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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**HUNGARY**

**DRAFT OPINION**

**ON THE COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS  
STANDARDS OF ACT LXXIX AMENDING CERTAIN ACTS FOR THE  
PROTECTION OF CHILDREN**

**on the basis of comments by**

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## I. Introduction

1. By letter of 24 September 2021, the Committee on Equality and Non-Discrimination of the Council of Europe requested an opinion of the Venice Commission “on the compatibility with international human rights standards of Act LXXIX of 2021 enacted by the Hungarian Parliament on 15 June 2021, in particular where it amends the following Acts: Act XXXI of 1997, Act XLVIII of 2008, Act CLXXXV of 2010, Act CCXI of 2011 and Act CXC of 2011, and notably as concerns its impact on the freedom to receive and impart information on subjects dealing with sexual orientation and gender identity and on other rights and freedoms of LGBTI people.” The scope of this opinion is limited to the legislative amendments concerning the five Acts enumerated above.
2. Ms Regina Kiener, Mr Jan Velaers, Mr Ben Vermeulen and Mr Christian Ahlund acted as rapporteurs for this opinion.
3. Due to the health situation, it was not possible to travel to Budapest. Instead, the rapporteurs, assisted by Ms Sopio Japaridze and Ms Tania Van Dijk from the Secretariat of the Venice Commission held a series of online meetings on 15, 17 and 18 November 2021 with representatives of the Ministry of Justice, the Ministry of Human Resources, the representatives of political parties from the parliamentary majority (Fidesz and KDNP) and opposition (Jobbik and MSZP), the National Media and Information Communications Authority (NMHH), the Data Protection and Freedom of Information Authority (NAIH), as well as with civil society organisations. The Commission is grateful to the authorities for the excellent organisation of these meetings.
4. This opinion was prepared in reliance on the English translation of Act LXXIX of 2021 “on taking more severe actions against paedophile offenders and amending certain Acts for the protection of children” (CDL-REF(2021)088), Act XXXI of 1997 “on the protection of children and guardianship administration”, Act XLVIII of 2008 “on the basic requirements and certain restrictions of commercial advertising activities”, Act CLXXXV of 2010 “on Media Services and Mass Media”, Act CCXI of 2011 “on the protection of families” and Act CXC of 2011 “on national public upbringing” (relevant extracts from these Acts can be found in CDL-REF(2021)089). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. *This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written submissions from stakeholders. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its 129<sup>th</sup> Plenary Session (Venice and online, .... 2021).*

## II. Background

### A. The law-making process and the rationale behind the amendments introduced by Act LXXIX of 2021

6. On 25 May 2021, a draft law “on harsher sentencing for paedophile criminal offences and a criminal registry for perpetrators of such offences” was submitted to Parliament by two members of Parliament. The reasoning behind the draft law was to introduce clear regulations on the protection of children against sexual exploitation and sexual abuse in line with relevant international instruments. A series of amendments to this draft were submitted on 10 June 2021 by the Legislative Committee of Parliament. The amended draft (hereinafter: Act LXXIX of 2021) “on taking more severe action against paedophile offenders and amending certain Acts for the protection of children” was adopted by Parliament on 15 June 2021 and came into force on

8 July 2021. The Hungarian authorities argued that the aim of the amendments was to establish additional rules for the protection of physical, mental and moral development of children (CDL-REF(2021)090). The Venice Commission observes at the outset that, as such, the aims alleged by the Hungarian authorities are legitimate in the abstract, but the amendments of 10 June 2021 do not address them and instead produce effects of discrimination and stigmatization which are contrary to the very values which they aim to promote.

7. The effect of the amendments is to outlaw any depiction or discussion of diverse gender identities and sexual orientations in the public sphere, including schools and the media, by prohibiting or limiting access to content that “propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality” for individuals under 18 years of age.

8. During the virtual meetings with civil society organizations and parliamentary opposition, the rapporteurs were informed that the legislative amendments introduced by Act LXXIX of 2021 were fast tracked, which limited the possibility of civil society, opposition and other interested stakeholders to provide meaningful input. No explanation was offered by the authorities as to the necessity for expedition of the law-making process or the urgent need to adopt the amendments when - as a result of the Covid-19 crisis - severe restrictions on fundamental rights, including the right to assembly, were in place.

9. During the virtual meetings with civil society and parliamentary opposition, it was brought to the rapporteurs’ attention that the intention of the Hungarian authorities behind the amendments was to further contribute to increasingly hostile public discourse against LGBTQI in Hungary, to divert attention from other serious problems, to split the opposition and to mobilize electorate for the forthcoming elections. Moreover, it was emphasized that regulating the portrayal/promotion of homosexuality and gender reassignment in the same law that contains new, harsher legislation regarding paedophilia was a strategy to stigmatise LGBTQI people by associating them with paedophilia, and present their inherent characteristics as something that poses a threat to children.<sup>1</sup> In contrast, the Ministry of Justice maintained that the only purpose of Act LXXIX of 2021 was to protect children and that it was a common practice in Hungary to amend several non-related pieces of legislation with one Act.<sup>2</sup>

10. Concerns about Act LXXIX of 2021 had been expressed in numerous statements and reports.<sup>3</sup> On 15 July 2021, in response to the resolution of the European Parliament on breaches

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<sup>1</sup> See *European network of legal experts in gender equality and non-discrimination*, Flash Report on Hungary, 18 August 2021, available at: [Hungary - European Equality Law Network](#); See also *Human Rights Watch*, available at : [Hungary's President Should Veto Anti-LGBT Law | Human Rights Watch \(hrw.org\)](#); See also *Amnesty International*, available at : [Hungary: Dark day for LGBTI rights as homophobic and transphobic law adopted - Amnesty International](#)

<sup>2</sup> An example of an amending Act containing provisions concerning forestry and activities of solicitors was brought to the attention of the rapporteurs.

<sup>3</sup> See European Parliament resolution of 8 July 2021 on *breaches of EU law and of the rights of LGBTQI persons in Hungary as a result of the adopted legal in the Hungarian Parliament(2021/2780(RSP))*, available at : [Texts adopted - Breaches of EU law and of the rights of LGBTQI citizens in Hungary as a result of the adopted legal changes in the Hungarian Parliament - Thursday, 8 July 2021 \(europa.eu\)](#), According to paras. 5 and 6 “the Law is not an isolated example, but rather constitutes another intentional and premeditated example of the gradual dismantling of fundamental rights in Hungary” [...] “Violations of the human rights of LGBTQI persons are part of a larger political agenda which is leading to the dismantling of democracy and the rule of law, including media freedom.”; See also the *Council of Europe Commissioner for Human Rights*, statement of 14 June 2021, available at : [Commissioner Mijatović urges Hungary's Parliamentarians to reject draft amendments banning discussion about sexual and gender identity and diversity - View \(coe.int\)](#); See also *PACE General Rapporteur on the rights of LGBTI people*, available at: [Hungary: PACE General Rapporteur denounces new legislation as 'part of a concerted attack on LGBTI people by the authorities' \(coe.int\)](#) ; See also *Hungarian Helsinki Committee*, available at: [Even though it has no public support, Hungarian Parliament passed the Putin Propaganda Law - Hungarian Helsinki Committee](#) ; See also *Article 19*, available at: [Hungary: End the attacks on the LGBTQI community and the rule of law in the EU - ARTICLE 19](#) ;The list of about 160 civil society organisations and companies protesting

of EU law and of the rights of LGBTQI persons in Hungary,<sup>4</sup> the European Commission launched infringement procedures against Hungary related to equality and the protection of fundamental rights.<sup>5</sup>

## B. The scope of the opinion

11. Act LXXIX of 2021 consists of 12 provisions, 11 of which are amendments to different Acts. The amendments that are of particular interest for the Committee on Equality and Non-Discrimination of the Council of Europe and are, therefore, the subject matter for this opinion are the following:

- *Amendment to Act XXXI of 1997 on the protection of children and guardianship (hereinafter: Child Protection Act);*
- *Amendment to Act XLVIII of 2008 on the basic conditions of and certain restrictions on economic advertising activities (hereinafter: Advertisement Act);*
- *Amendment to Act CLXXXV of 2010 on media services and mass communication (hereinafter: Media Act);*
- *Amendment to Act CCXI of 2011 on the protection of families (hereinafter: Family Protection Act);*
- *Amendment to Act CXC of 2011 on national public upbringing (hereinafter: National Public Education Act).*

12. The amendments to the National Public Education Act, the Advertisement Act and the Media Act only apply to specific target groups (namely: schools and teachers, businesses and media service providers). The Child Protection Act however has a much broader scope of application and applies also to parents and other legal guardians. And Family Protection Act does not contain any limitation on its scope, thus its provisions apply to all natural persons, public bodies and private entities in Hungary.

