A litmus test for post-Maidan democracy

Anti-discrimination legislation

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The political discourse on LGBT rights has shifted in Ukraine after the Maidan and as a result of the conflict with Russia, which aggressively promotes "traditional values". However, writes Maria Teteriuk, the efficacy of recent legal reform concerning LGBT rights, introduced as part of the visa-free deal with the EU, remains to be seen.

In order to conclude a Visa Liberalization Agreement with the European Union in 2013, Ukraine had to approve comprehensive anti-discrimination legislation, including the explicit prohibition of discrimination on the grounds of sexual orientation. However, LGBT people were granted no legal protection against discrimination under either the pre-Maidan Azarov government in 2013, or the new post-Maidan government at the beginning of 2014. This was due to the resistance of certain parliamentary parties and the coordinated lobbying efforts of churches and grassroots movements of the religious Right. In November 2015, under the pressure of the European Commission and civil protests, discrimination at work on the basis of sexual orientation was finally prohibited. The protests united LGBT activists with ordinary citizens, which may serve as an indicator of the gradual undermining of the conservative consensus on LGBT rights in Ukraine established during Victor Yanukovych’s rule. But it was two years after Euromaidan that this development first became possible.

Political struggles over LGBT rights before Euromaidan

Attitudes towards homosexuality have contributed to a cultural divide between western European countries, that is, the first EU member states, and the eastern European countries that joined the EU later. Insufficient human rights implementation, and the weakness of democratic institutions in eastern Europe resulting from the Soviet era, complicated the EU enlargement project. In Ukraine, LGBT rights were for a long time a stumbling block in political negotiations with the EU. Homonegativity in Ukraine is present not only on the level of public attitudes (reflected in social surveys and statistics
of hate crimes against LGBT people), but also on the level of political discourse and the legislative process. The majority of Ukrainian politicians either avoid raising their voice on this issue or support the discourse on traditional values that supposedly distinguish Ukraine from Europe.

During the period from 2011 to 2013, several “anti-propaganda” bills (nos. 8711, 10290 and 10729) were proposed in the Ukrainian parliament. The most notorious opponent of the “propaganda of homosexuality” was Vadym Kolesnichenko, a former MP from Crimea who is today a member of Russian national-conservative party “Rodina”. However, it is worth noting that members of all factions of the seventh session of Ukrainian parliament contributed to the creation of such anti-propaganda initiatives. These initiatives were never put to the vote, due to criticism from international bodies, such as the United Nations, the EU and human rights organizations. However, due to the media resonance, the term “propaganda of homosexuality” became a commonplace in political and public discourses. At the same time, similar “anti-propaganda” bills were debated and approved in Russia.

In 2013, a bill in support of LGBT rights appeared for the first time on public agenda in Ukraine. There is a long story behind its emergence. In 2010, the Visa Liberalization Action Plan for Ukraine was developed, which required several changes in Ukrainian legislation in order to lift visa requirements for Ukrainian citizens when traveling to the EU. The Plan included a requirement that Ukrainian anti-discrimination legislation be aligned with European standards. During the next five years, EU experts conveyed these European standards in the form of lists of concrete legislative norms, which were part of the annual progress reports assessing Ukraine’s fulfilment of visa-free regime requirements. Among other legal norms repeatedly mentioned in the annual progress reports (a large portion of which were accepted during these years) was a requirement to explicitly prohibit discrimination on the grounds of sexual orientation, as secured by the European Council Directive 2000/78/EC on equal treatment in the sphere of employment. [1]

Also, the protection of LGBT people from discrimination was among the requirements for the Association Agreement, which was debated at the same time as visa liberalization. The text of the Association Agreement does not contain any explicit references to LGBT rights, but Annex XL to Chapter 21 “Cooperation on employment, social policy and equal opportunities” states that the Directive 2000/78/EC on equal treatment shall be implemented within four years of the entry into force of the Association Agreement. [2]

Some EU countries prohibit discrimination on the grounds of sexual orientation in a much broader range of social spheres (such as education and access to goods and services), though this approach has yet to be incorporated into the Directives of the European Council. A proposed Council Directive on implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age or sexual orientation, in a wider range of social fields has been debated in the European Parliament since 2008 but never approved. [3] Therefore, equal treatment in employment alone remains the minimum EU legal standard that Ukraine should have adopted.

