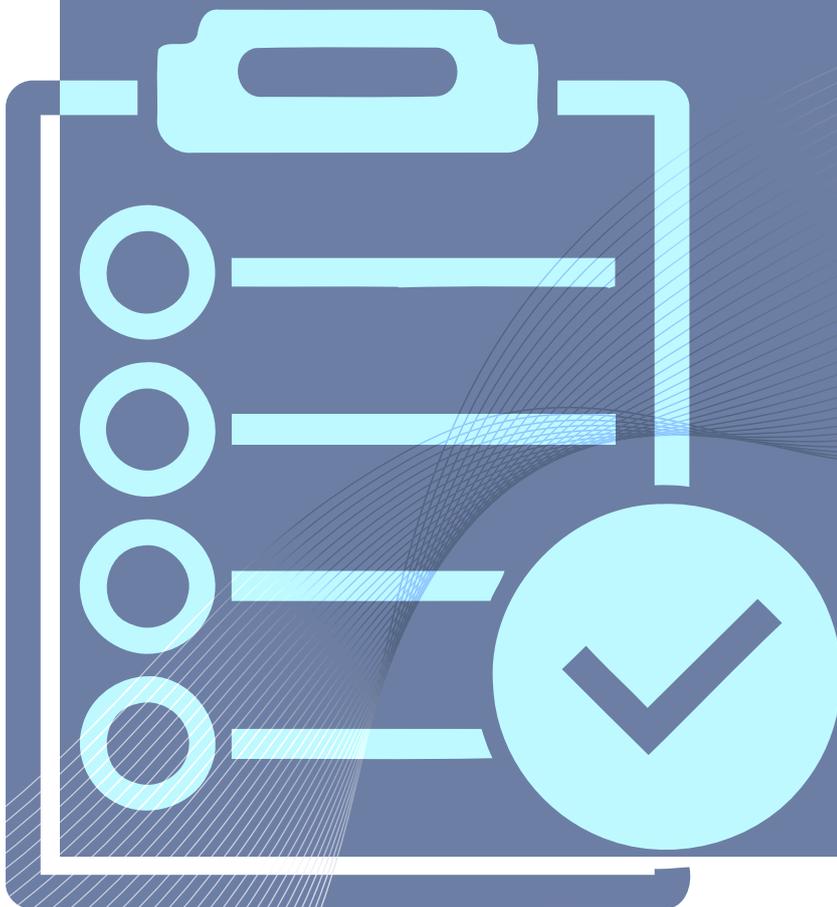


*Policy brief*

**GOALS FOR 2019-2020  
ON THE PROTECTION  
OF CERTAIN RIGHTS  
OF THE LGBTQI COMMUNITY  
AND ACCESS TO JUSTICE**



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 The LGBTQI community is one of the most marginalized social groups in Ukraine, and activities aimed at defending their rights are extremely needed and relevant today. With the country going through systemic changes and the homophobic and transphobic sentiments on the rise in Ukraine, it is particularly important to focus on specific goals that can be achieved within the next two years.

This report is important as it outlines the serious problems that LGBTQI people are facing when trying to defend their rights. The report suggests concrete and achievable goals designed to change the current situation that makes it impossible or extremely difficult for the LGBTQI community to defend their rights. If the goals proposed by this document are achieved, it will have a major effect on the defense of LGBTQI rights as well as the human rights situation in Ukraine as a whole. 

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# **GOALS FOR 2019-2020 ON THE PROTECTION OF CERTAIN RIGHTS OF THE LGBTQI COMMUNITY AND ACCESS TO JUSTICE**

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## SUMMARY

**ACCORDING** to the Commissioner of the Verkhovna Rada of Ukraine for Human Rights, «there still exists a high level of prejudice in Ukrainian society towards representatives of the LGBTI community, which manifests itself in numerous cases of discrimination, violations of the rights to personal security, respect for human dignity, freedom of speech and peaceful assembly, and also in the commission of crimes of intolerance on the grounds of sexual orientation and gender identity», which is in line with the opinions of Ukrainian and international human rights NGOs.

Although independent observers document considerably more crimes and other offenses related to homophobia and transphobia than Ukraine's National Police, according to both sources, the motive of sexual orientation and gender identity-based intolerance is among the most widespread for hate crimes in Ukraine and the most widespread among all motives of intolerance not mentioned in the current Ukrainian legislation.

The absence of sexual orientation and gender identity among the grounds on which discrimination and hate crimes are explicitly prohibited in Ukrainian criminal law is a major obstacle to effective investigation and court examination of crimes of intolerance committed on these grounds. A problem no less serious is the lack of qualifications among law enforcement officers and judges, as well as the lack of effective methodological guidelines for them in this area.

This policy brief describes existing mechanisms for legal protection of the rights of the Ukrainian LGBTQI community and the issues that arise when trying to utilize these mechanisms. Three stages were identified, during which specific obstacles arise that hinder access to justice for Ukrainian LGBTQI people: filing a crime report and initiating a criminal investigation; pre-trial investigation; examination of cases in court. Real-life examples are used to illustrate the issues that arise at each of these stages. Based on the collected and analyzed information, recommendations are given on how to overcome the identified problems and key goals are set for 2019-2020, which must be met to improve the situation:

- ✓ **GOAL 1:** UNHINDERED REPORTING  
OF CRIMES OF INTOLERANCE ON SOGI GROUNDS
- ✓ **GOAL 2:** EFFECTIVE INVESTIGATION  
OF CRIMES OF INTOLERANCE ON SOGI GROUNDS
- ✓ **GOAL 3:** EFFECTIVE COURT EXAMINATION  
OF CRIMES OF INTOLERANCE ON SOGI GROUNDS

# I. ISSUES WITH LGBTQI RIGHTS PROTECTION

A **WIDESPREAD** form of LGBTI rights violations in Ukraine is **hate crimes and incidents**. According to the definition proposed by the OSCE, hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people. Hate crimes are criminal offenses even without the motive of prejudice, so they should not be confused with **discrimination and incitement to hostility and hatred** that always have the motive of prejudice. Hate incidents are actions which are motivated by bias towards certain groups of people but do not constitute a criminal offense (such as related administrative offenses). At the same time, hate crimes can be considered an extreme form of discrimination, and incitement to hostility and hatred creates the environment for actual hate crimes and incidents, which is why all these concepts should be considered together.

