

# NON- COM PLIA NCE

BY THE REPUBLIC OF BULGARIA WITH  
DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT  
AND THE COUNCIL OF 25 OCTOBER 2012 ESTABLISHING  
MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND  
PROTECTION OF VICTIMS OF CRIME





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# I

INTRODUCTION – POLITICAL SITUATION IN BULGARIA

Human rights are a fundamental principle in the existence and functioning of the United Nations (UN), the Council of Europe (CoE) and the European Union (EU), with each of these organizations having drawn up documents to codify this. For example, in 1948, the UN adopted the Universal Declaration of Human Rights; The Council of Europe adopted in 1950 the European Convention on Human Rights (ECHR), on the basis of which a mechanism for the protection of proclaimed rights was created, namely the European Court of Human Rights (ECtHR); the European Union, for its part, adopted the EU Charter of Fundamental Rights annexed to the Treaty of Lisbon, thus making the Charter legally binding on all Member States.

The European Convention on Human Rights, as well as the case-law of the ECtHR, explicitly exclude any form of discrimination against lesbian, gay, bisexual, transgender and intersex people (LGBTI), and the EU Charter of Fundamental Rights excludes any discrimination based on sexual orientation. This means that in all EU Member States, homosexual people, among other affected groups in society, should have the same rights and life conditions as all other people. However, practice shows that this is not the case in many countries. One of the countries in the EU where the rights of LGBTI people remain neglected, and often deliberately violated, is Bulgaria.

The adoption of the Protection against Discrimination Act (PDA) was set as a condition for Bulgaria's accession to the European Union in 2007. This happened in 2004, and the law states the following:

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*Art. 4. (1) (Supplemented – SG no. 70/2004 – effective 1.01.2005)  
Any direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, **sexual orientation**, marital status, property status, or on **any other grounds** established by law or by an international treaty to which the Republic of Bulgaria is a party, shall be prohibited.*

The Protection against Discrimination Act explicitly emphasizes that discrimination based on sexual orientation is prohibited, but there is no explicit prohibition on discrimination based on gender identity and/or gender expression. The latter would be covered by "any other grounds", but it is a matter of a broad interpretation of the magistrate applying this law.

At the same time, there is no other law in the country that protects the rights of LGBTI people. The Bulgarian Criminal Code does not provide for penalties in cases of crimes against LGBTI persons. Bulgaria remains one of the countries that does not recognize in any form the relationships of persons of the same sex. The Constitution defines civil marriage as a voluntary union between a man and a woman, and the Family Code does not introduce any other form of regulation of relations between two persons. In this sense, LGBTI people remain outside the law and their relationships, social and economic relations remain unregulated by the legislation of the country. According to a survey conducted by Youth LGBT Organization Deystvie, not recognizing same-sex couples puts them at a disadvantage and deprives them of more than 300 civil, social and economic rights<sup>1</sup>.

On the other hand, the Bulgarian government and institutions have never formally expressed their support for LGBTI people. There are no government policies, measures and programs in place to monitor discrimination and hate crime against the LGBTI community. Such monitoring is carried out by existing LGBTI non-governmental organizations working with the community, but due to the limited budget of the latter, they are unable to measure the actual magnitude of the problem.

According to an official ranking reflecting the rights of LGBTI people in Europe made annually by ILGA Europe<sup>2</sup>, in 2014, Bulgaria received a score of 30% of the maximum number of points (where 100% equals full acceptance of LGBTI people and 0% reflects the highest degree of human rights violations of LGBTI people and widespread discrimination), it received 27% in 2015, 24% in 2016, and in 2019, it was ranked among the last in the ILGA Europe ranking with 20% acceptance of LGBTI people. This is the result of large-scale pro-Russian and evangelical campaigns undertaken in recent years against women's and LGBTI people's rights and freedoms. As a result of these campaigns, and due to the lack of adequate legislation taking into account social realities, the levels of discrimination, hate speech and violence against the LGBTI community are on the rise.<sup>3</sup>

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<sup>1</sup> See: [www.deystvie.org](http://www.deystvie.org)

<sup>2</sup> ILGA-Europe Rainbow Map

<sup>3</sup> According to data of Youth LGBT Organization Deystvie

# III

BULGARIA'S OBLIGATIONS UNDER INTERNATIONAL  
TREATIES AND EU PRIMARY AND SECONDARY LAW

Hate crimes generally affect a number of human rights that are protected by international and European law binding for Bulgaria. These include the right to be free from discrimination, as well as the right to life and physical integrity, the right not to be subjected to torture or other ill-treatment.