The Azarov government consistently avoided reforming anti-discrimination legislation. Instead it approved a visa liberalization strategy that did not have any legal force. Since
this imitation did not satisfy European experts, the Ministry of Justice finally developed bill no. 2342, which among other required changes to anti-discrimination legislation did prohibit discrimination on the basis of sexual orientation. The bill was submitted to parliament at the beginning of 2013, at the behest of Mykola Azarov.

The bill immediately surfaced at the centre of a political struggle between supporters and opponents of Ukraine’s integration with Europe. It contained a long list of amendments to anti-discrimination legislation concerning all citizens, such as the definition of discrimination and types of discrimination, as well as the related specification of norms in court proceedings and court appellation. Yet opponents of LGBT rights reduced the public discussion of the bill to the issue of the rights of “sexual minorities”. Opposition to 2342 appeared to be even stronger than antagonisms surrounding European integration: it united otherwise irreconcilable opponents such as the Communist Party and the nationalist party Svoboda. The pro-government Party of Regions appeared to find itself in a contradictory situation: on the one hand it should have supported the government in its decision to build stronger ties with the EU through signing the Association and Visa Liberalization Agreements, on the other, the political and economic interests of a large group of deputies within the party were tied to Russia and the Eurasian Customs Union project. Thus Party of Regions leader Oleksandr Yefremov announced that each deputy would vote on the issue independently, even though he personally did not deem the bill to pose a threat, since it had been “fully cleansed”. [4] The other two parliamentary parties, which together with Svoboda formed an oppositional camp, hesitated. The media spread rumours that Udar, led by Vitali Klitschko, was ready to support the bill, and the party’s website published several supportive statements about it. Bat’kivshchyna, led by Yulia Tymoshenko, kept silent on the issue.

One of the important factors that lead to the failure of bill no. 2342 was the massive lobbying campaign organized by churches, [5] as well as religious and pro-Russian grassroots organizations supported by the pro-Russian section of the Party of Regions and the Communist Party. The lobbyists initiated protest actions in several regions of Ukraine. The largest and most successful one was held before the parliament building in May 2013. Under the pressure of this action, the bill was never even voted upon. The NGO “Ukrains’kyj Vybir” lead by the pro-Russian politician Viktor Medvedchuk sponsored a public advertisement campaign in Kyiv that associated Europe with same-sex marriages. [6] The lobbyists also sent overwhelming numbers of letters and official appeals to parliamentarians and members of government, in which they demanded that 2342 be dismissed. Governmental bodies received so many letters from opponents of “homodictatorship” that this subject regularly received a special mention in official statistics on appeals during 2013. [7] It was also prominently represented in the media. All the major TV channels ran stories on the protests of “Christian activists” and even “indignant citizens” that were held in front of the parliament building; popular online news media also regularly covered related conservative actions.

After half a year of mutual public accusations blocking political association and a visa-free agreement with the EU, pro-government and opposition parliamentary parties reached consensus: they would not approve bill no. 2342, but they would ask the Constitutional Court to explain how existing Ukrainian laws already prohibited discrimination on all grounds, including sexual orientation. This proposal had already
been finalized by July 2013, several months before Victor Yanukovych suddenly changed his mind and expressed his preference for the Eurasian Customs Union with Russia.

In November 2013, arguments against bill no. 2342 developed by pro-Russian grassroots movements were used by the political establishment as a catchy explanation for the wider public as to why Yanukovych had turned to the Eurasian Customs Union. At an anti-Maidan meeting, the formal author of bill no. 2342, prime minister Mykola Azarov, hypocritically complained about the EU forcing Ukraine to legalize gay marriages - though he should have known the content and legal consequences of the bill better than anyone else. [8]

Heated debates during 2013 created an environment conducive to the use of sexual orientation as a bogey in political struggles. Moreover, accusations about homosexuality (the so-called “black and blue PR”) were already commonplace as acts of political defamation in Ukraine since the 1990s. Most Ukrainian politicians, regardless of party affiliation and political views, learned that it was in their best interests to react to the term “sexual orientation” with ritual statements concerning their personal heterosexuality and their support for traditional Christian and family values. Only a few members of parliament openly supported bill no. 2342. The most notorious were Iryna Herashchenko from Udar and Iryna Berezhna from Party of Regions.