The available official statistics of hate crimes and incidents based on sexual orientation and gender identity (hereinafter referred to as SOGI-related crimes) are very limited and do not reflect the real state of affairs in this area. The Main Investigations Department of the Ministry of Internal Affairs of Ukraine (hereinafter referred to as the GSU) only started recording information on possible instances of hate crimes on other grounds than the three (racial, religious and national/ethnic intolerance) mentioned in the Criminal Code of Ukraine (hereinafter referred to as the CCU) in 2016. According to the information of Ukraine's National Center Point on Hate Crimes available on the OSCE website, in 2016 Ukraine's National Police registered 13 offenses with probable motives of intolerance under SOGI, in 2017 – 17 such cases. At the same time, according to the OSCE, civil society organizations documented 67 cases of homophobic/transphobic crimes and incidents in 2016 and 110 in 2017<sup>1</sup>. 70 acts that could be interpreted as homophobic/transphobic crimes were documented by the Nash Svit in 2016<sup>2</sup>, in 2017 – 86 cases<sup>3</sup>, in 2018 – 103<sup>4</sup>. In particular, the following violations of LGBTQI rights (including hate incidents; one case could include several different types of violations) were documented in 2018:

<b>TYPE OF VIOLATIONS</b>	<b>NUMBER OF VIOLATIONS</b>
<b>insults</b> , humiliation, threats	<b>176</b>
<b>physical violence</b> of varying degree of severity	<b>93</b>
<b>illegal collection</b> , disclosure (or threat of disclosure) of confidential information	<b>38</b>
<b>extortion</b> and blackmail	<b>29</b>
<b>theft</b>	<b>16</b>
<b>attacks</b> on LGBT centers, actions or activists	<b>12</b>
<b>threatening</b> with a weapon and using it	<b>11</b>
<b>damage</b> to property	<b>7</b>
<b>interference</b> with a peaceful assembly	<b>7</b>
<b>robbery</b>	<b>6</b>
<b>sexual violence</b>	<b>2</b>
<b>kidnapping</b>	<b>2</b>
<b>torture</b> or inhuman treatment	<b>1</b>
<b>murder</b>	<b>1</b>

<sup>1</sup> <http://hatecrime.osce.org/ukraine>

<sup>2</sup> Nash Svit, New beginning. Situation of LGBT in Ukraine in 2016, p. 35, [gay.org.ua](http://gay.org.ua).

<sup>3</sup> Nash Svit, On the rise. Situation of LGBT in Ukraine in 2017, p. 32, [gay.org.ua](http://gay.org.ua).

<sup>4</sup> Nash Svit, Overcoming obstacles. Situation of LGBT in Ukraine in 2018, 2019, p. 38, [gay.org.ua](http://gay.org.ua).

According to the information from both the independent observers and Ukraine’s police provided to the OSCE, motives of intolerance under SOGI are among the most widespread for hate crimes in Ukraine and the most common among all motives of intolerance not mentioned in the current legislation (see picture below).



**The number of hate crimes/incidents committed on various grounds that were reported to the OSCE by the National Police of Ukraine and independent observers in 2017.<sup>5</sup>**

According to the annual report of the Ukrainian Parliament Human Rights Commissioner on the observance of human rights and freedoms in Ukraine in 2018, «since the beginning of 2018, the Commissioner examined 29 reports on instances of discrimination based on sexual orientation and gender identity and initiated 28 proceedings on these issues». It also states that the results of the Commissioner’s monitoring of the observance of the rights and freedoms of the LGBTI community indicate that the situation in the field of prevention and combating of discrimination based on sexual orientation and gender identity has not undergone any significant positive changes compared to past years.

There still exists a high level of prejudice in Ukrainian society towards representatives of the LGBTI community, which manifests itself in numerous cases of discrimination, violations of the rights to personal security, respect for human dignity, freedom of speech and peaceful assembly, and also in the commission of crimes of intolerance on the grounds of sexual orientation and gender identity. [...]

<sup>5</sup> See footnote 1.

The authorities' declared support for equality for representatives of the LGBTI community remains an empty claim, as they appear to be in no haste to fulfill their commitments under the Human Rights Action Plan.

In particular, among the most pressing tasks is the development of legislation that would properly address the issue of ensuring and protecting the rights of the LGBTI community and reduce the level of homophobia in Ukrainian society, which could reduce the number of manifestations of discrimination based on sexual discrimination and gender identity.»<sup>6</sup>

The Human Rights Watch in its report of the human rights situation in Ukraine said, among other things: «the year 2018 in Ukraine was characterized by numerous attacks on activists and critics of the government. [...] The government did not take enough steps to prevent these attacks and punish the perpetrators, as well as to curb the growing violence against minorities, specifically Roma and LGBT people [...] There have been dozens of instances of attacks, threats or intimidation attempts in several cities on the part of certain groups that preach violence and discrimination against minorities, in particular Roma and LGBT people. In most of such cases, the police either did not respond or failed to conduct a thorough investigation.»<sup>7</sup>

The report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Ukraine for the period between August 16 and November 15 2018 reads: «OHCHR documented five attacks against members of Lesbian Gay Bisexual Transgender Queer Intersex (LGBTQI) community throughout the reporting period. In the most brutal incident, on 6 September, an individual was stabbed during daylight hours on the main street of Kyiv city center following homophobic epithets hurled at him by perpetrators. OHCHR has been informed by victims of such attacks that police rarely (and exclusively at their or their legal counsel's motion) qualify such attacks as hate crimes, obscuring the motivation of perpetrators and protection needs of those at risk. [...] OHCHR continued documenting incidents of extreme right-wing groups disrupting peaceful assemblies. On 11 and 12 October, two consecutive LGBTQI events in Kharkiv were disrupted by members of extreme right-wing groups with physical attacks and intimidation against participants. Participants of the first event suffered non-life threatening injuries and submitted complaints to police.»<sup>8</sup>