13. The opinion will assess the compatibility of the legal amendments to the five Acts listed above with international human rights standards in the field.

## III. Analysis

### C. Procedure used for the adoption of the amendments

14. The Act LXXIX of 2021 was adopted in a speedy manner and without thorough and transparent public consultations. The amendments were submitted five days before the adoption of the law, which deprived civil society, opposition and other interested stakeholders of the possibility to provide any meaningful input in line with the Venice Commission's recommendations in the Rule of Law Checklist<sup>6</sup> and the Report on the role of the opposition in a democratic Parliament.<sup>7</sup>

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against legislation at stake can be found at: [#NEMVAGYEGYEDÜL - A propagandatörvény ellen tiltakozó szervezetek | Háttér Társaság \(hatter.hu\)](#).

<sup>4</sup> See European Parliament resolution of 8 July 2021 cited above.

<sup>5</sup> Detailed information can be seen at: [Commission takes legal action for discrimination LGBTQI \(europa.eu\)](#).

<sup>6</sup> See Venice Commission, *Rule of Law Check List*, CDL-AD(2016)007, point 5.

<sup>7</sup> See Venice Commission, *Report on the Role of the opposition in a democratic Parliament*, CDL-AD(2010)025, paras. 106 - 115.

15. Concerns about frequent and sudden changes of legislation have been expressed by the Secretary General of the Council of Europe regarding the level of transparency and consultation with which legislative proposals have to be processed.<sup>8</sup>

16. The Secretary-General of the United Nations stressed the particular importance of the right to meaningful participation in times of crisis like COVID-19. He underlined that meaningful participation in decision-making is a human right that must be defended in the face of pushback, an imperative amplified by crisis such as COVID-19.<sup>9</sup>

17. During the virtual meetings with the Ministry of Justice and the parliamentary majority, the participants underlined that the Hungarian legislation<sup>10</sup> does not require public consultations when draft bills are submitted by members of Parliament. Therefore, there was no need to conduct public consultations concerning Act LXXIX of 2021, initiated by the Legislative Committee of Parliament.

18. The Venice Commission is aware that in Hungary the rules applicable to the legislative process differ depending on the author of the draft law and that drafts submitted by Members of Parliament, unlike those submitted by the Government or the President of the Republic, do not require an obligatory public consultation. However, a public consultation for drafts submitted by members of Parliament is not explicitly ruled out either.<sup>11</sup> Moreover, The Venice Commission reiterates the importance, in a democratic society, of inclusive public debate and a meaningful participation in the law-making process and encourages the Hungarian authorities to always follow this significant international standard.

19. The Commission has repeatedly underlined - *inter alia* in relation to Hungary - the importance of the procedural element for the quality of the legislative process: conducting a public, transparent and accountable consultation with civil society organisations, opposition and relevant stakeholders prior to the adoption of legislation.<sup>12</sup> Moreover, it has emphasized that consultations with all stakeholders and civil society have to take place irrespective of strict time schedules or other commitments a state has to comply with.<sup>13</sup>

20. In sum, the speedy adoption of Act LXXIX of 2021, without any consultation, does not meet the above-mentioned requirements.

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<sup>8</sup> See Report by the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law, A Democratic Renewal for Europe*, 2021, p.80, available at: [State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe. \(coe.int\)](#). See also European Commission, *Rule of Law Report, The Rule of law Situation in the European Union*, COM (2021) 700, 20 July 2021, p.21, available at : [2021 Rule of law report - Communication and country chapters | European Commission \(europa.eu\)](#).

<sup>9</sup> See Secretary-General's remarks at High-level side event: "Participation, Human Rights and the Governance Challenge Ahead", 25 September 2020, available at: <https://www.un.org/sg/en/content/sg/statement/2020-09-25/secretary-generals-remarks-high-level-side-event-participation-human-rights-and-the-governance-challenge-ahead-delivered>

<sup>10</sup> See Act CXXXI of 2010 on Public Participation in the Preparation of Legislation, Articles 1 and 8.

<sup>11</sup> See CDL-AD(2017)015, Hungary - Opinion on the draft Law on the transparency of organisations receiving support from abroad, para. 26.

<sup>12</sup> See CDL-AD(2021)034, Hungary - Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, paras.50-56, See also CDL-AD (2021)036, Opinion on the amendments to the Act on the Organisation and Administration of Courts and the Act on the Legal Status and Remuneration of Judges adopted by the Hungarian Parliament in December 2020, paras.20-22; See also, CDL-AD (2021)039, Joint Opinion of the Venice Commission and the OSCE/ODIHR on amendments to electoral legislation, paras. 19-21; See also 2014 OSCE/ODIHR *Guidelines on the Protection of Human Rights Defenders*, Section II, Sub-Section G on the Right to participate in public affairs.

<sup>13</sup> See CDL-AD(2021)023, Turkey - Opinion on the compatibility with international human rights standards of law no. 7262 on the prevention of financing of the proliferation of weapons of mass destruction, paras. 14 and 84.

#### D. International standards

21. The relevant hard law standards of the most pertinent issues identified in the amended Acts can be found in Articles 10 ECHR and 19 (2) ICCPR (freedom of expression, including the right to receive and impart information and ideas without interference by public authorities regardless of frontiers), Articles 14 ECHR and 26 ICCPR (prohibition of discrimination), Article 2 of Protocol No. 1 to the ECHR and Article 29 CRC (right to education), and Articles 8 ECHR and 17 ICCPR (right to respect for private and family life, including right to health).

22. The amendments will be assessed in the light of the set of judgments and recommendations by European and international human rights bodies regarding diverse gender identities and sexual orientations, as well as different human right issues identified in the amended Acts, notably:

- European Court of Human Rights
  - Case of *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017: legislative ban on propaganda of non-tradition sexual relations aimed at minors is harmful to children, discriminatory and in breach of article 10 ECHR and Article 14 in conjunction with article 10 ECHR.
  - Case of *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010: repeated bans on holding gay-rights marches and pickets is not necessary in a democratic society, is discriminatory and in breach of Article 11 ECHR and Article 14 in conjunction with article 11 ECHR.
- European Committee of Social Rights
  - *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, No. 45/2007, 30 March 2009: Sexual education curriculum's content is discriminatory towards homosexual relationships and in breach of Article 11(2) ESC.
- Parliamentary Assembly of the Council of Europe
  - Resolution 1948(2013) of the Parliamentary Assembly of the Council of Europe, adopted on 27 June 2013 and entitled "Tackling discrimination on the grounds of sexual orientation and gender identity".
  - Resolution 2097(2016) of the Parliamentary Assembly of the Council of Europe adopted 29 January 2016 and entitled "Access to school and educations for all children".
  - Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe adopted 29 April 2010 and entitled "Discrimination on the basis of sexual orientation and gender identity"
- Congress of Local and Regional Authorities of the Council of Europe
  - Recommendation 211(2007)1 adopted on 28 March 2007 and entitled "Freedom of assembly and expression for lesbians, gays, bisexuals and transgender persons.
- European Commission for Democracy through Law
  - Opinion CDL-AD(2013)022 on the Issue of the Prohibition of so-called "Propaganda of Homosexuality" in the Light of Recent Legislation in Some Member States of the Council of Europe, where the Venice Commission examined the statutory provisions containing prohibitions of "propaganda of homosexuality" which had been adopted or proposed to be adopted in the Republic of Moldova, the Russian Federation and Ukraine.

