



27 October 2021

## **THIRD-PARTY INTERVENTION SUBMITTED BY HÁTTÉR SOCIETY IN THE CASE OF *MACATÉ V. LITHUANIA* (NO. 61435/19)**

- [1] In *Macaté v. Lithuania* (no. 61435/19) the Court is asked to rule on the compliance of the restriction imposed on the late applicant's right to freedom of expression with Article 10 (2) of the Convention. The contested measures fit into a wider phenomenon in the Member States illustrated by the introduction of laws sanctioning, censoring or even outlawing speech concerning sexual orientation and gender identity with reference to protecting children. Such restrictions not only impact freedom of expression through the inevitable chilling effect they trigger: such restrictions stigmatize LGBTQI persons regardless of their age, limit the right of parents to ensure the upbringing of their children according to their convictions, and restrict the rights of children to receive comprehensive and age-appropriate information on sexuality, sexual and reproductive health.
- [2] Háttér Society, founded in 1995, is the oldest and largest lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) organization in Hungary. Its aims are awareness raising on problems faced by LGBTQI people; providing support services; exploring the needs of LGBTQI people; mainstreaming these concerns in laws and public services; protecting the human rights of LGBTQI people and countering discrimination against them; promoting the health and well-being of LGBTQI people; encouraging the self-organization of LGBTQI communities; and preserving and disseminating LGBTQI heritage and culture.
- [3] Háttér Society's Legal Aid Service has successfully represented LGBTQI victims of human rights violations before domestic courts and other fora, including the European Court of Human Rights (*Rana v. Hungary*, application no. 40888/17). We currently offer legal representation to Labrisz Lesbian Association in a court case to challenge the decision of the Consumer Protection Department of the Budapest Government County Office that requires posting a warning about "patterns of behavior deviating from traditional gender roles" on the cover of a book (*Fairyland for Everyone*) that features LGBTQI characters among other minorities. We also offer legal advice to the legal representative of Líra Kiskereskedelmi Kft. to challenge in court fines imposed by the Consumer Protection Department of the Pest County Government County office for selling another children's book (*Micsoda család*) featuring rainbow families amongst other children's books. We are also involved in a legal challenge against an investigation launched by the Media Council of the National Media and Infocommunications Authority against M-RTL Zrt. for airing public service advertising we produced about rainbow families.

### **1. Background: Proliferation of legislation protecting minors from information that depicts sexual minorities in a positive light in the CoE**

- [4] Article 4(2)(16) of the Lithuanian Law on the Protection of Minors from Detrimental Effects of Public Information does not mention homosexuality or the propaganda of homosexuality directly.

Its application, however, fits within a pattern of practices<sup>1</sup> that openly defy the jurisprudence of the European Court of Human Rights (the Court or ECtHR) and purposefully undermine the existing level of protection of LGBTQI rights in Europe in the name of protecting traditional family values and – ultimately – constitutional identity. According to the Court such measures cannot be justified with reference to the value preferences of the majority.<sup>2</sup> Yet, such practices emerging in defiance of the Court’s jurisprudence result in the retrogression of the protection of Convention rights.

- [5] In 2017 *Bayev v. Russia* the ECtHR found that by adopting legislation protecting the morality and health of children from the propaganda of homosexuality “the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.”<sup>3</sup> In 2020 in Russia a constitutional amendment was adopted to reinforce the constitutional protection of the traditional family and marriage [Article 72 (1)], and ultimately Russia’s cultural and constitutional identity.<sup>4</sup> At the same time, this amendment bolsters the constitutional foundations of legislative measures that the ECtHR found to violate the rights of sexual minorities.<sup>5</sup>
- [6] Despite the ECtHR’s rejection, the Russian legislation on the propaganda of homosexuality – together with its constitutional embedding – has inspired similar bills in several Member States (e.g. in Latvia,<sup>6</sup> in Moldova<sup>7</sup> and several times in Ukraine<sup>8</sup>). In July 2019 in Poland the legislature discussed a bill (submitted via a popular initiative) to Stop Paedophilia, seeking to criminalize sex education, thus impairing children’s access to age-appropriate and comprehensive information on sexual and reproductive health.<sup>9</sup> A few months before, in April 2019 Jaroslaw Kaczynski, the chairman of the governing Law and Justice Party called homosexuality a “threat to Polish identity, to our nation, to its existence, and thus to the Polish state.”<sup>10</sup> Even if ultimately unsuccessful, legislative initiatives targeting sexual minorities encourage violence and discrimination, including hate speech, against LGBTQI persons.<sup>11</sup>
- [7] In Hungary in 2020 the Article L(1) of the Fundamental Law has been amended to further entrench the traditional heteronormative and exclusionary notion of marriage and family by adding the provision that “The mother shall be a woman, the father shall be a man.” Another newly adopted constitutional provision [Article XVI(1), second sentence] provides that “Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall

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<sup>1</sup> Recognized e.g. by European Commission for Democracy through Law (Venice Commission), Opinion 707/2012 on the issue of the prohibition of the so-called “propaganda of homosexuality” in light of recent legislation in some Member States of the Council of Europe, CDL-AD(2013)022, 18 June 2013; PACE Resolution 2239 (2018) Private and family life: achieving equality regardless of sexual orientation, 4.2 (10 October 2018).

<sup>2</sup> *Fedotova and Others v. Russia* 40792/10; 30538/14; 43439/14 (13/07/ 2021), par. 52.

<sup>3</sup> *Bayev and Others v. Russia* 67667/09; 44092/12; 56717/12 (20/06/2017), par. 83.

<sup>4</sup> See: <https://imrussia.org/en/analysis/3126-new-russian-identity-makes-way-into-the-constitution>

<sup>5</sup> *Fedotova and Others v. Russia* 40792/10; 30538/14; 43439/14 (13/07/ 2021), par. 54.

<sup>6</sup> See: <https://www.equalitylaw.eu/downloads/2147-lv-12-attempts-to-ban-homosexual-propaganda-among-children-fail>

<sup>7</sup> See: <https://www.hrw.org/news/2016/06/21/moldova-reject-gay-propaganda-law>

<sup>8</sup> See: <https://www.opendemocracy.net/en/odr/a-landmark-court-case-on-traditional-values-in-ukraine-ends-strangely-in-victory-for-both-sides/>

<sup>9</sup> See: [https://www.europarl.europa.eu/doceo/document/TA-9-2019-0058\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0058_EN.html)

<sup>10</sup> See: <https://www.nytimes.com/2021/04/24/world/europe/poland-lgbtq-gay-migration.html>.

<sup>11</sup> See e.g. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25444> (Poland).

ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.” These amendments followed a ‘public scandal’ – perpetuated by government-friendly media – surrounding the publication of LGBTQI-positive fairy tales (*Fairyland for Everyone*). According to Prime Minister Orbán the book crossed a red line, calling on the LGBTQI community to “leave our children alone.”<sup>12</sup>

- [8] It was in this spirit that in June 2021 the Hungarian Parliament adopted a law to combat paedophilia and protect children (Act no. LXXIX of 2021), including a prohibition on making available to children under the age of eighteen “any pornographic content and content that depicts sexuality as having a purpose in itself or promotes or represents deviation from the self-identity in line with the birth sex, gender re-assignment and homosexuality” in commercial advertising and mass media. The Hungarian law also includes restrictions on sex education, impairing children’s access to comprehensive and age-appropriate information on sexual health; in schools only promotion of homosexuality is sanctioned (but not its representation). Calls for help to Háttér Society’s Information and Counselling Hotline from youth under the age of 18 tripled in the five months following the introduction of the bill in Parliament compared to the same period in the preceding year. Our experience is consistent with data and research in similar situations in other contexts.
- [9] The European Parliament called the new Hungarian law an instance of state-sponsored discrimination (§ 24), and stressed that it was “not an isolated example, but rather constitutes another intentional and premeditated example of the gradual dismantling of fundamental rights in Hungary” (§ 5). The European Parliament emphasized that conflating LGBTQI rights with paedophilia and other – rightly – criminalized acts in the name of protecting the rights of children instrumentalizes the human rights language and uses it to justify discriminatory laws (§ 17).<sup>13</sup>

