



INTERNATIONAL COMMISSION OF JURISTS

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AN ANALYSIS OF THE PROPOSED AMENDMENT NO. XIP-2595 UNDER INTERNATIONAL HUMAN RIGHTS LAW

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The International Commission of Jurists ("ICJ") is an international nongovernmental organisation, established in 1952 and headquartered in Geneva, Switzerland. It works to advance the rule of law and to ensure the domestic implementation of international human rights law. In this context it promotes States' compliance with their international human rights legal obligations.

The ICJ is writing to express its concern at a proposed amendment to the Administrative Code that, if enacted, would undermine Lithuania's obligations under international human rights law. According to the information we have received, the proposed amendment No. XIP-2595 would add a new provision, Article 214(30), entitled "Public promotion of homosexual relations." Under this provision, "public promotion of homosexual relations is to be punished by a fine from two thousand to ten thousand litas." The ICJ believes that this amendment, if enacted, would threaten the rights to freedom of expression and freedom from discrimination, which are guaranteed under both the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

I. The Right to Freedom of Expression Under Article 10 of the European Convention and Article 19 of the ICCPR

Article 10§1 of the European Convention protects the right to freedom of expression, which includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Article 19 of the ICCPR uses very similar language to describe the right to freedom of expression. As articulated by the European Court of Human Rights, any restrictions with the right must be "prescribed by law" and "necessary in a democratic society" for a legitimate aim. Proposed Amendment No. XIP-2595 fails each prong of this test.

Prescribed by Law

"Prescribed by law" means not only that the restriction must have a basis in law, but also that the law itself must be "formulated with sufficient precision" to enable people to know the consequences of

their actions.¹ This is known as foreseeability and it is a component of the legality principle, which is a well-established general principle of law. In the proposed amendment, “public promotion” is not defined. Nor is “homosexual relations.” It is unclear what kind of expression the term “promotion” is intended to capture. A same-sex couple holding hands and walking in a public park might be viewed as the kind of expressive activity prohibited by this phrase. A poster, a book or a film might be banned. An advertisement featuring a same-sex couple could also fall within the law’s sweep. A civil society organization such as the Lithuania Gay League might be forbidden from publicizing news about its activities and services. A website could constitute “public promotion.” As for “homosexual relations,” this could easily mean any kind of same-sex relationship, even one that does not involve sexual activity. Or it might refer only to same-sex partnerships and marriage. In brief, Amendment No. XIP-2595 is so vague that it fails the requirement of “foreseeability.” A reasonable person, even with the advice of a lawyer, would not be able to predict with any degree of confidence what kind of conduct might lead to the imposition of the administrative sanction. Without foreseeability, no one would be able to conform his or her conduct to the law.

Necessary in a Democratic Society

Any restriction on the right to freedom of expression must be necessary in a democratic society. “Necessity” implies both a “pressing social need” and that the restriction is “proportionate to the legitimate aim pursued.”² This proposed amendment neither responds to a pressing social need nor would it be proportionate even if there were such a need.

The “need” for the legislation identified by MP Petras Grazulis is to protect traditional family values and morals and to prevent events such as the Baltic Pride marches. In the recent case of *Alekseyev v. Russia*, the Court confronted a similar claim of pressing social need as a justification for interference with the closely related right of freedom of assembly.³ There the Government argued that the events could be banned because “propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults.”⁴ The Court, however, held that the ban was not necessary in a democratic society. Although there might be a lack of European consensus on issues of same-sex marriage, for example, the Court found that there was “no ambiguity about the other member States’ recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.”⁵ The Court firmly rejected the Government’s view that it was “necessary to confine every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye,” noting that this position was entirely unsupported by any evidence.⁶ Because the Government’s view was simply a bare assertion, unsupported by data,

¹ *Miloslavsky v. United Kingdom*, Application no. 18139/91, Judgment dated 13 July 1995, at para. 37; *Müller and Others v. Switzerland*, Application no. 10737/84, Judgment dated 24 May 1988, at para. 29.

² *Olsson v. Sweden*, Application no. 10465/83, Judgment dated 24 March 1988, at para. 67.

³ Articles 10 and 11 are of course closely linked and restrictions with rights under Article 11 are often considered in light of Article 10. See *Vogt v. Germany*, Application no. 17851/91, Judgment dated 26 September 1995, at para. 64. See also *United Communist Party v. Turkey*, Application no. 19392/92, Judgment dated 30 January 1998, at para. 42 (“The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.”).