Thus, we can conclude that hate crimes and incidents are a serious problem for the LGBTQI community in Ukraine. These crimes and incidents violate numerous LGBTQI rights and concern various areas of their lives. **Recent years have seen a rising number of attacks on LGBT activists and events and disruption of such events by ultra-right groups, which violates the right of LGBTQI people to peaceful assembly and freedom of expression.**

At the same time, complaints regarding discrimination in the context of the Law «On the Principles of Prevention and Combating of Discrimination in Ukraine» are rare. As far as we know, Ukrainian courts have issued no sentences in cases related to discrimination against LGBTQI persons.

Obviously, the absence of any legal form of recognition of same-sex couples in itself constitutes and generates discrimination against same-sex partners, but any attempts to address this problem are met with resistance from the Ukrainian society<sup>9</sup> and politicians, which means that the issue can not be resolved in the near future. In the meantime it is more realistic to deal with such issues as discrimination, incitement to hatred and hate crimes.

<sup>6</sup> Annual Report of the Ukrainian Parliament Commissioner for Human Rights on the observance and protection of human and civil rights and freedoms in Ukraine, 2018, 2019, p. 109-110, [ombudsman.gov.ua](http://ombudsman.gov.ua).

<sup>7</sup> Human Rights Watch, Ukraine: deteriorating human rights situation as the elections draw near. January 17, 2019, [hrw.org](http://hrw.org).

<sup>8</sup> Office of the United Nations High Commissioner for Human Rights, Report on the human rights situation in Ukraine, August 16 - November 15, 2018, pp. 83, 86

<sup>9</sup> See, for example, Pew Research Center, Most Central and Eastern Europeans oppose same-sex marriage, while most Western Europeans favor it, 24.10, 2018, [pewforum.org](http://pewforum.org).

## II. OBSTRUCTED ACCESS TO JUSTICE AND RECOMMENDATIONS ON HOW TO DEAL WITH THIS

### 1. SUBMITTING CRIME PORTS AND ENTERING INFORMATION IN THE UNIFIED REGISTER OF PRE-TRIAL INVESTIGATIONS

Obstruction of access to justice in cases of SOGI-related hate crimes often begins as early as the stage of talking to the police or reporting a crime. Moreover, police officers do not always conduct themselves properly and professionally. In recent years, representatives of injured parties often encounter such issues as intimidation of victims, use of homophobic vocabulary, disclosure of confidential information, refusal to provide protection or accept a crime report.

The next stage at which problems arise is entering of information about a committed offense in the Unified Register of Pre-trial Investigations (hereinafter referred to as the URPTI). Failure to enter this information in the URPTI makes it impossible to initiate a pre-trial investigation, establish the identity of the suspect, or transfer a case to a court with an indictment. In a situation like this, victims or their representatives have to turn to the investigating judge, which does not always help resolve the problem.

#### LEGISLATION

Criminal proceedings are regulated in Ukraine by the Criminal Procedural Code of Ukraine (hereinafter referred to as the CPCU). In accordance with the current legislation, general principles of criminal proceedings include: lawfulness, equality before the law and the court, respect for human dignity and access to justice.

Article 21 of the CPCU «Access to justice and binding nature of court decisions» declares the right to a fair trial and examination of one's case within reasonable time by an independent and impartial tribunal established by law; the right to take part in the court examination of any case that concerns one's rights and obligations, in the manner prescribed by this Code. Ongoing criminal proceedings may not be used as grounds to deny a person access to other legal remedies (unless otherwise specified by the CPCU), if during the criminal proceedings the person's rights guaranteed by the Constitution of Ukraine and international treaties of Ukraine have been violated.

The applicant in a criminal proceeding is a natural or legal person who has filed a petition or report regarding a criminal offense to a state body authorized to initiate a pre-trial investigation, and who is not a victim. The applicant does not necessarily get the status of victim later on but has the right to be issued an extract from the URPTI as well as information regarding the end of the pre-trial investigation.

The victim is a party to a criminal proceedings and has certain rights and obligations (Articles 55-57 of the CPCU). The victim in a criminal proceeding can be either a natural person that has suffered moral, physical or property damage as a result of a criminal offense, or a legal person that has suffered property damage as a result of a criminal offense. The person's rights and obligations arise from the moment that person files an application on the commission of a criminal offense, or a petition to involve them in the proceedings as a victim. The victim can be a person other than the applicant who has suffered as a result of a criminal offense, which made the victim file a petition to be involved in the criminal proceedings as a victim after said proceedings have already been initiated. The victim has the right to immediate acceptance and registration of the application regarding a criminal offense and to be recognized as a victim.

Information to the URPTI is entered by the investigator/prosecutor immediately and no later than 24 hours after the filing of the application or report on a criminal offense, or after the investigator/prosecutor independently learns from some source of circumstances that may indicate that a criminal offense has been committed. The investigator, prosecutor or other official authorized to admit and register applications and reports on criminal offenses must accept and register said application or report. It is not permitted to refuse to accept and register an application or crime report. An extract from the URPTI is issued to the applicant within 24 hours after the entry of such information into the register.