## 2. Children’s right to receive information on sexuality, sexual and reproductive health

- [10] LGBTQI rights are human rights, and any legislation on education and information available to minors needs to fully comply with international human rights standards, including the Convention and EU law. The European Commission’s LGBTQI strategy (2020-25) emphasizes that “[f]rom an early age, LGBTIQ children and young people, and children of LGBTIQ or rainbow families ... are often stigmatised, making them targets of discrimination and bullying that affects their educational performance and employment prospects, their daily lives and their personal and family well-being.”<sup>14</sup> Most commonly LGBTQI children become victims of discrimination, bullying or violence either from their peers in allegedly safe environments, such as schools, or from other members of the society.<sup>15</sup>
- [11] As regards bullying or harassment of children or violence against children, the Convention on the Rights of the Child (CRC) offers the most comprehensive list of their rights and corresponding state obligations. The ECtHR has long relied on the CRC to afford protection to the best interest

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<sup>12</sup> For an overview see of the domestic controversy see: <https://www.euronews.com/2020/10/05/leave-our-children-alone-hungarian-pm-tells-publisher-of-lgbt-book>

<sup>13</sup> European Parliament resolution of 8 July 2021 on breaches of EU law and of the rights of LGBTIQ citizens in Hungary as a result of the legal changes adopted by the Hungarian Parliament (2021/2780(RSP)).

<sup>14</sup> European Union: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698 final (12.11. 2020)

<sup>15</sup> For a broader overview see for instance: Berta Esperanza Hernández-Truyol, Embracing our LGBTQ Youth: A Child Rights Paradigm, in: J. Todres - Shani M. King (eds.), *The Oxford Handbook of Children’s Rights Law*, OUP, 2020, p. 544-545.

of the child under the Convention.<sup>16</sup> The Committee on the Rights of the Child (UNCRC) advocates for a paradigm shift from a ‘child protection’ to a ‘child rights’ approach: the latter requires states to fully realize the non-negotiable rights of children outlined in the CRC without discrimination, with an increasing emphasis on the ‘evolving capacities’ of the child.<sup>17</sup>

- [12] Sexual orientation and gender identity have been recognized to fall under ‘other status’ in Article 2 of the CRC on the prohibition of discrimination.<sup>18</sup> Similarly to the case-law of the ECtHR, under the CRC, LGBTIQI children are recognized as “potentially vulnerable or marginalized”<sup>19</sup>, and states have an obligation to reduce and ultimately prevent any form of discrimination against them on the basis of sexual orientation and gender identity. The UNCRC further recommends to introduce preventive mechanisms, raise awareness<sup>20</sup> or “make proactive efforts to ensure that such children are assured their right to protection on an equal basis with all other children”.<sup>21</sup> The child rights approach shall also prevail in the interpretation of Article 19 of the CRC, which – among others – prescribes states to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse”.<sup>22</sup>
- [13] Accepting children as right holders implies that laws based solely on paternalistic, strongly morality-driven considerations become subject to closer scrutiny. The UNCRC in their Concluding Observations to Russia in 2014 voiced a serious concern at “the recent legislation of the State party prohibiting ‘propaganda of unconventional sexual relationships’, (...) which encourages the stigmatization of and discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, including children, and children from LGBTI families”.<sup>23</sup>
- [14] Laws restricting access to content on sexual orientation and gender identity before the age of 14 are often justified by protective rationales, submitting that ‘these [issues] do not concern them.’ As the Hungarian government recently argued in support of the law on the propaganda of homosexuality: it is “imperative” that children are not confronted with content they “may misunderstand” or which can “confuse their developing ethical, moral standards” or self-image. This runs counter to an ‘evolving capacities’ approach to child rights. Research shows that LGBT youth are coming out of the closet significantly earlier today than before, thus it is the lack of objective information or positive content on sexuality and gender diversity that affects them

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<sup>16</sup> *Neulinger and Shuruk v. Switzerland* [GC], 41615/07 (06/07/2010), para. 135; recently: *Vavricka and others v. the Czech Republic* [GC], 47621/13 (08/04/2021).

