have been and there are even more hate crimes, i.e. attacks against people participating on LGBTI events (there are some procedures on this ground but with incorrectly determined legal grounds for the attacks) and the LGBTI Support Centre is being demolished for who knows what time in a row (while there are no cases of attacks on the Centre that have been solved).

The SL project we are working on comes at a very significant time, i.e. before the establishment of a legal practice in the area of discrimination on the grounds of sexual orientation, and therefore is a pioneer, with significant obligations and expectations.

This material should be a basis for future assessments and decisions regarding processing cases of violation of rights of LGBTI people in Macedonia and therefore any prediction of outcomes would be inappropriate, however, I cannot be forbidden from making a few remarks.

I believe that urgent decisions should include processing of the cases of violence against LGBTI people, and especially violence being indirectly mediated by the passiveness of the state organs in the phase of disclosure and prosecution. The case of demolition and arson on the LGBTI Support Centre is an evident example of a case that should be processed with an accent to the aggravating circumstances and hate toward the LGBTI people, from whom it had been "inspired", and the passiveness of the police as well as the system of ignoring, implemented by the Government.

There should also be a selection and processing of a case of violence toward an activist, participant on an LGBTI event (public protest, gathering, Pride), with an accent to the aggravating circumstances (and not as in the processed case of "obstruction of a public gathering") of the violence against a member of a vulnerable population, LGBTI.

Dr. Ljubomir Frckoski, PhD

⁷1. Law on public health (Official Gazette of the RM, No. 22 from 15 February 2010) in the part on activities of the centres and Institute for public health, article 16; 2. Law on higher education (Official Gazette of the RM, No. 35 from 14 March 2008) in the part for procedures and conditions for enrollment into studies, article 108; 3. Law on protection of patients' rights (Official Gazette of the RM, No. 82 from 8 July 2008) in the part for patients' rights, article 5; 4. Law on family (Official Gazette of the RM, No. 157/08 from 12 December 2008), in the part for victims of human trafficking and their families, article 177-1; 5. Law on establishment of a National Agency for European educational programs and mobility (Official Gazette of the RM, No. 133 from 20 September 2008) in the part for the program Youth in Action, articles 7 and 8; 6. Law on labor relations (Official Gazette of the RM, No. 158 from 9 December 2010), article 6 prohibits discrimination on the grounds of sexual "inclination", which may be considered discriminatory, due to only referring to the sexual act, and not all aspects of sexual orientation (emotional, romantic, spiritual etc.).

⁸ See the response of the Commission for protection against discrimination to the letter by MHC regarding discrimination on the grounds of sexual orientation. In the response, the Commission states that there have been 7 complaints on this ground, 7 of which have been processed, and in one it had determined harassment which had been eliminated upon reaction by the Commission, and in another case, that there has been discrimination which had also been removed upon reaction by the Commission, while it did not find discrimination in three cases.

5. ANNEX

Cases of discrimination on the grounds of sexual orientation and gender identity in practice in Macedonian society

Excerpted materials:

the experience and reports of the LGBTI Support Centre, the Helsinki Committee for human rights of the Republic of Macedonia, the Coalition "Sexual and health rights of the marginalized communities", EGAL and the Network against discrimination.

In the last 5 years in the Republic of Macedonia, three NGOs recorded 20 cases of violations of the rights of LGBTI people.

The number of violations of the rights of LGBTI people in the Republic of Macedonia is much larger than the one documented, both in the institutions and the civil sector. This is due to the fear of the victims from exposure, lack of trust in the institutions, but also due to not recognizing discrimination by the victims themselves.

In practice, the civil sector documents cases which mostly stay in the archive, due to the lack of motivation of the victims to undertake any measures. What is symptomatic is that victims often quit due to bad police treatment or hospital treatment, after the disclosure of the motive for the violent act, while most victims do not believe in the capability of the institutions for recognizing discrimination on the grounds of sexual orientation and gender identity. The disclosure of their story, even before the institutions, is a danger of public condemnation, negative behavior and unequal treatment due to the disclosure of identity. Furthermore, what is also a frequent reason for not initiating a procedure, is the lack of readiness to spend their limited resources for a procedure which is highly unlikely to yield any positive results.

Most frequently, individual cases documented in the civil sector refer to domestic violence and discrimination on the grounds of sexual orientation and gender identity. Many of the documented cases may point to problems in regard to the lack of rule of law in the RM and the insufficient knowledge by the professionals working in the institutions, regarding the seriousness of discrimination on the grounds of sexual orientation and gender identity. Still, these cases mostly remain documented and without progress.