## EXAMPLES OF OBSTRUCTED ACCESS TO JUSTICE

### EXAMPLE 1:



*On June 7, 2018 the Chernivtsi Oblast department of the National Police received a report on the disruption of the Equality Festival in Chernivtsi scheduled for May 19, 2018 by radical groups (preliminary legal classification - part 2, Article 161 and Article 170 of the CCU). The report was registered in incoming correspondence and in the register of crime reports, but no information was entered in the URPTI.*

*On July 6, 2018, the investigating judge of the Pershotravnevyi District Court of Chernivtsi made a ruling in the case No. 725/3577/18, in which he refused to satisfy the complaint regarding the failure to enter information in the URPTI, noting that, in the opinion of the court, the circumstances described in the report were a subjective perspective of the head of the organization regarding the described events and contained no signs of a committed criminal offense within the meaning of Article 11 of the CCU.*

### EXAMPLE 2:



*On May 1, 2017 Natalya and her partner Galina went to a lake in Zhytomyr Oblast, after which they returned to the place they had been renting. There was a large group in the common yard there. One of the men asked the victim «where is your man?», to which she replied that she had none and that she was a lesbian. The man assaulted her, saying: «people like you should not be allowed to live, I'm going to kill you and bury you».*

*The police accepted the call on the third try. After they arrived, while taking Natalya's statement, the officers behaved unprofessionally, laughing at the woman. They also tried to influence the victim, mentioning that «lots of alcohol had been consumed», without giving her the opportunity to describe the actual circumstances of the incident. Later the victim went to have the signs of beating recorded and to make her statement to the investigator. Under the pressure of police officers, she signed a document where she withdrew her statement. The police did not arrest the assailant and did not even bring him to the police station. The next day the victim returned and insisted on reporting the crime. A criminal proceeding was initiated.*

### EXAMPLE 3:



*On June 13, 2018, the Dniprovskiyi department of the National Police in Kyiv received a report on a crime with signs related to Article 161 of the CCU - post on a social network with a call to hunt down activists before the Equality March. The report was registered in incoming correspondence and in the register of reports, but no information was entered in the URPTI.*

*By the decision of December 21, 2012 the investigating judge of the Dniprovskiyi District Court ordered an official of the Dniprovskiyi Police Department in Kyiv to perform actions provided for in Article 214 of the CPCU (to enter information in the URPTI upon receiving an application/report on a criminal offense). The information was entered in the register only on February 22, 2019, under part 1, Article 129 of the CCU, two months after the above-mentioned court order, which also constitutes a violation.*

Failure to enter this information in the URPTI makes it impossible to initiate a pre-trial investigation, establish the identity of the suspect, or transfer a case to a court with an indictment, and violates Article 13 of the ECHR «The right to an effective remedy.» As part of implementing Measure 1, item 109 of the Action Plan («Adoption of a protocol/instruction on the admittance of an application regarding a criminal offense, taking into account the motive of intolerance reported by the victim»), paragraph 5 was added to the Protocol on acceptance of applications regarding a committed or planned criminal offense, in which the applicant indicates the existence of the motive of intolerance. The police officer drawing up this protocol must ask the applicant if such circumstances took place, but, according to the victims, this rarely happens. Although Ukraine's Ministry of Internal Affairs does collect information on cases of probable hate crimes now, there are still no separate records for them. The statistics on them provided by the National Police are formed by searching for key words and CCU articles in the URPTI and the Unified State Register of Court Decisions.

## **GOAL 1: UNHINDERED REPORTING** OF CRIMES OF INTOLERANCE ON SOGI GROUNDS

### **RECOMMENDATIONS**

1. **Develop** a procedure/algorithm for penalizing the person responsible for belated registration, or registration of incomplete or biased information in the Register, in accordance with the current legislation.
2. **Petition** the Supreme Court to provide universal judicial practice on appeals against decisions, actions or inaction during pre-trial investigations, in regards to failure to enter information on a criminal offense in the URPTI.

## **2. PRE-TRIAL INVESTIGATION**

At present, to our knowledge, there has not been a single properly conducted pre-trial investigation and sentencing in cases on homophobic or transphobic crimes under Article 161 - the only provision of the CCU that has any relation to the motive of intolerance on SOGI grounds. Investigators and prosecutors have not yet initiated investigations under this article in cases of such crimes, and all investigations launched by the orders of investigating judges were closed and never made it to court.

Investigations of crimes with possible motives of intolerance towards the LGBTQI are often characterized by investigators ignoring such motives, even when they are openly stated by suspects themselves. Investigators ignore signs of intolerance described in protocols drawn up by the patrol police; they also either do not know how or are unwilling to look for such signs on their own. They almost always classify attacks on LGBT activists and participants of LGBT events and attempts to disrupt them as regular hooliganism (Article 296 of the CCU), without bothering to investigate their true motives and applying such articles of the CCU as 293 «Group disruption of public order» and 170 «Hindering legal activities of trade unions, political parties and civil society organizations».

### **LEGISLATION**

Currently, explicit prohibition of discrimination based on sexual orientation and gender identity is stated in Article 21 of the Labor Code of Ukraine; on the basis of sexual orientation - in Article 7 of the Law of Ukraine «On the Legal Status of Missing Persons». Implicit prohibition of discrimination on these grounds follows from the open list of grounds on which discrimination is prohibited, which is contained in Article 6 of the Law «On the Principles of Prevention and Combating of Discrimination in Ukraine». Also can be said to implicitly prohibit discrimination on SOGI grounds Article 24 of the Constitution of Ukraine («There can be no privileges or restrictions based on race, skin color, political, religious or other beliefs, gender, ethnic or social origin, property status, place of residence, language or other grounds»), as well as a number of relevant provisions in other laws of Ukraine. However, without explicit mentioning of sexual orientation and gender identity among the protected characteristics, investigators and judges are forced to decide on a case-by-case basis whether the anti-discrimination articles apply to the characteristics under consideration.

At the moment, specific punishment for discrimination is provided for only in Article 161 of the CCU «Violation of the equality of citizens based on their race, nationality, religious beliefs, disability and other grounds».