- Opinion CDL-AD(2021)029 on the constitutional amendments adopted by the Hungarian Parliament in December 2020 which, *inter alia*, concerned issues of marriage and family, including sexual orientation, gender identity and upbringing of children.
- Committee of Ministers
  - Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010. This recommendation covers a wide range of areas where LGBTQI persons may encounter discrimination. It also deals with the requirement that states respect the freedom to receive and impart information on subjects dealing with sexual orientation and gender identity.
- United Nations Human Rights Committee
  - Case of *Fedotova v. Russian Federation*, Communication No 1932/2010, UN Doc CCPR/C/106/D/1932/2010, IHR 2053 (UNHRC 2012), 31 October 2012: conviction of an administrative offence for “propaganda of homosexuality among minors” on the basis of an ambiguous and discriminatory section in the law, amounted to a violation of the author’s rights under Article 19, paragraph 2 [right to freedom of expression], read in conjunction with Article 26 [protection against discrimination] of the International Covenant on Civil and Political Rights (ICCPR).
  - General comment No. 18: Non-discrimination.
  - General comment No. 34: Article 19: Freedom of opinion and expression.
- United Nations Committee on the Rights of the Child
  - General comment No. 1(2001): Article 29 (1): The aims of the education.
  - General Comment No. 4(2003): Adolescent health and development in the context of the Convention on the Rights of the Child.
  - General comment No. 20 (2016) on the implementation of the rights of the child during adolescence.

**E. Amendments to Act XXXI of 1997, Act XLVIII of 2008, Act CLXXXV of 2010, Act CCXI of 2011 and Act CXC of 2011 in the light of international standards**

**1. General remarks**

23. The Law seems to serve as an implementation of the recent constitutional changes in Hungary regarding - among others - issues of marriage and family, including questions of gender identity and upbringing of children. The Venice Commission assessed the constitutional amendments in its opinion of July 2021.<sup>14</sup> The Commission warned against the danger that the constitutional amendments “will further strengthen an attitude according to which *non-heterosexual lifestyles are seen as inferior*, and fuel a hostile and stigmatising atmosphere against LGBTQI people”.<sup>15</sup>

24. The legislation at stake is titled as “Act on taking more severe action against paedophile offenders and amending certain Acts for the protection of children”. The legislation insinuates that sexual orientation and gender identity are associated with the violation of children’s rights. Both are degrading, stigmatizing and discriminatory. It seems that the amendments start from the

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<sup>14</sup> See CDL-AD(2021)029, Opinion on the constitutional amendments adopted by the Hungarian Parliament in December 2020.

<sup>15</sup> See *Ibid.*, para.30.

underlying premise that “homosexuality” and diverse gender identity are something that corrupt youth, undermine society and the state and should therefore be resisted, and that consequently, “propagation of homosexuality or divergence from self-identity corresponding to sex” needs to be prohibited and limited.<sup>16</sup>

25. The term *paedophile* has but negative connotations and is likely to create a hostile environment towards a group of people whose sexual orientation and gender identity is protected under international human rights law (right to privacy, Articles 8 ECHR and 17 ICCPR). The *ECtHR in its Bayev v. Russia* judgement held that attempts to draw parallels between homosexuality and paedophilia are “unacceptable”.<sup>17</sup>

26. For these reasons and irrespective of either the assessment of the content of the Law or the explanations provided by the representatives of the Ministry of Justice, during the virtual meeting, that the use of the notion is just a matter of the law-making technique, the Venice Commission urges the Hungarian authorities to *change the title of the Act*.

## **2. Non-recognition of gender identity and protection of the right to privacy, prohibition of discrimination**

27. Two provisions of Act LXXIX of 2021 are related to the recognition of “the right of children to a self-identity corresponding to their sex at birth.”

- Section 3/A of the Child Protection Act reads as follows “In the child protection system, the State shall protect the right of children to a self-identity corresponding to their sex at birth.” (Section 1, (1) of the Act LXXIX of 2021).
- Section 1 (2) of the Family Protection Act provides: “The protection of organized family relationships and the implementation of the right of children to a self-identity corresponding to their sex at birth shall play a key role in preserving their physical, mental and moral health.” (Section 10 (2) of the Act LXXIX of 2021).

28. These provisions mirror Article XVI paragraph (1) of the Fundamental Law of Hungary stating: (1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. *Hungary shall protect the right of children to a self-identity corresponding to their sex at birth* and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.”

29. Article XVI paragraph (1) of the Fundamental Law of Hungary - among other constitutional amendments - has been assessed by the Venice Commission in its opinion of July 2021.<sup>18</sup> The Venice Commission finds it relevant and important to repeat the analysis and findings from its previous opinion in relation to Section 3/A of the Child Protection Act and Section 1 (2) of the Family Protection Act.

30. In the view of the Venice Commission, the amendments under consideration are not compatible with international human rights standards. Various international human rights bodies have asserted that all individuals have a “right to a self-identity” based not only on their “sex at birth” (as the amendments suggest), but also on the basis of their “gender,” the socially

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<sup>16</sup> See CDL-AD(2013)022, Opinion on the issues of the prohibition of so-called “propaganda of homosexuality” in the light of recent legislation in some member States of the Council of Europe, para.23.

<sup>17</sup> See ECtHR, *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, 20 June 2017, para.69; See also *supra* (note1), para. 17: “*Conflation of sexual orientation and gender identity with paedophilia or attacks on children’s rights displays a clear attempt to instrumentalise human rights language in order to enact discriminatory policies; considers this to be contrary to international human rights principles and norms*”.

<sup>18</sup> See CDL-AD(2021)029, paras.33-52.

constructed characteristics and roles for women and men.<sup>19</sup> Under the ECHR, gender identity is recognised as a component of personal identity, falling under the right to respect for private life.<sup>20</sup>

31. Already in 2002, in the case of *Christine Goodwin v. the United Kingdom*,<sup>21</sup> the Court found a violation of Article 8 ECHR notably on the basis that a European and international consensus existed favoring the legal recognition of a transgender person's acquired gender. The *Goodwin* case raised the issue of whether or not the respondent State had failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transgender, to respect for her private life, in particular through the lack of legal recognition given to her gender reassignment. The Court held that there had been a failure to respect the applicant's right to private life since there were no significant factors of public interest to weigh against the interest of the applicant in obtaining legal recognition of her gender reassignment.<sup>22</sup>

32. Since then, the Court has regularly dealt with the issue. According to current case-law, Article 8 ECHR is applicable to the question of the legal recognition of the gender identity of transgender people who have undergone gender reassignment surgery,<sup>23</sup> the conditions for access to such surgery,<sup>24</sup> and the legal recognition of the gender identity of transgender people who have not undergone, or do not wish to undergo, gender reassignment treatment.<sup>25</sup>

33. Next to Article 8 ECHR, the non-discrimination clause of Article 14 ECHR prohibits discrimination on the ground of gender identity under the category of 'sex' or 'other status'. In this respect, the ECtHR has developed a constant jurisprudence, which allows applicants subjected to discrimination based on their sexual orientation and/or gender identity to claim a violation of Article 14 ECHR in conjunction with another substantive right of the Convention.<sup>26</sup>

34. The Venice Commission is aware that in Hungary, any legal document reporting the sex of an individual, such as the ID or passport, is based on the sex identified in the birth certificate, which has to be established shortly after the birth of the child and can never be changed afterwards, not even in the case of change of sex by medical treatment.<sup>27</sup>

35. The Venice Commission notes with concern that this situation, stemming from Article XVI paragraph (1) of the Fundamental Law of Hungary, further reaffirmed in the relevant provisions of the Child Protection Act and the Family Protection Act, may result in discrimination on the

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<sup>19</sup> On the basis of Article 2, CRC, the CRC Committee stressed that States parties must address discrimination against vulnerable or marginalised groups of children including children who are lesbian, gay, transgender or transsexual (CRC, General Comment No. 13, The right of the child to freedom from all forms of violence, paras. 60 and 72(g)). On the basis of Article 5 and 2 (f) CEDAW, the CEDAW Committee recognised that discrimination suffered by women is "inextricably linked" with other factors that affect women including gender identity (General Recommendation No. 27, Older women and protection of their human rights, para. 13; General Recommendation No. 28, The core obligations of States parties under article 2 CEDAW, para. 18). On the basis of Article 2 CESC, CESC Committee explicitly recognised that a person's gender identity is among the prohibited grounds of discrimination enshrined in Article 2 (2) ICESCR (General Comment No. 20 Article 2 (2), Non-discrimination in economic, social and cultural rights, para. 32). For more details, see *Born free and equal, Sexual Orientation and Gender identity in International Human Rights Law*, United Nations, Office of the High Commissioner for Human Rights, New York and Geneva, 2012, available at : <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> (last accessed on 16 June 2021).