<sup>17</sup> Sheila Varadan, The Principle of Evolving Capacities under the UN Convention on the Rights of the Child, *The International Journal of Children's Rights* 27: 306-338 (2019).

<sup>18</sup> See for instance: UN Committee on the Rights of the Child (CRC), General comment No. 3 (2003): *HIV/AIDS and the Rights of the Child*, 17 March 2003, CRC/GC/2003/3, par. 8; or UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, par. 8.

<sup>19</sup> UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): *The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, par. 60 read together with par. 72 (g).

<sup>20</sup> Concluding observations on the third and fourth periodic reports of the United Kingdom of Great Britain and Northern Ireland, 20 October 2008, CRC/C/GBR/CO/4, par. 24-25. See also for similar recommendations: Concluding observations on the combined third, fourth and fifth periodic reports of Hungary, 14 October 2014, CRC/C/HUN/CO/3-5, point B.

<sup>21</sup> UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): *The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, par. 60.

<sup>22</sup> UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): *The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, par. 59.

<sup>23</sup> Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation, 25 February 2014, CRC/C/RUS/CO/4-5, par. 24.

detrimentally. In 2013 the Pew Research Center asked adult members of the lesbian, gay and bisexual community in a comprehensive questionnaire when they first thought about being “something other than straight or heterosexual” and the median age for all respondents was 12, while for gay men it was 10, and 13 for lesbians and bisexuals.<sup>24</sup>

- [15] Legal rules that require labelling any content on homosexuality, transgender identities and LGBTQI persons harmful for children without distinguishing between objective, age-appropriate information on or positive portrayal of sexual and gender minorities, and content that may legitimately be barred from children, impede their access to vital information, expose them to bullying and violence, and force them to hide sexual orientation and gender identity.
- [16] Recognizing such harmful effects, the Committee of Ministers’ Recommendation Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity encouraged “safeguarding the right of children and youth to education in safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.”<sup>25</sup> Consequently, the position that promotes shielding children under the age of 14 from any content depicting diverse sexual orientations and gender identities cannot be maintained; rather, children need unbiased and unprejudiced information about sexual and gender minorities. According to CM Rec(2010)5 Member States should provide “objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity.” The lack of knowledge may expose children to physical, emotional, and social harm.<sup>26</sup>
- [17] The UN Special Rapporteur on the right to education emphasized that education is the primary tool for “generating the cultural shift so necessary for equality among individuals”, the education system that is not “properly organized” merely perpetuates injustice and discrimination<sup>27</sup>, and sexual education is understood as a means “for ending discrimination against persons of diverse sexual orientations.”<sup>28</sup> Importantly, the UN Special Rapporteur endorsed Principle 16 set out in the Yogyakarta Principles (2007), which – among others – prescribes states to “ensure that education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds.”<sup>29</sup>
- [18] As regards the Convention, the requirement contained in Article 2 of Protocol no. 2 (Art. 2 Pr. 2) on the right to education needs to be read together with Articles 8, 9 and 10 (of both parents and children) and it thus embodies – *inter alia* – the “freedom ... to receive and impart information and

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<sup>24</sup> M. H. Lopez, *Personal Milestones in the Coming Out Experience*. Available at: <https://www.pewresearch.org/social-trends/2013/06/13/the-coming-out-experience-age-when-you-first-thought-knew-told/>. See also: Institute of Medicine (US) Committee on Lesbian, Gay, Bisexual, and Transgender Health Issues and Research Gaps and Opportunities. *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding*. Washington (DC): National Academies Press (US); 2011. 4, Childhood/Adolescence. Available at: <https://www.ncbi.nlm.nih.gov/books/NBK64808/>.