The CCU contains a number of articles that provide for more severe punishment for crimes committed on the grounds of racial, national or religious intolerance: parts 2 of Articles 115 «Premeditated murder», 121 «Intentional causing of severe bodily harm», 122 «Intentional causing of moderate bodily harm», 126 «Beating», 127 «Torture» and 129 «Threatening with murder». Par. 3, part 1, Article 67 of the CCU «Aggravating circumstances» names as such circumstances «commission of an offense on the basis of racial, national, religious hatred or enmity, or on the basis of gender identity». This allows to regard as a hate crime and impose a stricter punishment for any crime not mentioned in the above-mentioned articles of the CCU committed on the grounds of prejudice towards the characteristics of race, nationality (ethnicity) and religion, as well as gender identity. Part 4 of this article stipulates that the classified offenses (i.e. those committed with aggravating circumstances specified in the relevant articles of the CCU - such as the above-mentioned second parts of articles 115, 121, 122, 126, 127 and 129) do not fall under its scope. At the same time, part 2, Article 67 states that «the Court has the right, depending on the nature of the crime, not to recognize any of the circumstances specified in part 1 of this Article, except under the circumstances specified in paragraphs 2, 6, 6-1, 7, 9, 10, 12 as aggravating, with indication in the verdict of the reasons for this decision». Thus, even proving the motive of prejudice based on one of the four grounds listed above does not guarantee that the punishment for the perpetrator of such an offense will be stricter.

If a crime was committed with homophobic or transphobic motives, current Ukrainian legislation does not impose a stricter punishment for it and thus does not recognize it as a hate crime. At present, the only way to take into account the motives of prejudice/intolerance on the grounds of sexual orientation or gender identity is by applying Article 161 of the CCU «Violation of the equality of citizens based on their race, nationality, religious beliefs, disability and other grounds», which provides for punishment for incitement to national, racial or religious hatred (closed list of grounds), as well as for discrimination - «direct or indirect restriction of rights or establishment of direct or indirect privileges of citizens on the grounds of race, skin color, political, religious and other beliefs, gender, disability, ethnic or social origin, property status, place of residence, language or other grounds» (open list of grounds). Since the second list is an open one, Article 161 protects from discrimination in the context of SOGI, but not from incitement to hatred or insults on these grounds.

Since hate crimes can be considered an extreme form of discrimination, investigators, prosecutors and judges can, in principle, take into account the motives of prejudice (intolerance) in regards to characteristics that are explicitly protected from discrimination by Article 161, as well as other characteristics which the article provides for. However, such application of this article in cases of SOGI-related hate crimes is highly questionable from the legal standpoint.

Jurisdiction in pre-trial investigations is determined by law, and in regards to hate crimes, pre-trial investigation is carried out by investigators of the National Police. Pre-trial investigation, according to general rules, is carried out by an investigator of the pre-trial investigation body that has jurisdiction over the crime scene.

The duration of pre-trial investigation is calculated from the moment information is entered in the URPTI until the day the case is transferred to court with an indictment, or until the decision is made to close the criminal proceeding. The duration of pre-trial investigation starting with the introduction of information in the URPTI and ending on the day the suspect is served a notice of suspicion is: 6 months - in criminal proceedings regarding a criminal misdemeanor; 12 months - in criminal proceedings regarding a minor or moderate offense crime; 18 months - in criminal proceedings regarding a serious or particularly serious crime.

During a pre-trial investigation, complaints may be filed within ten days against a decision, action or inaction, and if the investigator's or prosecutor's decision is in the form of a resolution, the complaints can be filed as soon as the person receives that resolution's copy.

Criminal proceedings in the form of private prosecution are proceedings that can be initiated by the investigator or prosecutor only on the grounds of the victim's application regarding a criminal offense, specified, in particular, in part 1, Article 122 of the CCU (intentional causing of moderate bodily harm without aggravating circumstances); Article 125 (intentional causing of minor bodily harm); part 1, Article 126

(intentional striking, beating or commission of other violent acts without aggravating circumstances); part 1, Article 129 (threatening with murder without aggravating circumstances); part 1, Article 139 (failure to provide medical treatment by a medical worker without aggravating circumstances); Article 145 (unauthorized violation of doctor-patient confidentiality); part 1, Article 161 (violation of the equality of citizens on the grounds of their race, nationality or religious beliefs without aggravating circumstances).

The victim has the right to submit an application to an investigator, prosecutor or other official of the body authorized to conduct a pre-trial investigation of a criminal offense within the statute of limitations for that criminal offense.

## EXAMPLES OF OBSTRUCTED ACCESS TO JUSTICE

### EXAMPLE 1



*On May 10, 2018 an event organized by the Amnesty International was disrupted. Aggressive individuals (about 50 people) openly stated that such events (LGBT events) should not be allowed and were threatening the participants. The organizers called the police and filed a crime report with preliminary legal classification under Articles 161, 170 and 364 of the CCU, but no information was entered in the URPTI. On July 12, 2018, by the decision of the investigating judge of the Pecherskyi District Court of Kyiv, authorized officials of the Pecherskyi Police Department of Kyiv were ordered to observe the requirements of Article 214 of the CPCU. The order was carried out only on October 31, 2018, with the information having been entered in the URPTI but given preliminary legal classification under Article 356 of the CCU.*

### EXAMPLE 2



*On May 11, 2018 the Shevchenkivskyi police department in Kyiv received a report that on May 9, 2018, on the social network Telegram, the organization «Nemesis» posted information on hateful vandalism having been committed against representatives of the LGBT community, Roma, etc. The post contained images of an Amnesty International Ukraine plaque defaced with a swastika, as well as an intercom camera that was painted over. The text itself contained threats and information aimed at incitement to hatred and hostility. The information was only entered in the URPTI on July 14, 2018, following the order of the investigating judge of June 19, 2018. The investigator named Article 296 of the CCU as preliminary legal classification of the offense. The pre-trial investigation lasted 14 days, after which a resolution was issued on termination of criminal proceedings (without even having interviewed the applicant), due to the absence of signs of a criminal offense.*