Internationally, the **UN Universal Declaration of Human Rights (1948)** guarantees the equality of all persons irrespective of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. **The United Nations International Covenant on Civil and Political Rights (1966)** obliges States to prevent, investigate, punish, compensate for the killing and other acts of violence by adopting legislative and other measures to ensure that every person is protected from such acts. **Международната конвенция за премахване на всички форми на расова дискриминация на ООН (1965 г.) The United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1965)** requires Member States to ensure without discrimination: "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution".

As a Member State of the European Union, Bulgaria is also bound by a number of EU documents, such as the **Charter of Fundamental Rights of the European Union** which protects the right to life, physical integrity and the right of every person not to be subjected to torture and ill-treatment, and prohibits discrimination on any grounds, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

**The Treaty on the Functioning of the European Union (TFEU)** provides the legal basis on which the Council of the European Union may take action to combat discrimination on grounds of sex, race, ethnicity, religion or belief, disability, age or sexual orientation. Pursuant to Art. 19 TFEU, the European Union has adopted secondary law aimed at combating discrimination. Article 67(3) TFEU states that "the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia".

The European Convention on Human Rights (ECHR), as mentioned above, guarantees human rights in the member states of the Council of Europe. Through its court, the European Court of Human Rights, a body of case-law has been established promoting the situation of LGBTI persons. Currently, there are several LGBTI rights cases against Bulgaria: M. Stoyanov v. Bulgaria – the case of Mihail Stoyanov (will be discussed below) against Bulgaria concerns the lack of a law on hate crimes on the basis of which the court would deliver a verdict and aggravating circumstance for homicide with homophobic motivation; S. Dimitrova v. Bulgaria – concerns the applicant's inability to obtain protection under the Domestic Violence Protection Act solely because her partner, with whom she cohabited, was a person of the same sex; R. Stoyanov v. Bulgaria – concerns hate speech against LGBTI persons.

Framework Decision (2008/913/JHA) on combating certain forms and expressions of racism and xenophobia by means of criminal law was adopted in 2008. Article 4 of the Framework Decision states that Member States "shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties". The mere transposition of the Framework Decision into national law often does not guarantee that the authorities will take all necessary measures to combat hate crime. Article 4 draws attention mainly to the applicable sanctions and does not apply in a manner consistent with the requirements laid down in European human rights law regarding the obligation of the authorities to take all possible measures to discover a xenophobic or racist motive, in particular in the investigation phase. Under this Framework Decision, all EU Member States undertake to impose criminal penalties for acts of incitement to hatred or violence, based on race, colour, descent, religion or belief, national or ethnic origin, and the dissemination of material expressing racism or xenophobia, and condoning, denying or trivialising genocide, war crimes, and crimes against humanity directed against such groups. In addition, Member States should take the necessary measures to ensure that racist and xenophobic motives are regarded as an aggravating circumstance. Mention should also be made of **OSCE Council of Ministers Decision No. 9/2009 on combating hate crimes**, requiring states to enact "specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes".