<sup>20</sup> At European level, ECtHR, *Van Kück v. Germany*, 12 June 2003; *A.P., Garçon and Nicot v. France*, 6 April 2017, paras. 95-96. European Court of Justice (ECJ), *P v S and Cornwall County Council*, 30 April 1996.

<sup>21</sup> See, ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002.

<sup>22</sup> See, *ibid.*, para. 93.

<sup>23</sup> See among others, ECtHR, GC, *Hämäläinen v. Finland*, 16 July 2014, para. 68.

<sup>24</sup> See among others, ECtHR, *Van Kück v. Germany*, op. cit., paras. 59 ff; ECtHR, *L. v. Lithuania*, 11 September 2007, paras. 56-57; ECtHR, *Schlumpf v. Switzerland*, 5 June 2009, para.107.

<sup>25</sup> See ECtHR, *A.P., Garçon and Nicot v. France*, 6 April 2017, paras. 95-96.

<sup>26</sup> See ECtHR, GC, *X and Others v. Austria*, op. cit.; ECtHR, *Taddeucci and McCall v. Italy*, 30 June 2016; ECtHR, *Sousa Goucha v. Portugal*, 22 March 2016.

<sup>27</sup> See, CDL-AD(2021)029, (*Supra* note 14), para. 40.

basis of sexual orientation and gender identity, thereby violating applicable international human rights norms. The Commission therefore repeats the recommendation already provided with regard to Article XVI paragraph (1) of the Fundamental Law of Hungary in its July opinion - to repeal the amendment "*Hungary shall protect the right of children to a self-identity corresponding to their sex at birth*". The Commission further recommends repealing the amendments with a similar wording of the Child Protection Act (Section 3/A) and the Family Protection Act (Section 1 (2)) or, at a minimum, to ensure that the amendments do not have the effect of denying the rights of transgender people to legal recognition of their acquired gender identity or denying state protection when it comes to preserving their physical, mental and moral health.

### **3. Prohibition of propagation and portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality in the context of freedom of expression and prohibition of discrimination**

36. Several provisions of Act LXXIX prohibit or limit access to content that propagates or portrays the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18 and for public service advertisement even without any age limit. (Section 32 (4a) of the Media Act).

- *New Section 6/A of the Child Protection Act and new Section 8(1a) of the Advertisement Act forbid to make accessible to persons who have not attained the age of eighteen years content that (...) propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality." (Section 1 (2) and section 3 of Act LXXIX of 2021)*
- *New Section 9(6) in combination with Section 9(1) of the Media Act imposes the obligation on media services to classify programmes under category V (not appropriate for audiences under the age of eighteen) if they are capable of exerting negative influence on the physical, mental or moral development of minors, in particular as a result of having as their central element violence, propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality [ ] ..... (); (Section 9 (2) of Act LXXIX of 2021)*
- *Section 32 (4a) of the Media Act excludes of the qualification as public service announcements and community facility where the advertisement is capable of exerting negative influence on the appropriate physical, mental or moral development of minors, in particular as a result of having as their central element [ ], pornography, propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality. (Section 9 (3) of Act LXXIX of 2021)*
- *Section 179(2) of the Media Act imposes the obligation for the Media Council, where problems are identified in connection with the provisions of classification or the Act on freedom of the press, to request the Member State under the jurisdiction of which the media service provider specified in paragraph (1) falls to implement effective measures and to take measures for the violations specified by the Media Council. (section 9 (5) of Act LXXIX of 2021)*
- *Section 5/A of the Family Protection Act forbids to make accessible to persons who have not attained the age of eighteen years content that (...) propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality." (Section 10 (3) of Act LXXIX of 2021)*

37. The right to freedom of expression is guaranteed in Article 10 ECHR and Article 19 ICCPR. This right includes freedom to hold opinions and to receive and impart information and ideas

without interference by public authority and regardless of frontiers. The European Court of Human Rights has repeatedly ruled that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb – “Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.”<sup>28</sup>

38. The Committee of Ministers of the Council of Europe stresses that the right to seek and receive information includes “information on subjects dealing with sexual orientation and gender identity” and that this right should be effectively enjoyed without discrimination.<sup>29</sup> More specifically regarding the children’s particular need for information, the Convention on the Rights of the Child requires states to ensure children’s “access to information and materials from a diversity of national and international sources.”<sup>30</sup>

39. As the Council of Europe’s Steering Committee for Human Rights has observed, the authorities “have a positive obligation to take effective measures to protect and ensure the respect of lesbian, gay, bisexual and transgender persons who wish to ... express themselves, even if their views are unpopular or not shared by the majority of the population.”<sup>31</sup>

40. The right to freedom of expression may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”. Any restriction has to be imposed under the three cumulative conditions foreseen in, inter alia, Article 10, § 2, of the ECHR, and Article 19 § 3 of the ICCPR: 1) *the restriction shall be prescribed by law* (condition of legality, including the requirements of foreseeability and accessibility); 2) *the restriction shall pursue at least one of the legitimate aims exhaustively indicated in Article 10(2) ECHR and Article 19(3) ICCPR* (the condition of legitimacy), and 3) *the restriction shall be necessary in a democratic society to achieve that legitimate aim* (the condition of necessity requiring also proportionality).<sup>32</sup>

### 3.1 “Prescribed by law” requirement

41. Any restriction on the freedom of expression should be “prescribed by law”. Two requirements flow from this expression. (1) The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. (2) The law must be foreseeable: a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his/her conduct: s/he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>33</sup> As underlined by the UN Human Rights Committee, “Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly

<sup>28</sup> See ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, No. 5493/72, 1 EHRR 737, para. 49.

<sup>29</sup> See Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010, para. 13.

<sup>30</sup> See United Nations Committee on the Rights of the Child, General Comment No. 4(2003): Adolescent health and development in the context of the Convention on the Rights of the Child, para.10.

<sup>31</sup> See Explanatory Memorandum, Recommendation CM/Rec(2015), 31 March 2010, para. 15.

<sup>32</sup> See also United Nations Human Rights Committee, General comment No. 34: Article 19: Freedom of opinion and expression, para. 22.

<sup>33</sup> See ECtHR, *Sunday Times v. United Kingdom*, judgment of 26 April 1970, para.49; See also communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995; See also CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, para. 22.

restricted and what sorts are not” and they must comply with the non-discrimination provision of the Covenant.<sup>34</sup>

42. The above-mentioned provisions of the legislative amendments contain the words “propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality.” The precise meaning of the notions “to propagate” and “to portray” is not clear. These terms have neither been defined by law, nor interpreted in the by-laws or by the relevant administrative authorities; they are neither qualified in the explanatory memorandum. Therefore, it remains vague and ambiguous whether these notions will be interpreted restrictively, or whether these terms will cover any information or opinion on diverse sexual orientation or gender identity, any attempt to change the homophobic attitude of a part of the population towards gay and lesbians, transgender persons, any attempt to counterbalance the sometimes deeply rooted prejudices by disseminating unbiased and factual information on sexual orientation and gender identity.”<sup>35</sup>

43. Other terms also lack the precision required for any law restricting the freedom of expression. For instance, the precise meaning of the words “capable of exerting negative influence on the physical, mental or moral development of minors” is not clear. (Section 9(1) and Section 32 (4a) of Media Act). The meaning of the term “homosexuality” remains unclear, too; does it refer to one’s sexual identity or sexual activity or both?<sup>36</sup>

44. During the virtual meetings, the rapporteurs were informed about the cases heard by the consumer protection authority and the Media Council,<sup>37</sup> concerning broad child protection provisions already in place in the Hungarian legislation before the adoption of the legislative amendments under review. These cases were brought to the attention of the rapporteurs as examples of a broad interpretation of child protection provisions, used against the LGBTQI content.<sup>38</sup> The Venice Commission has also been informed that the Media Council updated its recommendation on age-appropriate classification (ratings) on 15 September 2021, in line with the new provisions of the Media Act (Section 9 (6)). The updated recommendation, *inter alia*, offers an interpretation of “propagation” and some examples of programmes under category V (not appropriate for audiences under the age of eighteen). These include - among others- works that seek to depict in detail or, where appropriate, promote gender non-conformity, gender reassignment and homosexuality.<sup>39</sup> However, according to the updated recommendation “it does not aim to lay down strict, rigidly interpreted rules for each classification [rating]”, and the list of considerations it recommends to take into account “is not at all comprehensive or final, as professional practice requires the continuous review and

<sup>34</sup> See UNHCR, General comment No. 34, (*Supra* note 32), para 25.