### EXAMPLE 3



*On May 29, 2017 two young men kissing in a secluded area of the Hydropark - a traditional meeting place for Kyiv's gay community - were attacked by three men of about the same age. The attackers beat up and robbed the victims, shouting out homophobic insults. One of the victims had his cellphone left, which he immediately used to call the police. The patrol police acted quickly and detained the attackers on the bridge across the Dnipro.*

*One of the victims was hospitalized with multiple injuries and suspected rib fractures. That same evening, at about half past nine, two investigators from the Dniprovskyi police department in Kyiv visited the young man at the hospital to interview him. The police officers were unacceptably rude, using homophobic vocabulary and disclosing confidential information regarding the victims' sexual orientation in the presence of medical staff and other patients. In violation of the law, the investigators did not enter information on the crime in the URPTI, only doing so after an order from the investigating judge. Even though the perpetrators themselves did not hide the homophobic motive of the attack, the investigators refused to take it into account and classified the crime as regular hooliganism. Again, only after the investigating judge approved the motion of the victim's lawyer was information entered in the URPTI concerning the possible commission of a crime under Article 161 of the CCU.*

The above issues demonstrate the fundamental inability of the current Ukrainian criminal law to ensure effective investigation and punishment for crimes of intolerance on any other grounds than those directly mentioned in the CCU - race, nationality/ethnicity, religion and gender. It is obvious that these issues can only be resolved by amending the CCU with provisions given in Measure 3, item 105 of the Human Rights Action Plan: «Ensuring punishment for crimes committed on the grounds of intolerance based on race, skin color, religious beliefs, sexual orientation, transsexuality, disability, language (amendments to item 3, Article 67, second parts of Articles 115, 121, 122, 126, 127, 129, article 293)». However, many other issues of pre-trial investigations in cases of intolerance crimes can be resolved without amending the CCU.

Aside from the generally low efficiency of investigators and their frequent failure to observe procedural and ethical norms, we can also name their obvious lack of competence and their inability to investigate crimes committed on grounds of intolerance, as well as their ignorance when it comes to investigating such crimes. In accordance with Measure 2, item 109 of the Human Rights Action Plan («development and inclusion of a course on effective and proper investigation of crimes of intolerance in the training, retraining and skill advancement programs for law enforcement officers»), in 2016, representatives of the Lviv State University of Internal Affairs together with GSU developed guidelines for investigating hate crimes, designed for «department heads of pre-trial investigation bodies, investigators, personnel of operative departments, specialists as well as cadets, students and academicians of law schools»<sup>10</sup>. This document combines general recommendations of the OSCE/ODIHR regarding hate crimes with practical experience in investigating such crimes in Ukraine. Unfortunately, it has a number of shortcomings that reduce its usefulness as a methodological textbook on investigating hate crimes, particularly those related to SOGI.

For instance, although the guidelines explain that «the investigator at the initial stage of the investigation must find out with what manifestation of xenophobia he/she is dealing», after which a list of such manifestations is given (racism, ethnophobia, religious intolerance, linguistic antipathy, sexism, age or health-related intolerance, homophobia), the text essentially deals only with investigating crimes committed on the grounds of race, nationality (ethnicity) and religious beliefs. There is no mention in the guidelines of crimes committed on other intolerance grounds. Appendix 3 to these recommendations containing a list of expert institutions in the field of hate crime investigations begins with the National Expert Commission of Ukraine for the Protection of Public Morals, which had been abolished back in 2015, one year before the publication of the guidelines. Appendix 5 has mentions, in particular, of «symbols of racist, neo-Nazi, extremist and other organizations in various countries» - Poland, Italy, Russia, Croatia, Romania, Germany, Spain, Greece, Great Britain - but nowhere does it name any Ukrainian organizations of this kind.

Some practical recommendations for investigators are also dubious, such as the one regarding legal classification of violent crimes committed on the grounds of intolerance at the initial stage of pre-trial investigations. The authors of the guidelines, on the one hand, believe that such classification is only possible after «establishing the suspect in a crime, since the motive of the crime is an element of the subjective aspect of the crime, proving which is essentially impossible without a suspect/accused», and therefore, «during the investigation of crimes of this category, preliminary classification of a criminal offense under criminal law will always be as a crime against the life and health of a person without classification attributes or with classification attributes other than those known at the time of entering information in the Register». On the other hand, they also warn that «failure to enter relevant information in the URPTI regarding crimes committed on the grounds of racial, national or religious intolerance is unacceptable». Hence, the motive of intolerance is not that unobvious, yet investigators are advised to leave it out of the URPTI (which is what actually happens

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<sup>10</sup> V. Burlaka, O. Kriukov, A. Korniyenko, Ukraine, 2016.

in most cases). The text does not mention the objective signs/indicators given in the OSCE/ODIHR publications that give grounds to believe that the motive of prejudice (intolerance) existed even in the absence of identified specific perpetrators.

Anti-discrimination issues were included in seminars for judges and law enforcement officers, to the curricula of selected law schools, training, retraining and skill advancement programs for the personnel of the State Border Guard Service. The issues of hate crimes were included in training and skill advancement programs for certain categories of police officers. Nevertheless, the target audience reached by these programs and their effectiveness remains unsatisfactory. In 2018, investigating units of the main departments of the National Police in oblasts and the city of Kyiv had personnel appointed that were tasked with monitoring the state of pre-trial investigations in criminal proceedings in crimes committed on the grounds of racial, national and religious intolerance - thus, they are essentially regional coordinators on hate crime investigations.