Due to the lack of legal regulation which concretely and exclusively prohibits discrimination on the grounds of sexual orientation and gender identity in the RM, NGOs practice strategic litigation in order to succeed in introducing these grounds under the existing grounds of "marginalized groups" and "all other grounds" in the Law on prevention and protection against discrimination, which would be an example for all relevant institutions in regard to their obligation to recognize these grounds, or initiate legal changes in that respect.

In the Republic of Macedonia, strategic litigation may be used for reaching a positive verdict and setting example for recognizing discrimination on the grounds of sexual orientation in existing legislation. Criminal charges and complaints sent to the Primary Public Prosecution and the Commission for protection against discrimination by the civil sector, refer to the verdicts of the European Court of human rights, which our courts are obliged to consider, because Macedonia ratified the European Convention on Human Rights, which obliges the country to adhere to it, being a document interpreted by the European Court as an international instance established for that purpose.

What would benefit our cause and encourage positive practice with the current legislation is the following:

- The Public Prosecution should prosecute the perpetrators of the crime Violation of equality from Article 137 of the Criminal Code, for a crime committed on the grounds of sexual orientation and gender identity, combining these grounds under the term "personal trait".
- The Commission for protection against discrimination should determine discrimination on the grounds of sexual orientation and gender identity, which would mean recognition of these grounds in the open list of Article 3 from the Law on prevention and protection against discrimination. This would facilitate the work of the courts and there would be an established practice of recognition of these grounds.
- A positive court decision recognizing discrimination on the grounds of sexual orientation and gender identity.

This practice would help fill the legislative gaps of concrete listing of the grounds, but it would also strengthen the rule of law, via facilitation of the interpretation of the legal norms, which would encourage other institutions to consider discrimination on these grounds.

Until now, the public prosecution has not recognized sexual orientation as a ground in the Criminal Code, nor has there been a positive court decision for discrimination on the grounds of sexual orientation and gender identity. The Commission for protection against discrimination has only determined discrimination on the ground of sexual orientation in one case (see 1.1), however, in two other similar cases the Commission did not find discrimination, which shows the selective approach and the insecurity of this "independent" body.

One of the greatest problems regarding institutional processing of discrimination on the grounds of sexual orientation and gender identity is the lack of information and capacity of the professionals regarding these topics, but even if certain individuals are found, who recognize such discrimination, the current government's homophobic policies are too pressuring, therefore there cannot be positive decisions in this field. Still, incomplete legislation is also not facilitating the situation.

If strategic litigation is used to initiate legal changes due to improvement and facilitation of the access to justice of LGBTI victims, the following is priority:

- Sexual orientation and gender identity should be entered as separate grounds for discrimination in the Criminal Code, the Law on prevention and protection against discrimination and certain laws which prohibit discrimination in various areas.
- Sexual orientation and gender identity should be entered in the Criminal Code as grounds for crimes / hate crimes and hate speech, and as grounds for aggravating circumstances during the determination of punishment by the court.
- The term "sexual inclination" in the Law on labor relations should be replaced with "sexual orientation", and gender identity should be added as a ground for discrimination.
- Article 94-b, paragraph 3 of the Law on family should be amended in a way aiming to provide same-sex couples with equal protection against domestic violence.
- Determination of procedures for legal gender recognition without asking for evidence of performed sex reassignment surgery.

Further in this document, we shall present several examples from the few cases which had entered a procedure regarding discrimination on the grounds of sexual orientation, from which we would be able to draw conclusions in regard to strategic litigation.

1. Cases - discrimination on the grounds of sexual orientation

First, we will present two cases of discrimination on the grounds of sexual orientation and one case showing social pressure on this topic.

1.1. Case „Pedagogy “:

In this case, the Commission for protection against discrimination found discrimination on the grounds of sexual orientation for the first time, in reference to a textbook with discriminatory content. Of course, this is a positive decision in the practice of the Commission. However, there were complaints, apart from the Pedagogy

textbook, also for Criminalistic psychology, Psychology (childhood, adulthood and gender), Psychiatry (tome 1 and 2) and Medical psychology, in which the text was in the same conotation, i.e. discriminatory and offensive for an entire group of citizens. The Commission has so far decided on Criminalistic Psychology, finding no discrimination, on the contrary, stated that the text is a reflection of the author's scientific viewpoint. There has been no decision for the other textbooks. The inconsistency regarding decision-making leaves room for insecurity, which makes one positive decision meaningless.