<sup>35</sup> See CDL-AD(2013)022 (*Supra* note16), para. 34. See also ECtHR *Bayev and others v. Russia*, 20 June 2017, § 76: “The Court shares the view of the Venice Commission, which referred to the vagueness of the terminology used in the legislation at hand, allowing for extensive interpretation of the relevant provisions (see §§ 31-37 of the Opinion, quoted in paragraph **Error! Reference source not found.** above). It considers that the broad scope of these laws, expressed in terms not susceptible to foreseeable application, should be taken into account in the assessment of the justification advanced by the Government.”

<sup>36</sup> See also UNHCR No. 1932/2010, *Fedotova v. Russian Federation*, § 10.2.

<sup>37</sup> Information about the Media Council and its mandate can be found at: [The Media Council • National Media and Infocommunications Authority \(nmhh.hu\)](https://www.nmhh.hu/).

<sup>38</sup> In October 2019, a fine of HUF 500, 000 (EUR 1,375) was imposed on Coca-Cola for featuring same-sex couples on a billboard. The campaign entitled *#loveislove* featured a gay male couple hugging each other, a lesbian couple looking into each other’s eyes and a heterosexual couple kissing each other. The third poster featuring a heterosexual couple was not reproached by the authority; In March 2021 the Media Council launched an investigation against RTL Klub for airing an information video (available at: <https://youtu.be/wXLuhRgihog>) about rainbow families. The video featured LGBTQI people raising children talking about their everyday experiences and experts (psychologists, sociologists, teachers) discussing scientific findings on such families, investigation is still pending; In January 2021 the consumer protection authority ordered Labrisz Lesbian Association to change the cover of their children’s book *Fairyland is for Everyone* because it includes “patterns of behaviour deviating from traditional gender roles”. The authority’s decision has been challenged in court; the judicial review is pending.

<sup>39</sup> The examples include the following programs: *Adele’s Life*, *Boys in the Club*, *It’s a Crime*, *All About My Mother*, *Generation X*, *Call Me by Your Name*, *L (The L Word)*, *Lip Service*, *Shameless*, *Skin I Live In*.

amendment of these considerations.” During the virtual meeting, the Media Council informed the rapporteurs that after the adoption of the amendments, it received 76 complaints, out of which 75 were found inadmissible. In the view of the Venice Commission, this is also indicative of the lack of clarity for the citizens around the regulations in question.

45. In the absence of any definition of “propagation” and “portrayal” contained in Hungarian legislation, the Commission welcomes the effort of the Media Council to update its recommendation. However, without assessing its content, the Commission cannot consider the interpretations (restrictions) contained in the non-binding document to be “prescribed by law”, in particular to be satisfying its legality condition, including, *inter alia*, “foreseeability”. Moreover, the Commission observes, that the guidelines of the Media Council may not necessarily be relevant or applicable concerning the similarly worded provisions contained in the other Acts at stake, like the National Public Education Act, the Child protection Act, etc.

46. The Venice Commission stressed on numerous occasions that overly broad and potentially ambiguous terms or concepts lack precision, which is essential for legal texts, and that they may lead to different and potentially diverging interpretations.<sup>40</sup> Furthermore, such terms risk being used to disproportionately restrict the rights to free expression<sup>41</sup> and are incompatible with international standards for restrictions of freedom of expression.<sup>42</sup>

47. In sum, in the Venice Commission’s opinion, the provisions in question are not formulated with sufficient precision so as to satisfy the requirement “prescribed by law” contained in the paragraphs 2 of Articles 10 ECHR and paragraph 3 of Article 19 ICCPR.<sup>43</sup> It endorses the position of the European Court on such vague terms in the Bayev judgement: “Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in individual cases.”<sup>44</sup>

### **3.2 “Necessary in a democratic society” for “the protection of health or morals” and “for the protection of the rights of others.”**

#### **3.2.1 “Necessary in a democratic society”**

48. Any restriction on the freedom of expression should be “necessary in a democratic society”. The hallmarks of “a democratic society” are pluralism, tolerance and broadmindedness<sup>45</sup>, as well as the fair and proper treatment of minorities and avoidance of any abuse of a dominant position.<sup>46</sup>

49. The adopted legislation has a detrimental effect on the freedom of expression. As the Council of Europe Commissioner for Human Rights rightly pointed out, the legislative amendments risk “to outlaw any depiction or discussion of diverse gender identities and sexual orientations in the public sphere, including in schools and the media.”<sup>47</sup> It also, therefore risks crowding out sexual minorities from participating in the public debate on LGBTI-issues and from combatting the negative stereotypes existing in society against them.

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<sup>40</sup> See CDL-AD(2016)025, Joint Opinion on the draft law "on Introduction of amendments and changes to the Constitution" of the Kyrgyz Republic, para. 31; See also CDL-AD(2018)002, Joint Opinion on the Draft Law amending the Law on Freedom of Conscience and on Religious Organisations of Armenia, para. 44.

<sup>41</sup> See CDL-AD(2018)001, Opinion on the Draft law on Prevention and Protection against Discrimination of "The former Yugoslav Republic of Macedonia", §36.

<sup>42</sup> See CDL-AD(2019)016, Joint Report on Digital Technologies and Elections, §90.

<sup>43</sup> See CDL-AD(2013)022 (*Supra* note16), para. 37.

<sup>44</sup> See ECtHR, *Bayev and others v. Russia*, 20 June 2017, § 83.

<sup>45</sup> See ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, § 49.

<sup>46</sup> See ECtHR, *Young, James and Webster v UK* (1982) 11 EHRR 439.

<sup>47</sup> See the *Council of Europe Commissioner for Human Rights*, statement of 14 June 2021, available at : [Commissioner Mijatović urges Hungary's Parliamentarians to reject draft amendments banning discussion about sexual and gender identity and diversity - View \(coe.int\)](#).

50. At the outset, it should be noted that the above-mentioned provisions are linked to the question of sexual identity, gender and sexual orientation. The ECtHR has recognized that gender identity and sexual orientation are protected by Article 8 ECHR and covered by the prohibition of discrimination in Article 14 ECHR. The Court observed that “there is a clear European consensus about the recognition of individuals’ right to openly identify themselves as gay, lesbian or any other minority and to promote their own rights and freedoms.”<sup>48</sup> According to the Court: “just like differences based on sex, differences (of treatment) based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons. Where a difference of treatment is based on sex or sexual orientation the State’s margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention.”<sup>49</sup>

51. In the light of this case law, “measures which seek to remove from the public domain promotion of other sexual identities except heterosexual, affect the basic tenets of a democratic society, characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities. Thus, such measures would have to be justified by compelling reasons.”<sup>50</sup>

### 3.2.2 For the protection of health or morals

52. The Hungarian authorities provide as justification for the above-mentioned provisions that they are in the interest of the protection of morals and the rights of others, more specifically the rights of minors. However, as both the right to sexual and gender identity and the right to sexual orientation are protected under the right to respect for private life, both under the ECHR (Article 8) and ICCPR (Article 17), public authorities cannot deem gender reassignment and homosexuality to be contrary to “morals”, in the sense of Article 10 (2) ECHR, as the right to sexual and gender identity and the right to sexual orientation are fundamental human rights under Article 8 ECHR.<sup>51</sup>

53. As underlined by the UN Human Rights Committee, “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.<sup>52</sup>

54. The negative attitude of even a large part of the public opinion towards gender reassignment or homosexuality as such can neither justify a restriction on the right to respect for the private life of LGBTIQ people, nor on their freedom to come true for their gender identity or sexual orientation in public, to advocate for positive ideas in relation to identity and to promote tolerance towards transgender persons and homosexuals. In this regard, the Venice Commission recalls that in its Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe considered that neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity.<sup>53</sup> It also recalls the position of the European Court that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly

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<sup>48</sup> See ECtHR, *Bayev and others v. Russia*, 20 June 2017, § 66.