⁴ *Alekseyev v. Russia*, Application Nos. 4916/07, 25924/08 and 14599/09, Judgment dated 21 October 2010, at para. 78.

⁵ *Id.* at para. 84.

⁶ *Id.* at para. 86.

the ban did not correspond to a pressing social need and was thus not necessary in a democratic society.

Amendment No. XIP-2595 appears to be motivated by a similar desire to keep homosexuality and same-sex relationships out of public view. Such a goal clearly does not correspond to a pressing social need.

Furthermore, a blanket ban on *all* forms of public expression concerning “homosexual relations” cannot be deemed proportionate. In *Open Door and Dublin Well Woman v. Ireland*, the European Court considered a law that prohibited women’s health clinics from providing information about the availability of abortion services outside Ireland. The Court noted that it was not actually illegal to travel outside the country to receive an abortion. “Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.”⁷ The Court then concluded that the restriction was disproportionate and in breach of Article 10.

Same-sex relationships are not illegal in Lithuania. A ban on public discussion and promotion of same-sex relations is thus disproportionate, as the Court concluded in *Open Door and Dublin Well Woman*. Moreover, same-sex relations have been frequently debated in Lithuania and elsewhere within Europe. The European Court has frequently noted that there is “little scope . . . for restrictions on political speech or on debate of questions of public interest.”⁸ The protection of Article 10 extends not only to information or ideas that are regarded as inoffensive but also ones “that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”⁹ In *Alekseyev v. Russia*, the Court observed that public debate about “sexual minorities’ social status” would, far from having harmful effects, be useful and would “benefit social cohesion by ensuring that representatives of all views are heard.” Such debate “could not be replaced by the officials spontaneously expressing uninformed views which they considered popular.”¹⁰

Legitimate Aim

The aim asserted by MP Grazulis is the protection of morals. Protection of public morals is one of the legitimate aims under Article 10§2. There are, however, three important aspects of public morality justifications.

First, the mere invocation of an ostensibly legitimate aim does not insulate the proposed law from review. In *Norris v. Ireland*, the Court rejected the idea that the “protection of morals” precluded it from reviewing a member state’s compliance with its obligations under the Convention.¹¹ There a criminal prohibition on same-sex sexual activity was found to violate Article 8. Similarly, in *Open Door and Dublin Well Woman*, the Court held, “The Court cannot agree that the State’s discretion in the field of the protection of morals is unfettered

⁷ *Id.* at para. 72.

⁸ *Murphy v. Ireland*, Application No. 44179/98, Judgment dated 10 July 2003, at para. 67;

⁹ *Open Door and Dublin Well Woman v. Ireland*, Application Nos. 14234/88, 14235/88, Judgment dated 29 October 1992, at para. 71.

¹⁰ *Alekseyev v. Russia*, at para. 86.

¹¹ *Norris v. Ireland*, Application no. 10581/83, Judgment dated 26 October 1988, at para. 45.

and unreviewable. . . It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.”¹² Similar language asserting the necessity of independent scrutiny concerning claims of morality is found in the U.N. Human Rights Committee’s decision in *Toonen v. Australia*.¹³

Second, the use of “public morals” cannot serve to impose the views of a politically popular majority over the views of an unpopular minority. Public morals are shifting and contingent. They vary with time and place. For example, in *Bączkowski v. Poland*, the European Court found a violation of the right of freedom of assembly where an LGBT organization had been denied a permit for a parade. The Court emphasized 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.”¹⁴ In the domestic adjudication of this case, the Constitutional Court of Poland noted: “Freedom of assembly is a constitutional value and not a value defined by the democratically legitimized political majority in power at a certain moment in time. . . The moral views of the holders of political power are not synonymous with ‘public morals’ as a premise for limiting freedom of assembly.”¹⁵

The UN Human Rights Committee has likewise stated that because there is no universally applicable common set of morals, limitations “for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.”¹⁶

Third, public morals may not be used as a pretext for forbidden discrimination. Restrictions on rights must be consistent with international law. That means they may not be imposed for a discriminatory purpose or applied in a discriminatory manner.¹⁷ National courts around the world have considered and rejected the validity of “public morals” as a justification for the disparate treatment of individuals based on their sexual orientation. In *Lawrence v. Texas*, the U.S. Supreme Court invalidated a state statute criminalizing same-sex sexual conduct. Justice O’Connor wrote separately to emphasize that “moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy” the court’s standard of review.¹⁸ In South Africa, the Constitutional Court considered whether public morality was an appropriate justification for a law criminalizing sodomy. The Court held, “The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose.”¹⁹

In 2009 in New Delhi, the High Court found unconstitutional Section 377 of the Indian Penal Code. In reaching its conclusion, the Court found that Section 377 was discriminatory

¹² *Open Door and Dublin Well Woman* at para. 68.