What is concerning is the implementation of the Commission's recommendation to the Ministry of Education, regarding the text from the Pedagogy textbook. Certain parts of the text were revised, but the topic of homosexuality was practically removed from the context of love, sexuality and "sexual determinations". On the other hand, other discriminatory parts of the textbook remained in the revised version. This once again degrades the relevance of the positive decision of the Commission, which determined discrimination on the grounds of sexual orientation.

Details of the case

On 18.4.2011, the Coalition "Sexual and health rights of the marginalized communities", submitted a complaint to the Commission for protection against discrimination, against the authors of the textbook "Pedagogy" (for year 3 of secondary school), and against the Ministry of Education and Science, because the authors had written and published the book, and the Ministry had allowed a textbook discriminating people with homosexual orientation to be used in schools.

On 19.5.2011, the Commission adopted an "Opinion", stating that it is relevant to process cases of discrimination on the grounds of sexual orientation and that the disputed contents of the textbook are "harrassing, causing humiliation, violation of the dignity of a group of people, deriving from a discriminatory ground, and is executed by the Ministry of Education and Science and the authors of the textbook, Dr. Marija Kostova, PhD, Dr. Aneta Barakoska, and Eli Makazlieva, MD".

Furthermore, the Commission stated that "the textbooks must not contain text stigmatizing a certain group of people" and that "the contents of the books must not be directed toward human rights violations".

Also, the Commission adopted a mandatory recommendation for the Ministry of Education and Science, for revising the contents of the textbook "Pedagogy", specifically, the "perversions of sex life", i.e. "in the part of homosexuality and lesbianis, page 203, and also that the revised content must not contain elements of harassment on discriminatory grounds".⁹

However, this recommendation was only partially implemented. The textbook was revised in a way that removed "homosexuality and lesbianism" from the section "Sexual determinations".

Moreover, the textbook still contains the discriminatory definition of love. It continues to be treated as "longing for a certain person of the opposite sex" (page 200), and on the matter of sexual intercourse, the possibility of intercourse with a person of the same sex is excluded: "Why does a young person have sexual intercourse with another person of the opposite sex?" (page 201). The authors did not consider the recommendation by the Commission that "the textbooks must not contain text stigmatizing a certain group of people".

1.1.1. Case: The authors of the textbook "Pedagogy" pressed criminal charges against Irena Cvetkovic - an activist from the Coalition.

in Macedonia, the LGBTI topic is at the bottom of any public or institutional support. Government policies are homophobic, while the public is full of prejudices, regarding anyone who does not fit the concept of heteronormativity, while most media are completely uninterested in breaking the dogmas generally present in regard to this group of people.

This case is a classic example of a reaction toward criticism of homophobia, which is present in every segment of our society. These conditions significantly impede strategic litigation of cases of discrimination on the grounds of sexual orientation and gender identity. The statement of Prim. Dr. Slavica Gajdzis Knezevic is

⁹ Coalition "Sexual and health rights of the marginalized communities", 2011, Report on sexual and health rights of the marginalized communities, (<http://coalition.org.mk/wp-content/uploads/2012/04/izvestaj.pdf>)

most likely the best description of the pressure faced by those who dared to point out discrimination on the grounds of sexual orientation:

"The hypocrisy of education is also shown in the case of Irena Cvetkovic, because she was the first to loudly state in the media that there are homophobic schoolbooks, and as a result, she was sued by the authors and luckily, won the process, but look at the establishment of "a court above the court", because later she was banned from entering the academic community, which means that the academic community has built its own judicial mechanism. Maybe there are false factors here, because I don't believe that those who voted against, even though she has all qualifications for the position, I don't believe that they don't know that homosexuality is not a disease."¹⁰

Details of the case:

The authors of the "Pedagogy" textbook initiated a criminal procedure for insult and defamation against Irena Cvetkovic, human rights activist in the Coalition "Sexual and health rights of the marginalized communities" (hereinafter: the Coalition), due to her published statements and columns, where she criticized the homophobic contents of the textbook.

The Coalition stood up in defense of the accused, considering the lawsuit as an attempt to silence public criticism of homophobic textbooks, which generate and support inequality, intolerance, injustice and violence. During the trial, human rights activists supported the activist, via statements in the media, columns in newspapers and electronic media.