<sup>49</sup> See ECtHR, *X and Others v Austria*, judgment of 19 February 2013, § 99.

<sup>50</sup> See CDL-AD(2013)022 (*Supra* note 16), § 48.

<sup>51</sup> See *Idem*, § 52.

<sup>52</sup> See UNHCR, General comment No. 34, (*Supra* note 32), para.32.

<sup>53</sup> See CM/Rec(2010)5.

would become merely theoretical rather than practical and effective as required by the Convention.<sup>54</sup>

55. As the provisions under consideration pertain to “propaganda and portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality” as such, without limiting the prohibition to obscene or pornographic display of sex change or homosexuality, or to the demonstration of nudity or sexually explicit or provocative behaviour or material, the provisions cannot be deemed to be justified as necessary in a democratic society to the protection of morals.<sup>55</sup>

### **3.2.3 “For the protection of the rights of others”**

56. The second asserted justification of the above-mentioned provisions is the protection of the rights of minors. Some of these provisions explicitly refer to the capacity “of exerting negative influence on the physical, mental or moral development of minors”. The Hungarian authorities claim that the protection of minors against transgender or homosexual portrayal or propagation is justified, given their lack of maturity, state of dependence and, in some cases, mental disability.

57. The Hungarian authorities fail however to explain for which reasons the exposure of minors to the dissemination of mere information or ideas, advocating a more positive attitude towards gender and sexual diversity is considered to be detrimental to their well-being and not in line with the best interests of children. The Venice Commission recalls the position of the European Court of Human Rights in the case of *Alekseyev*: “There 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”<sup>56</sup> Children do not need to be protected from the mere exposure to diversity.” The Commission also recalls the *Bayev* judgement, where the ECtHR concluded that the Russian legislation in question did “not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others”.<sup>57</sup>

58. The European Court of Human Rights ruled in 2017, that the so-called “gay propaganda” law passed in Russia in 2013 violates article 10 ECtHR, safeguarding the freedom of expression. It found in particular that by adopting this law the authorities had reinforced stigma and prejudice and encouraged homophobia, which was incompatible with the values of a democratic society.<sup>58</sup>

59. The Venice Commission also concludes that the blanket nature of the prohibitions of “propaganda and portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality” in ACT LXXIX cannot be deemed to be justified as necessary in a democratic society for the protection of the rights of minors.<sup>59</sup>

### **3.3 Prohibition of discrimination on the ground of sexual orientation and gender identity**

60. The above-mentioned provisions imply that only propagation and portrayal of “divergence from self-identity corresponding to sex at birth, sex change or homosexuality” is forbidden, and

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<sup>54</sup> See ECtHR, *Alekseyev v. Russian Federation*, judgment of 21 October 2010, § 81; See also ECtHR, *Bayev and others v. Russia*, 20 June 2017, § 70

<sup>55</sup> See CDL-AD(2013)022, § 58.

<sup>56</sup> See ECtHR, *Alekseyev v. Russian Federation*, judgment of 21 October 2010, § 86: See also ECtHR, *Bayev and others v. Russia*, 20 June 2017, § 78

<sup>57</sup> See *Bayev and others v. Russia*, 20 June 2017, para 83.

<sup>58</sup> See *Idem.*, para.83.

<sup>59</sup> See CDL-AD(2013)022, § 58.

not the propagation or portrayal of self-identity corresponding to sex birth, heterosexuality or sexuality in general.

61. The amendments stigmatize LGBTI persons and discriminate against them on the basis of sexual orientation, gender identity and gender expression.

62. Discrimination on the ground of gender identity is prohibited under the category of ‘*other status*’ of Article 14 ECHR. In this respect, the ECtHR has developed a settled case law, which allows applicants subjected to discrimination based on their *sexual orientation and/or gender identity* to claim a violation of Article 14 ECHR in conjunction with another substantive right of the ECHR.<sup>60</sup>

63. The UN Human Rights Committee (*UNHRC*) has found that the reference to “sex” in Article 2 (1) and Article 26 ICCPR also includes sexual orientation.<sup>61</sup> The HRC considers that State parties need to ensure to all individuals on their territory the rights enshrined in the ICCPR as well as equal protection before the law without distinctions of any grounds including sexual orientation (Article 2 (1) and Article 26 ICCPR).<sup>62</sup>

64. The UN Committee on Economic, Social and Cultural Rights (*CESCR*) has adopted a General Comment on non-discrimination in economic, social and cultural rights, in which it recognized that *a person’s enjoyment of the ICESCR rights may not be restricted due to his or her sexual orientation or gender identity*. The CESCR explicitly recognizes that under Article 2 (2) ICESCR the criteria “other status” includes sexual orientation and gender identity. As a consequence, a person’s sexual orientation or gender identity are among the prohibited grounds of discrimination enshrined in Article 2 (2) ICESCR.<sup>63</sup>

65. The Venice Commission recalls that gender identity and sexual orientation are protected under Article 8 of the ECHR Article 17 of the ICCPR while any differences made solely on the basis of sexual orientation are unacceptable<sup>64</sup>, and that “negative attitudes (in the population) cannot of themselves be considered (...) to amount to sufficient justification for the different treatment any more than similar negative attitudes towards those of a different race, origin or colour.”<sup>65</sup>

66. The Venice Commission refers to the case-law of both the European Court of Human Rights and the UN Human Rights Committee. The ECtHR ruled in 2017 that the so-called “gay propaganda”-law passed in Russia in 2013, violates Article 14 in conjunction with Article 10 ECtHR on the prohibition on discrimination.<sup>66</sup> The UNHCR held that punishment of Ms Fedotova for “propaganda of homosexuality” was in violation of Article 19, paragraph 2 (freedom of expression), read in conjunction with Article 26 (right to equality and prohibition of discrimination) of the ICCPR.<sup>67</sup> The Human Rights Committee considered that the legislative measure in question was in itself discriminatory: “the State party has not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to

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<sup>60</sup> See ECtHR, *X and Others v. Austria* [GC], No. 19010/07, judgement of 19 February 2013; *Taddeucci and McCall v. Italy*, No. 51362/09, judgement of 30 June 2016; *Sousa Goucha v. Portugal*, No. 70434/12, judgement of 22 March 2016.

<sup>61</sup> See UNHRC, *Toonen v. Australia*, No. 488/1992, 31 March 1994, § 8.7.

<sup>62</sup> See UNHRC, *X v. Colombia*, No. 1361/2005, 13 January 2001, § 7.2 and *Young v. Australia*, No. 941/2000, 29 June 1999, § 10.2.

<sup>63</sup> See General Comment 20 Article 2 (2) (Non-discrimination in economic, social and cultural rights), 2 July 2009, § 32.

<sup>64</sup> See, CDL-AD(2013)022, § 71 and the references to case-law in footnote 76.

<sup>65</sup> See ECtHR, *S.L. v. Austria*, 9 January 2003, § 44; See also CDL-AD(2013)022, § 74.

<sup>66</sup> See ECtHR, *Bayev and others v. Russia*, 20 June 2017, paras. 91-92.

<sup>67</sup> See UNHCR, *Fedotova v. Russian Federation*, cited above, para. 11.

propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.”<sup>68</sup>

67. The Venice Commission considers that the prohibition of “propagation and portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality” among minors, amounts to a discrimination, since the authors of the provisions under consideration have not put forward any reasonable and objective justification of the differential treatment.