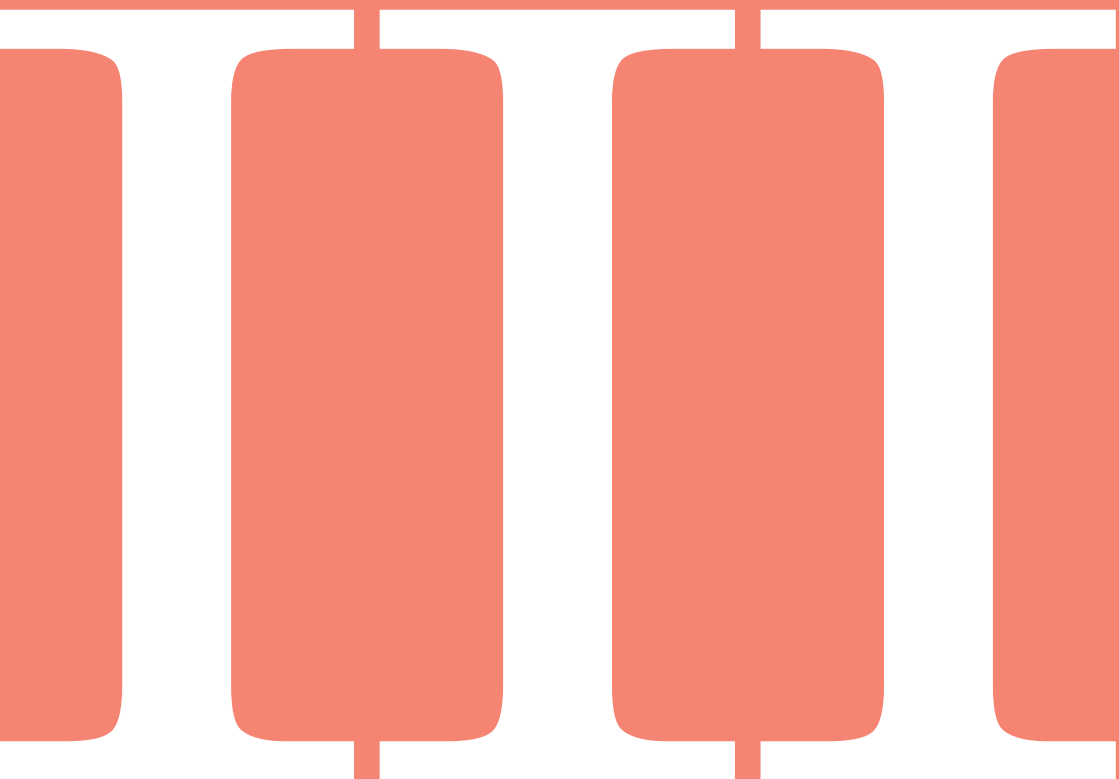
The first legislative decision at the European Union level concerning victims of crime was the Council Framework Decision (2001/220/JHA) on the standing of victims in criminal proceedings, adopted in 2001. The Framework Decision seeks to establish the fundamental rights of victims of crimes within the EU by laying down an obligation for all Member States to adapt their legislation to the requirements of the Framework Decision by 2006. From 2004 to 2009, Member States were obliged to provide information on their progress in transposing this Framework Decision. The information provided shows that no Member State has transposed the Framework Decision into its legislation and that States are referring to their already existing penal legislation for the transposition. Following the submission of the information, it was concluded that the Framework Decision is not sufficiently effective legislation to guarantee minimum standards for crime victims across the EU<sup>4</sup>. Thus, in 2011, the Commission presented a legislative package – the Victims of Crime Package – to strengthen the legal framework for victims' rights, including a proposal for a directly binding and enforceable directive establishing minimum standards for the rights, support and protection of victims of crime<sup>5</sup>.

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<sup>4</sup>[eur-lex.europa.eu](http://eur-lex.europa.eu)

<sup>5</sup>[victimsupport.eu](http://victimsupport.eu)





EUROPEAN LEGISLATION GUARANTEEING THE RIGHTS OF  
VICTIMS OF CRIME

Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (hereinafter referred to as the "Victims' Rights Directive") was adopted on 25 October 2012 and entered into force on 15 November 2012. All Member States had an obligation to transpose the provisions of the Directive into their national laws by 16 November 2015. The Directive replaces Council Framework Decision 2001/220/JHA, sets standards for police and judicial procedures and introduces an obligation for public officials to avoid discriminatory treatment in the processing of complaints from victims of crime. The Directive applies in connection with crimes and criminal proceedings and does not criminalize certain acts or behavior in the Member States, nor can it oblige or penalize Member States for criminalizing or non-criminalizing an act.