Meanwhile, in the Russian Federation, “the protection of traditional values”, which includes denying homosexual people full citizenship, has turned into a kind of state ideology that provides the wider public with a simple and easily intelligible justification for Vladimir Putin’s opposition to “the West”. At the geopolitical level, it provides a cornerstone of the new messianic idea of saving humanity from modern European degeneracy. [9] Within Russia, the declared protection of “traditional values” masks the absence of real state support for families and children, and constitutes an effective instrument for citizens’ inurement to the state’s total intrusion into their lives and the private sphere. [10] In this context, the initially formal requirement to amend Ukrainian anti-discrimination legislation became bound up with the larger geopolitical confrontation between the Russian Federation and the liberal democracies of Europe and the United States, in which Russia used the ideology of “traditional values”, among other instruments, to ensure that Ukraine remained within its sphere of influence.

However, no explanation of the massive opposition to anti-discrimination amendments in 2013 can be reduced to the actions of the pro-Russian lobby, since it united pro-European actors as well. Moreover, Russian ideological influence cannot explain the challenges that anti-discrimination legislation faced after Euromaidan, when pro-European political actors formed the government and parliamentary majority, and Ukraine’s “European choice” became a normative topos in public discourse.

**Post-Maidan controversies over anti-discrimination legislation**

In May 2014, the Ukrainian parliament approved bill no. 4581, proposed by the temporary pro-European government, which largely reproduced the content of bill no. 2342 – except for the prohibition of discrimination on the basis of sexual orientation. In the same month, the High Specialized Court of Ukraine for Civil and Criminal Cases sent
a letter to appeal courts, explaining that the open-ended lists of prohibited grounds for discrimination in employment found in the Constitution of Ukraine, in the “Law of Ukraine on Principles of Prevention and Combating Discrimination”, and in the Labour Code imply that sexual orientation is one of the “other grounds” on which discrimination is prohibited. The public controversy over the issue had already calmed down, since public attention was fully focussed on Euromaidan, the subsequent annexation of Crimea, and the founding of (unrecognized) “peoples republics” in Luhansk and Donetsk in eastern Ukraine.

Though comprehensive anti-discrimination legislation had not been introduced, Ukraine officially entered the second phase of the Visa Liberalization Action Plan in June 2014 [11] upon the recommendation of the European Commission – endorsed by the European Council. It is worth noting that Moldova [12] and Georgia, [13] which were also preparing to conclude visa liberalization agreements with the EU at the same time, introduced legislation explicitly prohibiting discrimination on the grounds of sexual orientation, despite similar resistance from the church and conservative politicians.

During the next two years, political discourse on LGBT rights gradually changed. Due to the war with Russia, identification with “Europe” increased in Ukraine, and the promotion of “traditional values” discourse became highly problematic. As a result, by the beginning of 2016, no homonegative legal initiatives were submitted to the new parliament. Religious right and pro-Russian organizations vanished from the Ukrainian public sphere after Euromaidan, a fact often explained by Russia ceasing to fund them. Such pro-Russian organizations as “Narodnyj Sobor” and “Ukrajins’kyj Vubir” moved to the so-called “people’s republics” of Luhansk and Donetsk. Street protests by “defenders of traditional family values” no longer occurred. The official website of the Christian fundamentalist organization “Love against Homosexualism” (LPG) was hardly updated at all in summer 2015, whereas during the campaign against bill no. 2342, articles about the horrors of “Euro-Sodom” were published almost daily. In lieu of religious right and pro-Russians opponents, nationalist far-right organizations campaigned against LGBT rights. Kyiv Pride 2013 prompted a counteraction by priests and senior orthodox fundamentalists donning icons and crosses; [14] Kyiv Pride 2015 was attacked by young members of the paramilitary organization “Right Sector” and the battalion “Sich” [15] with a homemade bomb.

The level of homophobia in the public statements of political actors also decreased, particularly because most visible opponents of the “propaganda of homosexuality” left for Russia. Kyiv Pride 2015 was a significant marker of change in political and media discourses on LGBT rights. In an official statement before Pride, president Petro Poroshenko emphasized that the right to peaceful assembly is the constitutional right of every citizen. (It is worth noting that former president Victor Yanukovych never made supportive statements on LGBT rights). Two parliamentary deputies from the pro-presidential faction “Block of Petro Poroshenko” – Svitlana Zalishchuk and Serhij Leshchenko – participated in the Pride. Also, Pride gained support in the media: prominent public persons (artists, journalists, politicians) took part in a social media campaign, [16] and media coverage of Pride 2015 was friendlier than in 2013.