The Coalition also organized a peaceful protest in front of the First Instance Court Skopje 1, on 2.2.2011, against homophobia in education and for the protection of critical thoughts and human rights activists. The Coalition welcomed the verdict, which stated that the activist was not guilty of the charges for insult and defamation, explaining that she was affirming the need for combating homophobia.

However, even though she was free from the charges, Cvetkovic was not free from the discriminatory treatment in the process of selection of an assistant at the Institute for gender studies at the Faculty of Philosophy in Skopje (the same faculty where some of her plaintiffs work).

Without questioning her professional qualifications and expert recommendations, Cvetkovic did not win sufficient votes to be selected as an assistant (which is a precedent). There are serious indications that most of the professors (lead by the Dean), had acted in solidarity with the authors of the textbook, even though they had been explicitly pointed by the Commission for protection against discrimination as people who have harassed and humiliated, as well as violated the dignity of a group of people, which derives from a discriminatory ground.¹¹

1.2. Case "Apartment"

Unfortunately, due to a number of reasons, there is no procedure for this case, however it is an example of everyday life in Macedonia and the manner of discriminating LGBTI people and activists who work for human rights and equality.

Details of the case:

The civil association EGAL - Equality for gays and lesbians, works on improving sexual and reproductive health of the gay and lesbian population. During their operation, there was a need for new business premises, due to which they concluded an agreement with the owner of an apartment they had chosen. During agreeing on the details for renting the apartment, the Community of apartment owners of that building directly opposed EGAL to be a part of the building community.

¹⁰ Coalition "Sexual and health rights of the marginalized communities", 2012, NO to homophobia in education, video, <http://www.youtube.com/watch?v=tNXImKNbg-w>

¹¹ "Cvetkovic was not selected, with no votes against her. Only about ten members of the Council voted "for", and all others had refrained. This, according to the words of the Dean, Mr. Ajdinski, was probably a sign of solidarity with professors from the faculty, who had sued Cvetkovic for insult and defamation, for her column criticizing their textbook. The professors lost the court dispute, and their textbook was withdrawn." Media statement of the Dean, Ajdinski, as found on: <http://www.makdenes.org/content/article/24348874.html>

Namely, EGAL negotiated with Mr. P. K., owner of the apartment. After short negotiations, both sides agreed that the apartment will be rented, and the association started to prepare to move in.

However, the problem arised when the association received a letter from the President of the Community of apartment owners of that building, stating that the Communnity is bothered by the focus of operation of the Association. The Community had entirely discriminated the association, the entire LGBTI community and other marginalized groups, by stating that they do not agree to share premises with LGBT people, people with AIDS, which allegedly are also drug users. There was no room for EGAL in that building, due to caring for their own health, as well as the health and socialization of the residents' children.

As a result, and under great pressure of possible further discrimination of the employees of the organization and its target group members, EGAL gave up the apartment and terminated the rent agreement.

Due to the aforementioned facts, there was direct discrimination on the grounds of sexual orientation and health condition, of an entire group of citizens. The Community of apartment owners has no legitimate right to interfere in the rent agreement, because every owner is free to decide on the use of their own premises. All citizens are equal before the Constitution and laws of the Republic of Macedonia, and in this case, their rights, and the rights of people from the target groups, have been resticted and violated.

2. Hate-motivated incidents on the grounds of sexual orientation and gender identity

What is most concerning are hate crimes and threats against LGBTI people and activists which continue to occur throughout a longer period of time, as well as the passiveness of the institutions regarding those cases.

Starting from multiple attacks on the LGBTI Support Centre, the attack on the guests in the Centre during the "Pride Week", the attacks in Bitola and Skopje against activists fighting for LGBTI rights, homophobic threats on social networks, the beating of two boys in the centre of Skopje, including the attack on the home of the actor who publicly spoke of his sexual orientation, it is scary but realistic to conclude that this trend has not concerned the state institutions at all.

We continue with an overview of the attacks on the LGBTI Support Centre.

2.1. Cases "Attacks on the LGBTI Support Centre"

Four out of five attacks on the Centre are still under investigation. there has been a whole year since the first attack on the Centre, and there is no response on whether the authorities had taken measures to apprehend the perpetrators and initiated a procedure to bring them to justice. The only case of attack on the Centre where the institutions reacted was tha attack from the 2nd of March 2013. That is the only case when the Centre was attacked "along the way", while the same mob caused more damage during the inter-ethnic demonstrations happening that day on several locations.