The Victims' Rights Directive is not the only EU legal instrument that seeks to achieve a common minimum level of protection for victims of crime. In order to set a binding obligation for Member States to improve the situation of victims of crime, the Victims Package includes several initiatives.

The current EU legislative framework on victim protection also includes Directive 2011/99/EU establishing the European Protection Order (EPO) (hereinafter referred to as the EPO Directive)<sup>6</sup>, Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters<sup>7</sup> and Directive 2004/80/EC relating to compensation to crime victims<sup>8</sup> (hereinafter referred to as the "Compensation Directive").

**The EPO Directive** establishes a mechanism that allows persons having a protection order in criminal matters issued in a Member State to request a European protection order. A European protection order is an act issued by a competent authority of a Member State on the basis of which a competent authority of another Member State takes the appropriate protection measure or measures under its national law in order to continue the protection of a person in its territory<sup>9</sup>. Such an order also allows protection in other Member States where the protected person is traveling or moving. A European protection order is issued on the basis of a protection measure taken, and the measures can be the following, either individually or in combination:

- prohibition for visiting certain settlements, regions or certain sites in which the protected person resides or or which they visit;
- prohibition or restriction of contacts in any form whatsoever with the protected person, including by telephone, e-mail or ordinary mail, fax or otherwise;
- prohibition or restriction of approaching the protected person at less than a certain distance.

The EPO Directive was transposed into Bulgarian law through the European Protection Order Act, which came into force on 06.07.2015.<sup>10</sup>

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<sup>6</sup> [eur-lex.europa.eu](http://eur-lex.europa.eu)

<sup>7</sup> [eur-lex.europa.eu](http://eur-lex.europa.eu)

<sup>8</sup> [eur-lex.europa.eu](http://eur-lex.europa.eu)

<sup>9</sup> Art. 2 of the European Protection Order Act

<sup>10</sup> [European Protection Order Act, available online](#)

**Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters** establishes a mechanism allowing the direct recognition of protection orders issued as a civil law measure between Member States. In this way, persons having a protection order in civil matters issued in the Member State of residence can refer to it directly in other Member States by presenting a certificate certifying their rights to the competent authorities. Regulation (EU) No 606/2013 has been transposed by the Act Amending and Supplementing the Civil Procedure Code of 19 June 2015 which adopts a new Chapter Three entitled 'Protection Measures Based on Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters'.<sup>11</sup>

**Council Directive 2004/80 relating to compensation to crime victims**, as adopted in 2004, creates the conditions for each Member State to put in place a national scheme guaranteeing fair and adequate compensation to crime victims. Moreover, the Directive makes it possible to make access to compensation practically easier, regardless of where in the European Union a person may become a victim of crime, by creating a system of cooperation between national institutions. The Directive requires all Member States to have a state compensation scheme providing fair and appropriate compensation to victims of intentional violence. The Directive also establishes a system for cooperation between national authorities for transfer of applications for compensation in cross-border situations; in particular, victims of crime committed outside their country of usual residence may contact an authority in their Member State to submit the application and receive assistance in practical and administrative formalities.

By virtue of the civil law in Bulgaria, everyone shall be obliged to repair the damage they have caused to another. The Criminal Procedure Code of Bulgaria regulates the ways of claiming compensation by victims of crime in criminal proceedings. If a victim does not make their claim within the criminal proceedings or the court decides not to allow the claim for compensation in the criminal proceedings (in cases where this would complicate the criminal proceedings), the victim shall be entitled to submit a claim for compensation under the provisions of the Obligations and Contracts Act before a civil court, the case being examined in the manner provided for in the Civil Procedure Code.