Besides the organization of Pride, the political activities of LGBT rights organizations were mostly focused on lobbying for LGBT rights in legislative bodies. In 2014,
representatives of LGBT rights organizations joined the working group on human and civil rights and freedoms of the Constitutional Committee. They proposed introducing the prohibition of discrimination on the basis of sexual orientation into the Constitution, but failed due to the opposition of the churches. LGBT and human rights organizations were also involved in developing the National Action Plan for Human Rights [17] that was adopted in November 2015. The Action Plan included a number of policy reforms to protect the rights of the LGBT community, including the legalization of same-sex partnerships. The inclusion of these reforms in the Action Plan may not automatically guarantee their realization, but it does indicate how the political climate is changing for the better. That said, the issue of LGBT rights was absent from the public agenda until the end of 2015, when the question of prohibiting discrimination against LGBT people was raised once again in relation to the visa liberalization process.

In November 2015, the European Commission was set to conduct its annual evaluation of Ukraine’s progress in fulfilling the terms of the Visa Liberalization Action Plan. Parliament was in a rush to accept all the legislation required by the previous year’s report with a view to securing a visa-free regime in 2017. The Commission’s fifth annual progress report (2014) stated that the prohibition of discrimination on the basis of sexual orientation should be included in the Labour Code. However, the required amendment did not appear in the final version of a new Labour Code submitted to parliament at the end of 2014. And there was no hope of parliament accepting the new Labour Code by mid-November. So the anti-discrimination amendment, later named bill no. 3442, was introduced to the old Labour Code, with the guarantee that it would be transferred to the new one as soon as parliament had approved it.

Unlike bill no. 2342, the anti-discrimination amendment of 2015 protected transgender rights as well. In 2013, the Ministry of Justice had ignored the suggestions of LGBT organizations and not included gender identity in bill no. 2342’s list of possible grounds for discrimination. In ensuing discussions of the bill, LGBT organizations rarely criticized this decision (probably thinking that advocacy of sexual orientation alone would be difficult enough). In 2015, transgender rights received more attention elsewhere too. The above-mentioned National Action Plan for Human Rights created in 2015 included provisions for the development of a new procedure of sex correction for transgender people and for granting transgender people permission to adopt children.

However, the anti-discrimination amendment of 2015 was not approved when first put to the vote by deputy Iryna Herashchenko (Block of Petro Poroshenko). In the new parliament, the previous opponents of LGBT rights, Svoboda and the Communist Party, gave way to Samopomich, the Radical Party of Oleh Liashko, and the Oppositional Block (formed by former members of Party of Regions). The Oppositional Block applied the strategy of pro-Russian actors using LGBT rights to discredit European integration. Samopomich, initially reliant on a religious electorate from western Ukraine, insisted on another formulation of the amendment suggested by the All-Ukrainian Council of Churches: “discrimination on the grounds of attitudes towards sexual relations”, which could easily have been used by homophobes to protect their “right” to direct hate speech at LGBT people, as an expression of a certain “attitude towards sexual relations”. Oleh Liashko’s Radical Party, despite being part of the ruling coalition, opposed the president, arguing that bill no. 3442 distracted attention away from more important issues. Members of this party are also known for their homophobic statements.
There are several possible explanations for the difficulties experienced in approving the anti-discrimination amendment in 2015: 1) tensions between the pro-presidential party and other factions of parliament; 2) attempts to detract public attention from other bills required for a visa-free regime and association with the EU (e.g. anti-corruption bills); 3) the personal homonegativity of parliamentarians; 4) parliamentarians’ fear losing the homophobic electorate. These four explanations are not mutually exclusive.

Unlike in 2013, LGBT rights organizations were able to organize public protest in support of the anti-discrimination amendment. Moreover, the protest united LGBT rights activists with “ordinary citizens”, who came to the parliament building to demand the approval of bills required for a visa-free regime. Under the pressure of both protests and EU officials, the bill was accepted on 12 November 2015. The sixth progress report [18] concluded that the benchmark on citizen rights and protection of minorities had been fulfilled.