## **GOAL 2: EFFECTIVE INVESTIGATION** OF CRIMES OF INTOLERANCE ON SOGI GROUNDS

### **RECOMMENDATIONS**

1. **Petition** the Supreme Court to provide universal judicial practice in cases on hate crimes.
2. **Improve** the existing guidelines regarding hate crimes (taking into account international standards, in particular the ODIHR recommendations for Ukraine), paying particular attention to the motive of intolerance on the grounds not currently mentioned in the CCU, specifically SOGI.
3. **Summarize** information on the systematic involvement of specific organizations and informal groups in crimes of intolerance, and create a database of these groups. Create a database of symbols used by radical groups in Ukraine (including symbols of totalitarian regimes, the use and propaganda of which is banned in Ukraine).
4. **Develop**, together with the GSU, professional guidelines that would take into account international standards, in particular, the ODIHR recommendations for Ukraine, naming hate indicators for proper classification, which would describe in detail all duties of the investigator in accordance with Article 214 of the CPCU (registration of application/report on the commission of an offense, inclusion of information in the URPTI, notification of the applicant, mandatory interview of the victim, mandatory notification of the applicant regarding the decision to stop the investigation, etc.).
5. **Ukraine's** National Police should introduce a separate statistical classification of crimes and incidents with probable motives of intolerance, to make it possible to get such statistics quickly and efficiently. Publish such statistics regularly.
6. **The GSU** should disseminate an official explanation among its personnel stating that sexual orientation and gender identity are characteristics protected from discrimination and that motives of intolerance toward them should be taken into account when investigating crimes.
7. **Amend** the Criminal Code of Ukraine as provided for in Measure 3, item 105 of the Human Rights Action Plan, as well as Article 161 of the CCU in regards to incitement to hatred on SOGI grounds.

### 3. EXAMINATION IN COURT

The law «On the Principles of Prevention and Combating of Discrimination in Ukraine» has no mention of such attributes as sexual orientation and gender identity, which complicates access to justice for victims of discrimination as well as court examination and makes it possible to sabotage amendments to laws and regulations. As mentioned above, we know of no precedent of conviction in cases on homophobic/transphobic crimes under Article 161 - the only article of the CCU that is applicable to SOGI-related crimes and punishes discrimination. Since there is no clear stance of the courts that SOGI grounds are among those «other grounds», on which discrimination is prohibited, SOGI-related crimes are given other classification.

Another issue is the disjointed stance of courts regarding applications to courts submitted by NGOs and associations on behalf of their members or other persons. Thus, the courts ignore the legal position expressed by the Constitutional Court of Ukraine in its Decision No. 12-rp/2013 of November 28, 2013, which states that NGOs can defend in court non-property and property rights of its members as well as the rights and law-protected interests of other persons that asked them for such protection, in cases when such powers are provided for in their statutory documents and if the relevant law allows the NGO to go to court on behalf of other persons.

### LEGISLATION

The Constitution of Ukraine provides that all people are free and equal in their dignity and rights. Human rights and freedoms are inalienable and immutable (Article 21); there can be no privileges or restrictions on the grounds of race, skin color, political, religious or other beliefs, gender, ethnic or social origin, property status, place of residence, language or other grounds (Article 24).

The Law of Ukraine «On Principles of Prevention and Combating of Discrimination in Ukraine» prohibits discrimination on the following grounds: race, skin color, political, religious and other beliefs, gender, age, disability, ethnic and social origin, citizenship, marital and property status, place of residence, language or **other grounds** (Article 1); a person who believes that they have been subjected to discrimination can file a report with state bodies, authorities of the Autonomous Republic of Crimea, bodies of local self-government and their officials, Commissioner of the Verkhovna Rada of Ukraine for Human Rights and/or court of law in the manner prescribed by law (Article 14); the persons found guilty of violating legislation on the prevention and combating of discrimination face civil, administrative and criminal liability (Article 16). Specific legal liability for discrimination is currently only provided for by Article 161 of the CCU.

The procedure for conducting preparatory proceedings in court is determined by Chapter 27 of the CPCU, which states that after receiving an indictment, the court schedules a preparatory hearing, during which it can be decided to return the indictment or to proceed with court examination based on the indictment. In accordance with part 2, Article 303 of the CPCU, complaints regarding decisions, actions or inaction of the investigator or prosecutor that were not considered during the pre-trial investigation should be considered during the preparatory proceedings.

De jure, victims can file a complaint with the court to reverse a change of legal classification, about which they found out during the disclosure of the case file of criminal proceedings. It is also possible to file a petition for the return of the indictment on the grounds that the investigating judge has canceled a decision to close the criminal proceedings, about which the injured party found out during the disclosure of the case file of the pre-trial investigation. De facto, the courts deny such complaints and petitions, arguing that Article 314 of the CPCU has a clear list of issues to be considered by courts during preparatory hearings and that the court is not authorized to consider these complaints and petitions. As a result, unless given proper legal classification during the pre-trial investigation, SOGI-related motives of intolerance or hatred remain neglected during trials.

The Civil Procedural Code of Ukraine (hereinafter referred to as the CiPCU) states that any person has the right to turn to court for the protection of their violated, unrecognized or challenged rights, freedoms or legitimate interests; certain bodies and persons are authorized by law to go to court on behalf of other persons or to uphold state or public interests (Article 3). The courts examine cases in accordance with the Constitution of Ukraine, the laws of Ukraine, international treaties made binding by the Verkhovna Rada of Ukraine, as well as other legal acts adopted by appropriate bodies on the basis, within the limits of authority and in the manner prescribed by the Constitution and laws of Ukraine ( Article 8). Also used in the consideration of cases as sources of law are the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols made binding by the Verkhovna Rada of Ukraine, as well as the case law of the European Court of Human Rights (Article 17 of the Law of Ukraine «On Enforcement of Court Decisions and Application of the Case Law of the European Court of Human Rights»).

According to Article 81 of the CiPCU, the burden of proof in civil cases on discrimination rests with the defendant, while the plaintiff only has to provide factual evidence that supports the existence of discrimination. Despite this, as far as we know, Ukrainian courts continue to demand that plaintiffs in such cases prove that it was on specific grounds (in particular, SOGI) that the discriminatory episode took place. Thus, especially given the lack of practical experience with such cases among most lawyers, discriminated persons are essentially deprived of the chance to defend themselves in court.