<sup>25</sup> Committee of Ministers’ Recommendation Rec(2010)5, par. 31; on quote in *Bayev and Others v. Russia* 67667/09; 44092/12; 56717/12 (20/06/2017), par. 82.

<sup>26</sup> See recently in *A.R. and L.R. v. Switzerland* (dec.), 22338/15 (19/12/2017), par. 35.

<sup>27</sup> Report of the United Nations Special Rapporteur on the right to education, 23 July 2010, A/65/162, par. 8.

<sup>28</sup> Report of the United Nations Special Rapporteur on the right to education, 23 July 2010, A/65/162, par. 23.

<sup>29</sup> [Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation of Sexual Orientation and Gender Identity](#), March 2007, Principle 26 (d).

ideas”.<sup>30</sup> First and foremost, children have the right to receive information on sexuality, sexual and reproductive health (including but not restricted to receiving comprehensive sexual education). Second, children have the right to not be shielded from relevant and appropriate information on sexuality and gender diversity in or outside schools.

### **3. Positive obligation to facilitate children’s right to receive information on sexuality, sexual and reproductive health**

- [19] States have a positive obligation to protect children and other members of the society belonging to a sexual or gender minority from discrimination and any kind of violence or harassment. Furthermore, states have an unequivocal positive obligation to provide education in an unbiased and objective manner, without discrimination on the basis of sexual orientation and gender identity, *i.e.* using materials that impart relevant, important and unprejudiced information on sexuality and gender diversity to children in schools.
- [20] As highlighted by the Venice Commission in its opinion on the laws prohibiting the so-called ‘propaganda of homosexuality’, the dissemination of information advocating a positive attitude towards LGBTQI persons does not harm or adversely affect children, and such content-based restrictions do not comply with Article 10 (2).<sup>31</sup> In *Alekseyev v. Russia* the Court underlined: “(t)here is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or “vulnerable adults”. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned.”<sup>32</sup>
- [21] The European Committee on Social Rights explicitly laid down the positive obligation to provide comprehensive sexual education in its landmark decision against Croatia in 2009: “(i)n the context of the right to protection of health through the provision of sexual and reproductive health education as set out in Article 11§2 [of the European Social Charter], this positive obligation extends to ensuring that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to the social exclusion, embedded discrimination and denial of human dignity often experienced by historically marginalised groups such as persons of non-heterosexual orientation.”<sup>33</sup>
- [22] Comprehensive sexual education (CSE) is the primary tool to develop and enhance children’s sexual literacy and build competences that help protect them from violence, coercion, or inequalities, and CSE also aids them to develop the emotional and social intelligence that they need to thrive in healthy and fulfilling relationships. Both the 2008 and the 2016 evidence review processes commissioned by the UNESCO confirm that research provides non-rebuttable evidence for the positive impact of CSE in schools. The key findings of the document show that there is no scientific proof that sexuality education increases sexual activity or risk-taking

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<sup>30</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark* 5095/71; 5920/72; 5926/72 (07/12/1976), A23, par. 52.

<sup>31</sup> European Commission for Democracy through Law (Venice Commission), Opinion 707/2012 on the issue of the prohibition of the so-called “propaganda of homosexuality” in light of recent legislation in some Member States of the Council of Europe, CDL-AD(2013)022, 18 June 2013, par. 56.

<sup>32</sup> *Alekseyev v. Russia* 4916/07; 25924/08; 14599/09 (21/10/2010), par. 86.