Winding roads of change

Though the approval of measures to protect LGBT people from discrimination may seem like a happy ending, there are still few grounds for optimism concerning LGBT rights in Ukraine for the coming decade. Given that bill no. 3442 was accepted under external pressure, there might be difficulties with its implementation. As the experience of other eastern European countries shows, legal reforms in the field of LGBT rights often lead to conservative backlashes in sexual policies and public discourse. Indeed, in Ukraine, the speaker of the parliament, Volodymyr Hrojsman, made an ominous public announcement the very next day after the bill was passed. He proposed creating the post of Commissioner for family and family values, claiming that same-sex marriages will never become possible in Ukraine. [19] Finally, tensions between LGBT and other civil activists during protests in support of visa liberalization indicated that the LGBT movement remains a marginal political player, which is not really welcomed even in liberal circles. Nonetheless, the approval of bill no. 3342 and the related public discussions reflect the overall weakening of the conservative consensus on LGBT rights in Ukraine.

In this process, political discourse in Ukraine seems to lag behind changes in the public’s perception of LGBT rights. For homonegative arguments and rhetorical strategies developed in Ukraine before Euromaidan are so deeply rooted in the political discourse. In 2013, conservative parliamentarians overtly speculated on homophobic attitudes among the Ukrainian population as a reason to oppose the anti-discrimination amendment. In 2015, deputies who voted for bill no. 3442 felt obliged to provide public excuses for the “sin” enacted in the name of European integration. [20]

Indeed, the notion of a high level of homonegativity in Ukraine is supported by the surveys. A number of those who do not agree that gays and lesbians should have equal rights with heterosexual people increased from 34 per cent in 2002 to 49 per cent in 2011. [21] In the most recent survey, conducted in 2013, 59 per cent supported the statement that “homosexuality should not be accepted in the society”. [22]

However, homonegativity does not necessarily mean opposition to prohibiting discrimination, especially if it is necessary to do so for a visa-free regime. In 2014, another survey focused precisely on attitudes to the prohibition of discrimination,
revealing that only about 35 per cent were against it and nearly 35 per cent were in favour; the remainder gave no opinion on the issue. [23] Thus, the construct of a “homophobic majority” that will not accept anti-discrimination laws reflects the personal attitudes of politicians rather than dominant opinion in the wider society. It does not take into account the high level of support for European integration.

Ukraine has now passed the litmus test for democracy and prohibited discrimination on the basis of sexual orientation – because the issue was related to the broader political situation and conflict with Russia. Thus, political change on LGBT rights became possible despite the persistence of a high level of homonegativity. Overall, the case of anti-discrimination legislation in Ukraine again shows that processes of social development are never linear. As well as changes in personal behaviour, changes in political regimes may occur for the “wrong” reasons (e.g., not because the civil equality of LGBT people is considered to be important, but because visa liberalization with the EU is highly valued). Resistance is not simply the antonym of domination. Both are more than capable of emerging in the same system of power relations, and may be enacted by the very same people.

Footnotes

1. eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML


4. Oleksandr Yefremov on 3 September 2013, Party of Regions, youtube.com/watch?v=2M6zzXq9eAU (in Russian)

5. All three major Ukrainian churches (the Orthodox Church of Kyiv Patriarchy, the Orthodox Church of Moscow Patriarchy and the Greek Catholic Church) and the All-Ukrainian Council of Churches and Religious Organizations publicly opposed the bill and demanded its dismissal during meetings with parliament and government representatives.


14. youtube.com/watch?v=ahoC7p-N4R8

15. "Militionery zhyvum shchytom prykryly hej-parad vid provokatoriv z bytkamy" ["Policemen protected Gay Pride from provocateurs with bats with a living shield"], Gazeta.ua, 6 June 2015, gazeta.ua/articles/life/_milicioneri-zhivim-schitom-prikrili-gejparad-vid-provokatoriv-z-bitkami/630312

16. Kolia Kamufliazh, "'Prava cheloveka vsegda ko vremeni!': Izvestnye Ukrainki i Ukraintsy rasskazali, pochemu podderzhivajut KievPrajd" ["'Human rights are always on time!': Ukrainian celebrities explain why they support Kyiv Pride"], upogau.org/ru/ourview/ourview_2325.html


19. "V. Hroisman vustupaje za vprovadzhennia v Uriadi posady upovnovazhennoho z pytan' simji i simejnykh tsinnostej" ["V. Hrojsman advocates the introduction of a governmental position of Commissioner for the family and family values"], www.rada.gov.ua/news/Povidomlennya/119041.html

20. Volodymyr Arjev "I have consciously committed a sin..." www.facebook.com/volodymyr.ariev/posts/981771931885663?__mref=message_bubble (in Ukrainian)

21. "Uroven homofobii v Ukraine" ["Level of homophobia in Ukraine"], LGBT Center


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