¹³ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), at para. 8.6 (noting that if moral issues were exclusively a matter for state concern, “this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy”).

¹⁴ *Bączkowski and Others v. Poland*, Application No. 1543/06, Judgment dated 24 September 2007, at para. 63.

¹⁵ Constitutional Court of Poland, *In re: Requirement to Obtain Permission for an Assembly on a Public Road*, 18 January 2006, at paras. 3-4.

¹⁶ Human Rights Committee, General Comment No. 22 (on Article 18) at para. 8; Human Rights Committee, Draft General Comment No. 34 (on Article 19) UN Doc. CCPR/C/GC/34/CRP.4, 11-19 October 2010, at para. 33.

¹⁷ General Comment No. 22; Draft General Comment No. 34 at para. 27; Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

¹⁸ *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

¹⁹ *Nat’l Coalition for Gay and Lesbian Equality v. Minister of Justice*, (1998) ZACC 15, at para. 37.

because it had “no other purpose than to criminalize conduct which fails to conform with the moral or religious views of a section of society.” The Court held that “popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights.”²⁰

More recently, in *Ang Ladlad LGBT Party v. Commission on Elections*, the Supreme Court of the Philippines heard a petition from an LGBT organisation that had been denied permission to register as a political party on morals grounds. There the Court concluded that “moral disapproval, without more, is not a sufficient governmental interest to justify exclusion of homosexuals from participation in the party-list system. The denial of Ang Ladlad’s registration on purely moral grounds amounts more to a statement of dislike and disapproval of homosexuals, rather than a tool to further any substantial interest.”²¹

II. The Right to Freedom from Discrimination under Article 14 of the European Convention and Article 26 of the ICCPR

If enacted, Proposed Amendment No. XIP-2595 would also violate individuals’ right to be free from discrimination based on sexual orientation in the exercise of their Convention rights.²² The European Court has repeatedly affirmed that differences in treatment based on sexual orientation amount to impermissible discrimination. On a number of occasions, it has stated that “if the reasons advanced for a difference in treatment were based solely on the applicant’s sexual orientation, this would amount to discrimination under the Convention.”²³ Similarly, the Human Rights Committee has held that differences in treatment based on sexual orientation are impermissible under the ICCPR.²⁴

In both *Bączkowski v. Poland* and *Alekseyev v. Russia*, the European Court found that the limitations on freedom of assembly imposed on LGBT organisations were discriminatory, in violation of Article 14 of the Convention. In the latter case, the Court observed that “the main reason for the ban . . . was the authorities’ disapproval of demonstrations which they considered to promote homosexuality. . . . In the light of these findings the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation.”²⁵

In the context of Article 19, the relevant UN Special Procedures have reaffirmed that the right to freedom of expression is a right held by everyone, regardless of sexual orientation and/or gender identity. For example, the Report of the Special Representative of the Secretary-General on the situation of human rights defenders commented on draft legislation in Nigeria introducing penalties for public advocacy or associations supporting the rights of LGBT

²⁰ *Naz Foundation v. Union of India*, WP(C) No. 7455/2001, 2 July 2009, at paras. 79, 86.

²¹ *Ang Ladlad LGBT Party v. Commission on Elections*, Supreme Court of the Philippines, 8 April 2010 (en banc) at 13.

²² *Salgueiro da Silva Mouta v. Portugal*, Application No. 3290/96, Judgment dated 21 December 1999, at para. 28 (holding that sexual orientation is “a concept which is undoubtedly covered by Article 14 of the Convention”)

²³ *Kozak v. Poland*, Application No. 13102/02, Judgment dated 2 March 2010, at para. 92; *E.B. v. France*, Application No. 43546/02, Judgment dated 22 January 2008, at para. 93; *Alekseyev v. Russia*, Application Nos. 4916/07, 25924/08 and 14599/09, Judgment dated 21 October 2010, at para. 108.