<sup>33</sup> European Committee on Social Rights, Decision on the merits: *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, Collective Complaint No. 45/2007 (30 March 2009), par. 61.

behaviour, on the contrary, it deepens children’s knowledge and improves their attitudes related to sexual and reproductive health, and such programmes work best if combined with community elements.<sup>34</sup>

- [23] Furthermore, as the Commissioner for Human Rights noted “the benefits of sexuality education, when comprehensive, go far beyond information on reproduction and health risks associated with sexuality”, and to prevent bullying and stigmatization of LGBTI youth, such education cannot exclude “information that is relevant to them, scientifically accurate and appropriate”. Given the higher risk of self-harm and suicide, non-stigmatizing information on sexual orientation and gender identity can save lives. Importantly, the Commissioner put the issue into context and highlighted the associated risks: “(s)exuality education in schools is today all the more necessary as children in most cases can – and do – obtain information otherwise, in particular through the Internet and social media. While these can be useful and appropriate sources of information, they can also convey a distorted image of sexuality and lack information on emotional and rights-related aspects of sexuality.”<sup>35</sup> The ECtHR has long been alert to the fact that children are exposed to a multitude of influences and external information – including from the media – which can raise legitimate questions in them and which make it necessary to confront children with subjects of sexuality and gender diversity in a structured manner.<sup>36</sup>
- [24] As the Court confirmed in *Bayev*: “In sensitive matters such as public discussion of sex education, where parental views, educational policies and the right of third parties to freedom of expression must be balanced, the authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience.”<sup>37</sup> Sexual education – even if it is mandatory – is not automatically in violation of the parents’ rights to raise their children according to their philosophical or religious convictions.
- [25] The state obligation to make information on sexual and gender minorities accessible to children does not end with putting in place a comprehensive sexual education curriculum. Furthermore, states need to actively facilitate children’s access to scientifically accurate, unbiased and age-appropriate information on sexuality, sexual and reproductive health. When parents do not have access to such materials, children’s right to information is automatically adversely affected. When such materials carry government-sanctioned warnings that demonize sexual minorities, parents who wish to share such content with their children risk being turned into instruments of social exclusion, stigmatization, bullying and harassment.

#### 4. Detrimental effects of content-based restrictions

- [26] Regarding the scope and permissible limitations of freedom of expression (Article 10) read in conjunction with Article 14, Háttér Society wishes to endorse the Venice Commission’s findings as outlined in Opinion 707/2012 on the issue of the prohibition of the so-called “propaganda of

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<sup>34</sup> UNESCO, [International technical guidance on sexuality education. An evidence-informed approach](#), Revised edition, 2018, p. 28.

<sup>35</sup> Commissioner for Human Rights, [Comprehensive sexuality education protects children and helps build a safer, inclusive society](#), Human Rights Comment (21 July 2020).

<sup>36</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark* 5095/71; 5920/72; 5926/72 (07/12/1976), A23, par. 54; *A.R. and L.R. v. Switzerland* (dec.), 22338/15 (19/12/2017), par. 35.

<sup>37</sup> *Bayev and Others v. Russia* 67667/09; 44092/12; 56717/12 (20/06/2017), par 82. Also: *Jimenez Alonso and Jimenez Merino v. Spain* (dec.) 51188/99 (25/05/2000), par. 1; *Dojan and Others v. Germany* (dec.) 319/08 et. al. (13/09/2011).

homosexuality” in light of recent legislation in some Member States of the Council of Europe published in June 2013.<sup>38</sup>