68. As the Venice Commission stated in a previous opinion: “On the whole, it seems that the aim of these measures is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion. As such, the measures in question appear to be incompatible with “the underlying values of the ECHR”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10 and 14 of the Convention.”<sup>69</sup>

69. In addition to the provisions concerning “propagation and portrayal” discussed above, Section 1(2) of the Family Protection Act provides:

*“(1) The State shall protect the institutions of family and marriage also due to their dignity and value in and of themselves, with particular regard to the relationship between parents and children, in which the mother is a woman and the father is man.”*

*“(2) The protection of organised family relationships and the implementation of the right of children to a self-identity corresponding to their sex at birth shall play a key role in preserving their physical, mental and moral health.”*

70. This provision echoes the recent amendment of *Article L of the Fundamental Law of Hungary* which had been covered by the July 2021 opinion of the Venice Commission.<sup>70</sup> Therefore, by reference to paragraphs 15-32 of the opinion, and without further elaboration, the Commission reiterates the recommendation contained in paragraph 32 of the opinion, that is to be extremely careful in the interpretation and application of the amendment “in a way that the principle of non-discrimination on all grounds, including sexual orientation, is fully implemented in line with international standards and Hungarian constitutional and legislative guarantees, notably, Article XV paragraph (2) of the Fundamental Law (Hungary shall guarantee fundamental rights to everyone without discrimination) and Article 1 of the Equal Treatment Act (all persons on the territory of Hungary must be treated with the same respect)”.

#### **4. Education and upbringing**

71. Some of the amendments touch upon the right to education, including sex education and upon the rights of parents in upbringing their children. A new paragraph 12 has been added to Section 9 of the National Public Education Act:

*“In the conduct of activities concerning sexual culture, sex, sexual orientation and sexual development, special attention shall be paid to the provisions of Article XVI (1) of the Fundamental Law. Such activities cannot be aimed at the propagation of divergence from self-identity corresponding to sex at birth, sex change or homosexuality.”*

72. Furthermore, a new Section 9/A has been added to the National Public Education Act, limiting the possibility of schools to provide registered programs/lectures (by persons other than the teachers) on sex education, drug prevention, internet usage, or any other topics relating to mental and physical development only through organisations/individuals registered with a “state agency

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<sup>68</sup> See Human Rights Committee No. 1932/2010, Fedotova v. Russian Federation, § 10.6.

<sup>69</sup> See CDL-AD(2013)022, § 82.

<sup>70</sup> See CDL-AD(2021)029.

defined by law”, with the possibility of infringement proceedings against the head of the school and the person or member of the unregistered organisation.

73. In the Explanatory Report to the Act LXXIX of 2021, the registration of NGO's, as a pre-condition to be permitted to provide sex education in schools, has been justified with the need to exclude organisations of questionable professional credibility, that have been set up to represent a specific sexual orientation.<sup>71</sup> Even though, according to a new point j) of Section 94(1) of the National Public Education Act, the Minister responsible for education is supposed to designate the organ authorised to keep the register and determine the detailed conditions for registration, after almost 5 months since the adoption of the amendments, no decree has been issued. As a result, currently no civil society organisations may hold sex education classes in public education institutions.

74. The new paragraph 12 of Section 9 of the National Public Education Act only refers to “*propagation*”, and not to “*portrayal* (depiction) of divergence from self-identity corresponding to sex at birth, sex change or homosexuality”. In so far as this provision differs from the provisions dealing with other fields, prohibiting not only propagation, but also portrayal (New Section 6/A of the Child Protection Act; New Section 8(1a) of the Advertisement Act; New Section 9(6) of the Media Act; Section 32 (4a) of the Media Act and Section 5/A of the Family Protection Act). The authorities have not been able to explain whether this differentiation was intentional, and what effect it will have.

75. The prohibition in section 9 paragraph 12 of the Act solely concerns the propagation of divergence from self-identity corresponding to sex at birth, sex change or homosexuality. It does not concern the “propagation of heterosexuality”. The Venice commission reiterates that the scope of terms like “propagation” and “propaganda” is very wide, ambiguous and vague, is prone to be used as an argument to only address heterosexuality, and to exclude any reference to sexual diversity and equal rights of LHBTQI persons. For instance, by referring to the provisions of Article XVI(1) of the Fundamental Law (the Constitution), to which special attention must be given in sex education at schools, the new provision implies that only the ‘self-identity corresponding to their sex at birth’ will be addressed.

76. In its opinion on the constitutional amendments of December 2020, the Venice Commission noted that it is tempting for states to use public education for ideological goals, and to favour the most influential ‘philosophy of life’. But in the light of Article 2 Protocol No. 1 ECHR, in itself and in conjunction with Article 14 ECHR, states are obliged to abstain from such instrumentalization of the public education system, and instead must ensure an *objective and pluralist curriculum and avoid indoctrination* in a dominant philosophy.<sup>72</sup> Furthermore, the Venice Commission stressed that, “where sex education is provided, this must be *non-discriminatory towards individuals and the promotion of constitutional values must not lead to disregarding and disrespecting the diversity of religious opinions and sexual identities*” (paragraph 50). The Venice Commission concluded that “in order to do that, the *public-school system must provide an objective and pluralist curriculum, avoiding any indoctrination and discrimination between individuals on all grounds including sexual orientation ...*” (para. 52).

77. As regards *sex education in State schools* in particular, the ECtHR in the case of Kjeldsen, Busk, Madsen and Pedersen v. Denmark (judgment of 7 December 1976) noted that “the second sentence of Article 2 (P1-2) implies (...) that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and

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<sup>71</sup> See CDL-REF(2021)090.

<sup>72</sup> See *Idem.*, paras. 47 and 48; See also ECtHR, Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976, para. 53.

philosophical convictions.” In the case of A.R. and L.R. v. Switzerland (judgment of 19 December 2017) the Court noted that one of the aims of sex education was the *prevention of sexual violence and exploitation*, which posed a real threat to the physical and mental health of children and against which they had to be protected at all ages. It also stressed that one of the objectives of State education was to *prepare children for social realities*, and this tended to justify the sexual education of very young children attending kindergarten or primary school. The Court thus found that school sex education, as practised in a specific Swiss canton pursued legitimate aims.

78. The Venice Commission observes, that discrimination based on sexual orientation and gender identity can be reinforced by excluding objective information about different forms of sexual orientation, gender identity, gender expression and sex characteristics from the curriculum on sex education, thus creating an unsafe and unfriendly environment where LGBTQI children can be subject to bullying, harassment and even health related risks.

79. The CoE Parliamentary Assembly Resolution 2097 (2016) on Access to school and education for all children, called on member States “to ensure access by lesbian, gay, bisexual, transgender and intersex children to quality education by promoting respect and inclusion of LGBTI persons and the dissemination of objective information about issues concerning sexual orientation and gender identity, and by introducing measures to address homophobic and transphobic bullying” (4.1.8).

80. The European Committee of Social Rights set important standards on the right to sexual education in a landmark decision *INTERIGHTS v. Croatia*.<sup>73</sup> The Committee decided that State’s positive obligations under Article 11 §2 of the European Social Charter 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 marginalized groups such as persons of non-heterosexual orientation. The reproduction of such state-sanctioned material in educational materials not alone has a discriminatory and demeaning impact upon persons of non-heterosexual orientation throughout Croatian society, but also presents a distorted picture of human sexuality to the children exposed to this material. By permitting sexual and reproductive health education to become a tool for reinforcing demeaning stereotypes, the authorities have failed to discharge their positive obligation not to discriminate in the provision of such education and have also failed to take steps to ensure the provision of objective and non-exclusionary health education.”

81. Dunja Mijatović, Council of Europe Commissioner for Human Rights, in her comment on comprehensive sexuality education, stated: “By providing factual, non-stigmatising information on sexual orientation and gender identity as one aspect of human development, comprehensive sexuality education can help save lives. It can contribute to combating homophobia and transphobia, at school and beyond, and to creating a safer and more inclusive learning environment for all.”<sup>74</sup>

82. Against this background, the amendment adding the new paragraph 12 to section 9 of the National Public Education Act is not in accordance with international human rights standards and constitutional norms, as it deprives individuals under 18 years of access to adequate sex education and objective information about different forms of sexual orientation, gender identity, gender expression and sex characteristics that today exist in every society. It may result in discrimination on the basis of sexual orientation and gender identity.

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<sup>73</sup>See ECSR, International Centre for the Legal Protection of Human Rights (*INTERIGHTS*) v. Croatia., No. 45/2007, 30 March 2009, para. 61.

<sup>74</sup> Available at : [Comprehensive sexuality education protects children and helps build a safer, inclusive society - Human Rights Comments - Commissioner for Human Rights \(coe.int\)](https://www.coe.int/en/web/commissioner-ghr/interights-v-croatia).