The First Instance Court Skopje 1 ruled that the attackers of the Centre are guilty for the crime of "participating in a mob committing a criminal act". During deciding on the amount and length of the punishment, the court took in consideration the aggravating circumstances for hate crimes on the grounds of national or social origin, political and religious beliefs, sex, race, skin color, while avoiding to recognize and include sexual orientation and gender identity as a motive for the crime.

As a result of the institutional silence regarding the other attacks on the Centre, the Network for protection against discrimination pressed criminal charges to the Primary Public Prosecution in Skopje, on 08.10.2013. The charges are against unknown perpetrators due to existence of reasonable doubt that apart from the rest, they had also committed the crimes of "Violence", "Racial and other discrimination", "Violation of the equality of citizens", as well as "Causing general danger".¹²

The Public Prosecution has an opportunity to make a positive change and investigate the cases of violence and hate crimes, while taking in consideration the verdict of the court regarding the aggravating circumstances during deciding on the verdict. For this purpose, other useful documents are the decisions of the European Court of Human Rights, which clearly state that "sexual orientation, as a fundamental trait of a

¹²Network for protection against discrimination, Public announcement, Skopje, 17.10.2013, as on: <http://lgbti.mk/Home/Post/ddbdfaaa-b076-4a52-bb1f-8cf2a0e00845#.UpYslcSkolQ>

person, should be treated the same as the categories of race, ethnicity and religion, which are mostly covered by laws sanctioning hate speech and hate violence“.

The attacks caused great danger for the lives and bodies of the people present in the Centre, a violation of equality of the citizens and discrimination (on the grounds of sexual orientation and gender identity). As a result, the personal and moral integrity, the dignity and reputation of LGBTI people were violated.

Details on the attacks

On the opening day of the LGBTI Support Centre, 23.10.2012, the event was peaceful, but only a few hours after its end, several masked people attacked the Centre, and their identities remained undisclosed. The window glass at the entrance of the Centre was broken, which caused pecuniary damage which disabled the operation of the Centre for a few days. The information spread throughout the media, while the institutions were silent and did not condemn the attack.¹³

On 17.12.2012 there was another attack on the Centre, an unsuccessful arson attempt. A swastika was drawn on the front shutter, as well as the word "Tremiti" (an archipelago where Nazis extradited homosexuals during World War 2). The attack was reported to the police and is being processed. The institutions are silent.¹⁴

On 02.03.2013, there were organized protests caused by inter-ethnic tension. While one of the groups was protesting, it demolished and burned a bus, and caused material damage in the municipality of Chair in Skopje. Later it continued demolishing throughout the Old Bazaar and also attacked the Centre. The glass was broken and some of the equipment was damaged.

When determined that the group that committed multiple crimes will be brought to court, MHC sent an official request to the First Instance Court in Skopje, to monitor the trial. During the trial, the video recording from the Centre's security cameras was presented as evidence. Our monitoring person informed the judge that the recording was given to the police by MHC, as evidence for the attack on the Centre. Our monitoring person asked that MHC is called into the process as a damaged party. The judge agreed and MHC had an opportunity to ask questions and ask for compensation of damages. During the final arguments, MHC proposed that Article 39 paragraph 5 is taken into consideration (aggravating circumstances in a crime), during the determination of the sentence. During the announcement of the verdict, it was stated that the proposal of MHC has been accepted. Seven defendants received suspended sentences. MHC continued sending requests for information to police stations and offices of the Public Prosecution, in order to either confirm that there was indeed a hate crime or if there has been a scheduled hearing in cases in which the perpetrators had been caught.

On the 20th of June 2013, 2 days before the start of the Pride Week, there was a substantial increase in homophobic statements containing hate speech and open calls for violence on the social networks and several national web portals. Later that day, most web-portals withdrew the articles containing lots of hate speech and open calls for violence, but the Helsinki Committee, via its subsidiary - the LGBTI Support Centre, still demanded increase police presence in the entire Old Bazaar, during the activities which were part of the Pride Week.

On the 22nd of June 2013, at around 18:00, the Pride Week started with a promotion of a Handbook on health rights of trans people, a debate and film projection on the topic of trans people. Apart from the employees of the Centre, there were 35-40 other coworkers and guests, present in the Centre during the attack.