²⁴ *X v. Columbia*, Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005, 14 May 2007, at para. 9; *Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/921/2000, 18 September 2003, at para. 10.4

²⁵ *Id.* at para. 109.

people. “In particular, serious concern is expressed in view of the restriction such law would place on freedoms of expression and association of human rights defenders and members of civil society, when advocating the rights of gays and lesbians.”²⁶ When the “Anti-Homosexuality” Bill was introduced in Uganda in 2009, two Special Rapporteurs issued a joint statement that said in part:

This Bill would further unjustifiably obstruct the exercise of the right to freedoms of opinion and expression, peaceful assembly and association, by prohibiting the publication and dissemination of materials on homosexuality, as well as funding and sponsoring related activities.²⁷

In his report on his visit to Colombia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression wrote, “[A]ll citizens, regardless of, inter alia, their sexual orientation, have the right to express themselves, and to seek, receive and impart information . . . Gay and lesbian groups and individuals’ right to freedom of opinion and expression is hindered by the opposition they find in the media where sexual issues, especially homosexuality, are treated in a prudish and traditional way and never broadcast on prime time.”²⁸ When three writers were sentenced to prison in Kuwait for the “crime” of mentioning lesbian relationships, the Special Rapporteur transmitted an urgent appeal on their behalf.²⁹

Within the past year, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has appealed to governments in Lithuania and Uganda concerning restrictions based on sexual orientation. The Special Rapporteur sent an urgent appeal to Lithuania about the Law on the Protection of Minors against the Detrimental Effect of Public Information.³⁰ In the case of Uganda, the Special Rapporteur sent a letter of allegations concerning the “Anti-Homosexuality Bill” which would have criminalized the publishing or dissemination of “homosexual materials.” The Special Rapporteur wrote, “According to information received, the Bill will prohibit any kind of community or political organizing around non-hetero-normative sexuality. It . . . implicitly encourages the persecution of sexual minorities by private actors.”³¹ Following general comments adopted by the Human Rights Committee, the Special Rapporteur has stated that any restriction or limitation “must be consistent with other rights recognized in the Covenant and in other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination.”³²

By prohibiting “promotion of homosexual relations” while not similarly prohibiting “promotion of heterosexual relations”, Proposed Amendment No. XIP-2595 makes a

²⁶ *Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hana Jilani, Addendum: Summary of cases transmitted to Governments and replies received*, UN Doc. A/HRC/4/37/Add.1, 27 March 2007, at para. 511.

²⁷ *Joint Statement from the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 1 March 2010.

²⁸ *Report of the Special Rapporteur on the right to freedom of opinion and expression, Ambeyi Ligabo, Addendum Mission to Colombia*, UN Doc. E/CN.4/2005/64/Add.3, 26 November 2004, at paras. 75 & 76.

²⁹ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain*, UN Doc. E/CN.4/2001/64, 13 February 2001, at para. 176.

³⁰ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, UN Doc. A/HRC/14/23/Add.1, 26 May 2010, at paras. 1400-1414.

³¹ UN Doc. A/HRC/14/23/Add.1, 26 May 2010, at para. 2511.

³² *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, UN Doc. A/HRC/14/23, 20 April 2010, at para. 79(k).

distinction that is based on sexual orientation. Enjoyment of all Convention rights without discrimination means both that the freedom of expression of LGBT individuals cannot be restricted because of the speaker's sexual orientation and that expression concerning sexual orientation and same-sex relationships cannot be restricted in a discriminatory manner. Any restriction on expression about sexuality must be neutral with respect to sexual orientation. In this respect, the Committee of Ministers of the Council of Europe recently issued a recommendation calling on member states to ensure "that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the right to receive and impart information on subjects dealing with sexual orientation or gender identity."³³

III. Conclusion

As the above-analysis demonstrates, Proposed Amendment No. XIP-2595 violates Lithuania's obligations concerning freedom of expression and non-discrimination under both the European Convention and the International Covenant on Civil and Political Rights. Similarly-motivated restrictions on the related right of freedom of assembly have been struck down by the European Court of Human Rights, and similar laws have been denounced by the human rights experts of the UN Human Rights Council. For these reasons, the ICJ respectfully urges you to reject this proposed law.

³³ Council of Europe Committee of Ministers Recommendation CM/Rec(2010)5 at para. 13.