- [27] Although the member states have “a wider margin of appreciation in the absence of consensus among member States where the subject matter may be linked to sensitive moral or ethical issues”. [...] “[T]he Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority [...]. It held that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment.”<sup>39</sup> For the purposes of this intervention it needs to be reiterated that “(d)ifferences based solely or decisively on considerations of sexual orientation are unacceptable under the Convention”.<sup>40</sup>
- [28] Restrictions placed on speech concerning sexual orientation and gender diversity have a considerable chilling effect on the freedom of expression of authors, professionals, civil society actors and LGBTQI advocates, and the public at large. In addition to their chilling effect, such restrictions also nurture an environment where the denigration, social exclusion of and discrimination (including hate speech and harassment) against LGBTQI persons is perceived as behaviour supported by the government.
- [29] It is uncontested that State parties to the Convention have a positive obligation “to secure the effective enjoyment of rights and freedoms under the Convention”, in particular with respect to the rights of “persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation”.<sup>41</sup> Restrictions on content about sexuality and gender diversity have a chilling effect on contributions supporting LGBTQI rights in the public discourse, and foster the creation or maintenance of a social environment that is hostile to sexual and gender minorities.<sup>42</sup> The impact of policies that seek to demonize, stigmatize and marginalize LGBTQI persons has been measured by Háttér Society in survey research.
- [30] In 2017, Háttér Society conducted an online survey about the school experiences of students aged between 13 and 21 during the 2016-2017 school year. More than half of the students asked (52%) felt unsafe at school because of their sexual orientation; almost half of them heard ‘sometimes’, ‘often’ or ‘frequently’ homophobic remarks. The figures were significantly worse when it came to negative comments about transgender people: the respondents (28%) frequently heard such remarks (and if ‘sometimes’ and ‘often’ is added, the ratio is 70%). Over two-thirds of the respondents were ‘bothered’ or ‘distressed’ to some extent when hearing such comments, only 27% chose the answer ‘not at all’. The survey further found that 22% of LGBTQI students had been physically harassed during their past school year on the ground of their sexual orientation, while 13% of them fell victim to physical assault.<sup>43</sup>

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<sup>38</sup> European Commission for Democracy through Law (Venice Commission), Opinion 707/2012 on the issue of the prohibition of the so-called “progranda of homosexuality” in light of recent legislation in some Member States of the Council of Europe, CDL-AD(2013)022, 18 June 2013.

<sup>39</sup> *Bayev and Others v. Russia*, 67667/09; 44092/12; 56717/12 (20/06/2017), para.s 66, 68.

<sup>40</sup> *Recently X. v. Poland* 20741/10 (16/09/2021), par. 70 (with further references).

<sup>41</sup> *Beizaras and Levickas v. Lithuania* 41288/15 (14/01/2020), par. 108.

<sup>42</sup> The EU Fundamental Rights Agency conducted large-scale surveys in the EU in 2012 and 2019 to map the experience and the challenges members of sexual and gender minorities face. For details see: EU Fundamental Rights Agency, [European lesbian, gay, bisexual and transgender survey](#), 2013, and EU Fundamental Rights Agency, [A long to go for LGBTI equality](#), 2019.

<sup>43</sup> Háttér Society, [Supportive friends, unprepared institutions. The experience of LGBTQI students in Hungarian schools based on the National School Climate Survey](#). 2019.



[31] In 2020 the Diversity Educational Working Group (*Sokszínűség Oktatási Munkacsoport*) with the participation of Háttér Society also measured the experience of teachers and other school professionals to map the prevalence of bullying and discrimination, and their needs in order to prevent those incidents. The survey questions related to the school year of 2019-2020. 32.3% of them experienced some form of prejudicial speech or harassment against a concrete LGBTQI person, and 55.6% heard general derogatory or biased remarks that were not directed against a specific person. The figures make LGBTQI persons (alongside persons living with a physical or intellectual disability) the second most frequent targets after the Roma.<sup>44</sup>

## 5. Addressing the retrogression of rights of sexual minorities under the Convention

[32] A narrow emphasis on the chilling effect of measures labelling any content on homosexuality, transgender identities and LGBTQI persons harmful for children does not capture the spirit that animates them: lack of respect for the Court's jurisprudence as well as a bare desire to harm sexual and gender minorities. Such state action is clearly incompatible with the spirit and values underscoring the Convention.

[33] The genuine way to confront such invidious measures is to expressly confirm the positive obligation of Member States to refrain from wilfully harming individuals on the basis of their sexual orientation and gender identity. As a minimum, states should refrain from denigrating, stigmatizing or marginalizing sexual or gender minorities; in particular, they should refrain from adopting or enforcing legal rules in a manner that inspires the social exclusion of sexual or gender minorities based on irrational prejudice.

