

საქართველოს ახალგაზრდა იურისტთა ასოციაცია GEORGIAN YOUNG LAWYERS' ASSOCIATION



GYLA reacts on the draft conclusion of the Human Rights and Civil Integration Committee of the Parliament in terms of the May 17 developments

[On June 18 mass media released draft conclusion of the Human Rights and Civil Integration Committee of the Parliament in terms of the May 17 developments.](#) Although disseminated document is a draft and the Committee has not voted for the final version we consider decisive to highlight that certain legal assessments of the draft lack reasoning and are incompatible with the standards enshrined in the Constitution and the European Convention of Human Rights. It should be noted that similar assessments were dominant in public discussions of the May 17

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event. In view of this, for shifting these debates in correct legislative aspect, it is necessary to submit reasoned answers. Furthermore, we think that our opinions will have positive effect on the final content of the Parliament's conclusion.

Hereby we submit some findings on the draft of the Committee's conclusion and the procedural gaps following discussion of the issue.

1. In its draft the Committee stresses that freedom of assembly is not an absolute right and its restriction might be justified for public moral and for legitimate reasons of protecting other individuals rights and freedoms, including right to freedom of religion. Whereas, as the Committee reports, protection of freedom of religion is one of the pillars of state's democracy.

As far as the state did not make decision on restriction of the scheduled rally on May 17, the day against transphobia and homophobia, justification of restriction of the right to assembly for public moral and freedom of religion lacks practical importance and is irrelevant for the case concerned. Such findings of the Commission create risk of legitimizing opinions of intolerant part of population to LGBT issues, who considered conduct of the May 17 rally inadmissible.

As regards argumentations of the Committee we should stress that they come in conflict with the standards stipulated in Article 11 of the ECHR. Article 11 of the Convention provides that restriction of the freedom of assembly should inter alia meet requirements necessary in a democratic society. Referring to the hallmarks of a “democratic society” the Court has attached particular importance to pluralism, tolerance and broadmindedness. In the case *Bączkowski and Others v. Poland* (no. 1543/06, judgment of 3 May 2007) the court held that democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. In the case *Genderdoc-M v. Moldova* (no. 9106/06, judgment of 12 June 2012) the court held that protection of the rights of LGBT individuals, including promotion of the process through freedom of assembly is precondition for conduct of public discussions on the issue and generation of public solidarity, which is a pillar of democratic society. The Court describes the State as the ultimate guarantor of the principle of pluralism and imposes upon the states positive obligation to secure the effective enjoyment of freedom of assembly with all possible means. The obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimization, the court states. (*Bączkowski and Others v. Poland*).

In the case *Alekseyev v. Russia* (nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010) the Court did not uphold argumentation of the Russian government on protection of public moral and religious opinions of majority by which it justified restriction of the scheduled LGBT rally. In that regard the court reiterated that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority groups were made condition on its being accepted by the majority. Where this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention, the court noted. Since in the instant case the participants had not intent to exhibit nudity, engage in sexually provocative behavior or criticize public morals or religious views, the European Court held that government claim about the risks of violating public morals were irrelevant. As the Court noted, the Government of Russia had problem only with the fact that certain individuals were willing to express their sexual and gender identity. In view above it concluded violation of Articles 11 in conjunction with Article 14 (prohibition of discrimination) of the European Convention.

In view of the above mentioned standards of the European Court, we consider that findings submitted in the Committee's draft come in conflict with requirements of the European Convention and it misinterprets importance of freedom of assembly and conditions for their legitimate restrictions.

2. It is problematic that the draft says nothing about State's failure to ensure protection of freedom of assembly for LGBT activists and therefore Article 25 of the Constitution has been violated. In that regard it is decisive for the Committee to assess realization of state's positive obligation in terms of securing enjoyment of freedom of assembly for LGBT individuals, when the state could have predicted the possible risk from counter-demonstrators; however its security strategy and tactics were ineffective for prevention of these risks. Furthermore, we consider that the Committee should stress that the May 17 counterdemonstration, for its massive and violent nature, was not peaceful and went far beyond the scope of freedom of assembly.

3. While evaluating the right to physical security the committee noted in its draft conclusion that marriage among homosexuals and propaganda of such relationship are special rights and the issue of realizing these rights is subject of dispute among

international community. Consideration of LGBT individuals' rights in the category of special rights is incorrect and contradicts with international consensus envisaging exercise of rights recognized by international instruments by LGBT individuals without discrimination. In the above mentioned case *Alekseyev v. Russia* the court noted that absence of European consensus on granting some rights to the sexual minorities (marriage of gays and lesbians and child adoption), is of no relevance to freedom of expression, because conferring substantive rights on homosexual persons is fundamentally different from recognizing their right to campaign for such rights. There is no ambiguity about the other member states' recognition of the right of individuals to openly express their sexual or gender identity and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.

It is incorrect to appeal on the propaganda issue from the Committee, since expression of protest by civil society on IDAHO day on violation of LGBT rights is not connected to propaganda in any form and reveals rights of LGBT individuals in negative context. While discussing propaganda issue distinct line should be drawn between freedom of expression, including self-representation of sexual and gender identity and the conduct that should be subject to legal regulation/restriction. While evaluating prohibition of homosexual propaganda in certain states (the Ukraine, Russia, Moldova) [the Venice Commission noted](#) that save for the instances when there is pornographic display of homosexuality, or demonstration of nudity or sexually explicit or provocative behaviour or material, prohibition of so called propaganda cannot be deemed to be justified as necessary in a democratic society to the protection of morals. Therefore general legislative provisions in terms of prohibition of propaganda violate Articles 10, 11 and 14 of the European Convention.

4. While examining submitted petition on the May 17 developments, the Committee failed to observe Para. 5 Article 49 of the Regulation of the Parliament stipulating necessity of releasing the Committee's agenda on the web-page two days earlier before the session. The agenda of the June 17 session was released only several hours before the scheduled session. As a result, interested civil society representatives were deprived of the chance to attend Committee session and to participate in decision making process. Furthermore, in view of high public interest on the May 17 events and urgency of the issue, regrettably, the Committee fell short to exercise its authority and to invite to the session interested parties (including authors of the petition, other organizations working on the issue, representatives from the Public

Defender's Office) and therefore it prevented public and comprehensive examination of the issue. Though the agenda of the Committee has not been publicized in advance, representatives from counterdemonstrators attended and participated in discussion of the draft and thus impartiality of the Committee has been questioned fairly, especially when the head of the Committee expressed her doubts about fidelity of the signatures on the Petition.

5. As far as the procedural issues are concerned, in view of urgency of the issue, GYLA considers important not to limit response of the Parliament, on the May 17 events, to the Committee conclusion only. GYLA opines that the Parliament should adopt relevant document (resolution or other), where it will assess ongoing process and will instruct executive branch on necessary systemic operations which need to be implemented for effective protection of LGBT rights. It should be noted that the Committee has not reviewed legislative or systemic deficiencies in terms of protecting rights of LGBT individuals, which is unacceptable in view of its role and function. In view of above, we anticipate that Human Rights and Civil Integration Committee will ensure effective participation of civil society representatives in examination of the conclusion of the May 17 events and the document will be brought in line with international human rights standards. In addition, we think reasonable to submit the issue at the plenary session and to adopt the document on the challenges faced in protection of LGBTs' rights.