The Administrative Judicial Procedure Code of Ukraine (hereinafter referred to as the AJPCU) stipulates that any person has the right to turn to an administrative court if they believe that their rights, freedoms or legitimate interests have been violated as a result of a decision, action or inaction of a representative of the authorities (Article 5). The court uses as sources of law the Constitution and laws of Ukraine, international treaties made binding by the Verkhovna Rada of Ukraine and other legal acts adopted by appropriate bodies on the basis, within the limits of authority and in the manner prescribed by the Constitution and laws of Ukraine (Article 7). In cases concerning appeals against decisions, actions or inaction of representatives of the authorities, the administrative court checks whether they were carried out, in particular, with the observance of the principle of equality before the law and prevention of all forms of discrimination (Article 2).

Article 77 of the AJPCU establishes the burden of proof in such a way that, as a general rule, each side must prove the circumstances on which their claims and complaints are based. At the same time, in administrative cases on unlawful decisions, actions or inaction of representatives of the authorities, the task to prove the lawfulness of one's decisions, actions or inaction lies with the defendant. In cases concerning appeals against decisions, actions or inaction of representatives of the authorities, the administrative court checks whether they were carried out, in particular, with the observance of the principle of equality before the law and prevention of all forms of discrimination.

## EXAMPLES OF OBSTRUCTED ACCESS TO JUSTICE

### EXAMPLE 1



*In 2018, the Nash Svit turned to administrative court with demands to recognize as unlawful the failure of Ukraine's National Police and Ministry of Internal Affairs to take measures to implement sub-item 3 of item 105 of the Action Plan to the National Human Rights Strategy 2020 and to obligate them to fulfill their commitments. The application was denied. The case is pending examination at the court of cassation.*

*When justifying its decision, the court noted that for the claim to be satisfied, the applicant had to prove that it is their rights and law-protected interests specifically that were violated by the defendant, as well as the fact that the applicant had substantive law claims or legitimate interest, in defense of which the application had been filed. According to the court, there was no evidence of offenses committed against members of the Nash Svit, nor was there evidence of other persons asking the applicant for help.*

## EXAMPLE 2



*On March 8, 2018, in Uzhhorod, an event dedicated to the International Women's Rights Day was disrupted by a group of individuals who poured paint on the women gathered there and spread around anti-feminism leaflets, LGBT, etc. Pre-trial investigation public criminal proceedings was carried out under Articles 161, 170, 296 of the CCU. In November 2018 the victims learned that at the end of September 2018, investigators closed proceedings under articles 161 and 170 of the CCU and changed the legal classification from Article 296 to Article 125, under which the case made it to court. During the preparatory hearing, the court ignored the victims' petition to return the indictment on the grounds that the decisions to close the proceedings under Articles 161 and 170 of the CCU had been canceled, as well as the complaint against the decision to change the legal classification.*

## EXAMPLE 3



*On October 29, 2014, two young people committed arson at the «Zhovten» cinema in Kyiv during a screening of a LGBT-themed film. The building sustained significant damage. The suspects never concealed their homophobic motives, yet this was completely ignored in the course of pre-trial investigation and trial, even though it was reflected in the case file. The perpetrators' actions were classified as regular hooliganism (Article 296 of the CCU), as well as illegal possession of firearms ammunition and explosives (Article 263). The defendants received a very mild sentence: two and three years of imprisonment with a probation period of three years. The Holosiyivskyi District Court of Kyiv did not find any aggravating circumstances in the actions of the defendants.*

As already mentioned above, current Ukrainian criminal law is not equipped to deal with hate crimes committed on any grounds other than those explicitly mentioned in the CCU - «race», national/ethnic identity, religion and gender. To address this complicated problem, it is necessary to introduce appropriate amendments to the CCU. Similarly, the absence of explicit mention of sexual orientation and gender identity among the characteristics protected from discrimination in the Law of Ukraine «On the Principles of Prevention and Combating of Discrimination in Ukraine» (as well as most other Ukrainian laws) forces the courts to decide this issue on a case-by-case basis.

It should be noted that these problems were mentioned in the comment (paragraph 7) of the Council of Europe experts K. Öhlund and W. Sorgdrager even before the mentioned law was drafted (2012): «The list of grounds on which discrimination is forbidden includes «other signs», which makes it non-exhaustive. This is a good thing, However, it would be advisable to include other grounds, such as citizenship, sexual orientation, gender identity. It would provide judges with the necessary extra guidelines.» A similar provision is contained in Measure 1 of item 105 of the Human Rights Action Plan: «developing and submitting to the Cabinet of Ministers of Ukraine a draft law on amendments to the Law of Ukraine» On the Principles of Prevention and Combating of Discrimination in Ukraine», to bring in line with the legal acts of the EU the list of grounds on which discrimination is forbidden, including sexual orientation and gender identity [...] «. However, this has not been done to this day. Another way to resolve this problem without having to use legislative change could be an official explanation of this issue by the Supreme Court of Ukraine.

### GOAL 3: **EFFECTIVE COURT EXAMINATION** OF CRIMES OF INTOLERANCE ON SOGI GROUNDS

#### RECOMMENDATIONS

1. **Petition** the Supreme Court to issue guidelines on the use of SOGI grounds when considering cases, in particular those under Article 161 of the Criminal Code.
2. **Petition** the Supreme Court to issue guidelines on the use of Article 81 of the CiPCU in regards to placement of the burden of proof on the defendant in cases on discrimination.
3. **Petition** the Supreme Court to summarize the case law on civil and administrative cases concerning applications by civil society organizations submitted in the interest of protecting human rights.
4. **Develop**, approve and implement skill advancement classes on SOGI-related cases for judges and lawyers.
5. **Amend** the Criminal Code of Ukraine as provided for in Measure 3, item 105 of the Human Rights Action Plan, as well as Article 161 of the CCU in regards to incitement to hatred on SOGI grounds.