[34] When such measures constitute a pattern of practices across the Member States, they present a problem of retrogression of the protection of LGBTQI rights under the Convention. While the principle of non-retrogression is familiar from the area of socio-economic rights, it is yet to be explicated prominently as a general principle of human rights jurisprudence.<sup>45</sup>

[35] The principle of non-retrogression is a key premise of the protection of human rights under the Convention. According to the Preamble (recital 3) the aim of the Council of Europe is the "maintenance and further realisation of Human Rights and Fundamental Freedoms" for the achievement of greater unity between the Member States. As William Schabas reminds, "compliance with this provision is a condition of membership" in the Council of Europe<sup>46</sup> and the Court emphasized that "the Convention was in fact designed to maintain and promote the ideals and values of a democratic society".<sup>47</sup> The principle of non-retrogression animates, *inter alia*, Article 19, under which the mission of the Court is to ensure that the Member States will respect their engagements deriving from the Convention and the Protocols.

[36] Recital 3 of the Preamble suggests a forward looking approach that furthers the protection of human rights (and does not diminish it).<sup>48</sup> In 2019 the Commissioner for Human Rights called on

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<sup>44</sup> Diversity Educational Working Group, [Iskolai zaklatás és kirekesztés. Szakemberek tapasztalatai a 2019/20-as tanévben](#) [Bullying and discrimination in schools. The experience of professionals in the school year of 2019-2020], 2021.

<sup>45</sup> See Den TC Warwick, Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights, *Human Rights Law Review* 19 (3): 467–490 (2019)

<sup>46</sup> William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) p. 65

<sup>47</sup> *Zdanoka v. Latvia*, 58278/00 (17/06/2004), para. 78

<sup>48</sup> *Khamtokhu and Aksenchik v. Russia* [GC], 60367/08 and 961/11 (24/01/2017) concurring opinion of Judge Mits; also *Stummer v. Austria* [GC], 37452/02 (37452/02), partly dissenting opinion of Judge Tulkens.

the Slovakian parliament to reject ‘retrogressive measures’ on access to safe abortion, noting that “ a number of requirements that run counter to the principle of non-retrogression, which prohibits any measures that diminish existing rights in the field of health.”<sup>49</sup> In a recent concurring opinion, in reading Article 18 in conjunction with the Preamble, Judge Serghides added that “[n]ot only would an abuse of power not maintain and further realise human rights, nor even merely lower the standard of protection of such rights; it would rather amount to the destruction of the rights themselves. This, of course, would be the most serious setback human rights may face.”<sup>50</sup>

[37] Recently, the Court of Justice of the European Union addressed the issue of constitutional retrogression, asserting that a Member State’s decision to join the Union is an instance of constitutional pre-commitment (§§ 60-61);<sup>51</sup> it entails that a Member State cannot amend its constitution after accession to the effect of reducing the existing protection its constitution provides to the Union’s founding values (§ 63). This approach resonates with the position of the Venice Commission in its opinion on the 2020 Russian constitutional amendments concerning the consequences of the political decision to join the Council of Europe for compliance with membership obligations.<sup>52</sup> These include respect for the judgments of the Court (Article 46) and the obligation to refrain from a purposeful violation of human rights, including the rights of sexual minorities under the Convention.

HÁTTÉR TÁRSASÁG  
1136 Budapest, Balzac u. 8-10. fszt. 1.  
Tel: +36 30 0013-00266509-0000000  
Adószám: 18071072-1-41

Tamás Dombos  
executive board member



Eszter Polgári



Renáta Uitz

Háttér Society

<sup>49</sup> Commissioner calls on Slovak parliament to reject retrogressive measures on access to safe and legal abortion care (26/11/2019), <https://www.coe.int/en/web/commissioner/-/commissioner-calls-on-slovak-parliament-to-reject-retrogressive-measures-on-access-to-safe-and-legal-abortion-care>

<sup>50</sup> *Merabishvili v. Georgia* [GC, 24/01/2017 (28/11/2017), concurring opinion of Judge Serghides, para. 20.

<sup>51</sup> C-896/19, *Republika v. Il-Prim Ministru*, 20 April 2021.

<sup>52</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)009-e) , para. 62.