¹³ LGBTI Support Centre, 2012, Quarterly report on the rights of LGBTI people in the Republic of Macedonia, October - December, as on: <http://lgbti.mk/uploads/06913cac-f415-49eb-a0fd-3ee19244f37e.pdf>

¹⁴ LGBTI Support Centre, 2012, Quarterly report on the rights of LGBTI people in the Republic of Macedonia, October - December, as on: <http://lgbti.mk/uploads/06913cac-f415-49eb-a0fd-3ee19244f37e.pdf>

As a response to our request, the police sent 8-10 police officers from the Unit for security, assistance and rendition from the Ministry of Interior. The officers were not equipped with any special protective, nor tactical equipment.

In 18:25, a group of around 40 people quickly ran by the Centre, coming from the west side. They were masked and armed with stones, glass bottles, metal pipes and pyrotechnical materials. At that time, there were seven people on the ground floor of the Centre - one guest, one police officer (who was performing activities related to the safety of the Centre), and five employees (the other guests were on the top floor).

The results of the attack were the following: one person with light injuries, one police officer with light injuries, broken window, fear in the sub-conscious of an entire community and not even one arrested perpetrator.

However, the most concerning part was not the attack itself, but the reaction of the police to it. Above all, the officers were not appropriately equipped, hence, when the attack occurred, they had no other choice but to run away.¹⁵

On the 5th of July 2013, there was another attack on the Centre. This time, the perpetrators were hidden in the darkness of the night, climbed on the roof of the Centre's building, removed the upper layer of roof tiles, poured some kind of flammable liquid on the wooden boards beneath and set the roof on fire. The material damage was much higher than the previous attack, but this time, at least the attack happened when they were no people in the Centre and it was closed.

Once again, what is most concerning was not the attack itself, but the fact that it occurred only a few hours after prominent representatives of the diplomatic core visited the Centre and expressed their support in the condemnation of anti-LGBTI violence.¹⁶

¹⁵ LGBTI Support Centre, 2013, Bimonthly report on the rights of LGBTI people in the RM, May-june, as on: <http://lgbti.mk/uploads/79fdbb63-978c-4838-9797-a5b2fed7b063.pdf>

¹⁶ LGBTI Support Centre, 2013, Bimonthly report on the rights of LGBTI people in the RM, July-August, as on: <http://lgbti.mk/uploads/0e50b007-b4bf-459b-8382-c439504fa192.pdf>

About the Helsinki Committee for human rights of the Republic of Macedonia

www.mhc.org.mk

The Helsinki Committee for Human Rights of the Republic of Macedonia (MHC) is a non-governmental organization for human rights promotion and protection, without any political and religious orientation. The goal of MHC is protection and promotion of human rights and freedoms guaranteed by the Constitution of the Republic of Macedonia and international instruments for civil, political, social economic and cultural rights and the Helsinki Final Act from 1975; building democratic conditions in which one can practice those rights on the basis of the rule of law.

The MHC monitors the situation of the human rights, provides legal assistance & counseling to the citizens in cases of violation or restriction of the rights and freedoms, and cooperates with other organizations and state authorities in the direction of increasing the promotion, protection and respect for the human rights and freedoms.

The vision of the MHC is that all people should have a possibility to exercise their basic human rights and freedoms, and a possibility to protect them in cases of violation or restriction thereof. This represents a foundation for democratic development, and a guarantee for peace at national, regional and world level.

About the LGBTI Support Centre

www.lgbti.mk

The mission of the LGBTI Support Centre is strengthening the LGBTI community for self-advocacy, as well as changing the social and legal status of LGBTI people in the Republic of Macedonia.

The vision of the LGBTI Support Centre is a society free from discrimination, in which all people enjoy universal human rights and freedoms, regardless of their sexual orientation, gender identity or any other trait.

Why we exist

- To support LGBTI people
- To strengthen the LGBTI community
- To eradicate stereotypes and prejudice in our society
- To change the social and legal status of LGBTI people in Macedonia
- To increase the visibility of the LGBTI community
- To resist the patriarchal and heteronormative concepts
- To sensitize relevant institutions and the general public
- To strengthen the self-advocacy capacities of the LGBTI community
- To achieve promotion, protection and respect of the rights of LGBTI people
- To monitor existing legislation, its implementation and practice
- To monitor the media
- To build networks of organizations, informal groups and activists on national and international level