83. Some provisions touch upon parental rights in the sphere of the family. New Section 6/A of the Child Protection Act prohibits “to make accessible to persons who have not attained the age of eighteen years content ... that propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality”. The new Section 5/A of the Family Protection Act contains a similar prohibition, with an even broader scope, which applies to parents and others.

84. The Hungarian authorities justified these amendments by, *inter alia*, referring to the protection of parental rights to educate children according to their own values. The Venice Commission observes that the right of parents to educate and choose the education of their children in conformity with their convictions is indeed protected by Article 2 Protocol no.1 ECHR which applies to all subjects, including sexual education.<sup>75</sup> However, it observes, that due to their broad application and ambiguous interpretation, the amendments to the Child Protection Act and the Family Protection Act in fact seem to have the opposite effect: providing only for a one-sided choice to ignore the existence of diverse sexual orientations and gender identities and discriminate and stigmatise LGBTIQ people. These objectives cannot be considered to be in conformity with the principles of pluralism and objectivity embodied in Article 2 Protocol no.1 ECHR. If parents buy their children under eighteen a youth novel on LGBTIQ persons or let them watch a film featuring LGBTIQ characters, they violate the law, as this amounts to making content portraying deviation of self-identity in line with birth sex, sex change or homosexuality available to minors. In fact, it seems that it will no longer be possible for parents to teach their children to accept gay, lesbian or transgender people, or even help their children to accept their own sexuality.

85. In sum, the Venice Commission considers this amendment to be in breach of the right to family life enshrined in Article 8 ECHR, and the right of parents to educate and teach their children in conformity with their own convictions, guaranteed in Article 2 Protocol no. 1 ECHR.

#### **IV. Conclusion**

86. By letter of 24 September 2021, the Venice Commission has been asked by the Committee on Equality and Non-Discrimination of the Council of Europe to assess “the compatibility with international human rights standards of Act LXXIX of 2021 enacted by the Hungarian Parliament on 15 June 2021, in particular where it amends the following Acts: Act XXXI of 1997, Act XLVIII of 2008, Act CLXXXV of 2010, Act CCXI of 2011 and Act CXC of 2011, and notably as concerns its impact on the freedom to receive and impart information on subjects dealing with sexual orientation and gender identity and on other rights and freedoms of LGBTIQ people.”

87. The scope of this opinion is limited to the legislative amendments concerning the following Acts:

- *Act XXXI of 1997 on the protection of children and guardianship (Child Protection Act);*
- *Act XLVIII of 2008 on the basic conditions of and certain restrictions on economic advertising activities (Advertisement Act);*
- *Act CLXXXV of 2010 on media services and mass communication (Media Act);*
- *Act CCXI of 2011 on the protection of families (Family Protection Act);*
- *Amendment to Act CXC of 2011 on national public upbringing (National Public Education Act).*

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<sup>75</sup> See ECtHR, Jimenez Alonso and Jimenez Merino v. Spain, Decision of 25.05.2000; See also Dodjan and others v. Germany, Decision of 13.09.2011;

88. The amendments introduce prohibitions and/or restrictions on any depiction or discussion of diverse gender identities and sexual orientations in the public sphere, including schools and the media, by prohibiting or limiting access to content that “propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality” for individuals under 18 years of age.

89. The Venice Commission regrets at the outset that Act LXXIX of 2021, in particular when it concerns five Acts enumerated in paragraph one above, was adopted in a rushed manner, without any consultation with civil society, opposition and other stakeholders. The Venice Commission considers that this is not in line with its recommendations in the Rule of Law Checklist and its Report on the role of the opposition in a democratic Parliament.

90. The Venice Commission finds that the provisions under consideration are not formulated with sufficient precision so as to satisfy the requirement “prescribed by law”. The terms used in these provisions such as “propagation”, “portrayal”, “negatively influence” and “homosexuality” are too ambiguous to reach the standard of “foreseeability” and the provisions do not sufficiently define the circumstances in which they are applied.

91. The Venice Commission is further of the view that “public morality”, and “protection of minors” cannot justify the prohibition/restriction of “propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality. The prohibitions and/or restrictions under consideration are not limited to sexually explicit content or obscenities, but they are blanket which also cover legitimate expressions of sexual orientation and gender identity. The Venice Commission recalls that gender as a component of personal identity and homosexuality as a variation of sexual orientation, are protected under the ECHR and as such, cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of the ECHR. On the other hand, there is no evidence that expressions of sexual orientation or gender identity would adversely affect minors, whose interest is to receive relevant, appropriate and objective information about sexuality, including sexual orientations and gender identities.

92. In addition, the prohibition concerns solely the “propagation and portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality of homosexuality” as opposed to “propagation and portrayal of heterosexuality or self-identity corresponding to sex at birth”. Taking also into account the democratic requirement of a fair and proper treatment of minorities, the lack of any reasonable and objective criteria to justify the difference of treatment in the application of the right to freedom of expression, such prohibition amounts to discrimination on the basis of sexual orientation and gender identity.<sup>76</sup>

93. In the light of the above, especially the Venice Commissions’ previous recommendations and the ECtHR’s previous case law in respect to “propaganda of homosexuality”, the amendments discussed above concerning the five Acts listed in paragraph one, can hardly be seen as *compatible* with the ECHR and international human rights standards.

94. The Venice Commission further observes that amendments to the National Public Education Act are not in accordance with international human rights standards and fail to comply with the positive obligation of Hungary to ensure that the educational system provides children with objective and non-biased information on gender identity and sexual orientation and protects them from discrimination on the same grounds. The amendments contribute to creating a threatening environment where LGBTQI children can be subject to health-related risks, bullying and harassment. Moreover, due to their broad application and ambiguous interpretation, the amendments to the Child Protection Act and the Family Protection Act, by prohibiting to make accessible to persons who have not attained the age of eighteen years any content that

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<sup>76</sup> Similar findings were made in CDL-AD(2013)022, paras. 79-81.

propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality, is in breach of the right to family life enshrined in Article 8 ECHR, and the right of parents to educate and teach their children in conformity with their own convictions, guaranteed in Article 2 Protocol no. 1 ECHR. The amendments leave space only for one-sided and biased teaching, opening doors to stigmatization and discrimination of LGBTQI people. They prevent from educating responsible citizens capable of participating in the democratic processes of a pluralistic society and contribute to formation of ideologically motivated “parallel societies” where minorities are excluded and discriminated. This cannot be considered in conformity with the principles embodied in Article 2 Protocol no.1 ECHR.

95. The Venice Commission therefore makes the following key recommendations:

- To change the title of Act LXXIX of 2021 so no parallels can be drawn between paedophilia or attack on children’s rights and diverse sexual orientation and gender identity;
- To repeal or modify the amendment “The State shall protect the right of children to a self-identity corresponding to their sex at birth” (Section 3/A of the Child Protection Act), as well as the amendment “the implementation of the right of children to a self-identity corresponding to their sex at birth shall play a key role in preserving their physical, mental and moral health” (Section 1 (2) of the Family Protection Act) so they do not have the effect of denying the rights of transgender people to legal recognition of their acquired gender identity or denying state protection when it comes to preserving their physical, mental and moral health;
- To repeal the amendments concerning “propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality” (New Section 6/A of the Child Protection Act; New Section 8(1a) of the Advertisement Act; New Section 9(6) of the Media Act; Section 32 (4a) of the Media Act and Section 5/A of the Family Protection Act); or at least to limit them to non-objective, obscene or pornographic display;
- To repeal the amendment “Such activities cannot be aimed at the propagation of divergence from self-identity corresponding to sex at birth, sex change or homosexuality” (New paragraph 12 of Section 9 of the National Public Education Act)
- To repeal the requirement of the prior registration of the organisations/individuals, other than the ones listed in a new Section 9/A of the National Public Education Act, or, at minimum, to ensure an immediate adoption of the relevant decree mentioned in Section 94(1) of the National Public Education Act (new point j). In addition, to ensure that the decree sets clear criteria for registration with a focus on professionalism, experience and knowledge of such individuals/organizations and not a blanket exclusion due to their “questionable professional credibility “or field of expertise in LGBTQI issues referred to as “organisations to present special sexual orientation” in the explanatory memorandum to Act LXXIX of 2021.

96. The Venice Commission remains at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.