There are cases where the victim of a crime cannot receive compensation from the perpetrator. It is possible that perpetrator has not been identified, i.e. the proceedings have been terminated due to the lack of an established perpetrator in the course of the proceedings; it is possible that the results of the police investigation do not allow for a firm conclusion to be drawn about the perpetrator of the crime; it is possible that there is a conviction against the perpetrator which has entered into force, and yet the victim cannot receive compensation due to the perpetrator's insufficient income and assets.

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<sup>11</sup> [Ykaz № 115](#)

For this reason, the Member States of the European Union have introduced the possibility for a victim to receive compensation from the State. In the first place, a victim must first try to obtain compensation from the perpetrator, and if this is not possible, the victim may apply to the State for compensation. In the Republic of Bulgaria, the possibility of receiving assistance and financial compensation from the State is regulated in the Crime Victim Assistance and Financial Compensation Act<sup>12</sup>, as well as in the Rules for Implementation of the Crime Victim Assistance and Financial Compensation Act<sup>13</sup>. The law regulates the terms and conditions for assistance to victims who have suffered pecuniary and non-pecuniary damage as a result of crime, and for financial compensation to victims of a number of serious intentional crimes. Individuals – Bulgarian nationals, nationals of EU Member States or foreign nationals who have suffered actual pecuniary and non-pecuniary damage shall be entitled if this is provided for in an international treaty to which the Republic of Bulgaria is a party. In case of death of the victim, the rights to assistance and compensation shall be transferred to their heirs or to the person with whom they were in de facto cohabitation. A National Council for Assistance and Compensation to Victims of Crime has been established at the Ministry of Justice<sup>14</sup>. The website of the National Council shows that the last meeting, which discussed the awarding of compensation to individuals, took place on 14.03.2016.<sup>15</sup> **This shows that the created mechanism for assistance and compensation of victims of crime in implementation of Council Directive 2004/80 relating to compensation to crime victims ceased its operation 4 (four) years ago.** There is no other information on the website of the National Council.

Combined, all the documents that make up the Victims Package must be sufficient and effective to create a system common to all Member States, according to which the rights of all victims of crime are strengthened, according to which victims must be able to continue to benefit from protection measures when moving to another Member State, as well as a system that ensures victims' rights to compensation.

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<sup>12</sup> [Available here](#)

<sup>13</sup> [The Rules are available here](#)

<sup>14</sup> [www.compensation.bg](http://www.compensation.bg)

<sup>15</sup> [The Minutes of the meeting are available here](#)

# IVW

DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT  
AND THE COUNCIL OF 25 OCTOBER 2012 ESTABLISHING  
MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND  
PROTECTION OF VICTIMS OF CRIME

According to the Organization for Security and Cooperation in Europe, hate crimes are “any criminal act, namely against people or property, in which the victims or targets of the crime are selected based on their connection (real or perceived), bond, affiliation, support or real or presumed association with a certain group”. Violence committed against victims on the basis of their real or perceived ethnicity, race, religion, sexual orientation, gender identity or any other prohibited grounds constitutes a form of discrimination.

Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (hereinafter referred to as the Victims' Rights Directive) replaces Framework Decision 2001/220/JHA of the Council and creates new obligations for law enforcement officials, and introduces specific measures to be applied in cases of victims of hate crimes based on sexual orientation and gender identity (SOGI). It should be emphasized that the Directive applies to crimes and criminal proceedings and does not criminalize certain actions or behavior in Member States. This means that the decision to recognize and punish hate crimes based on SOGI remains within the exclusive competence of national legislators. Member States that do not include sexual orientation and gender identity in their criteria for discriminatory crime are few and Bulgaria is one of them. However, the Directive sets standards for police and judicial procedures and imposes an obligation on public officials to avoid discriminatory treatment when handling complaints made by LGBTI victims of crime. This sets a standard of full respect for the dignity, sexual orientation and gender identity of persons reporting crimes. The directive will be examined in detail in the context of LGBTI people who have been victims of hate crime in Bulgaria, and investigative bodies' and prosecutors' obligation to investigate.

# IV. 1

## RECITAL 2 IN THE PREAMBLE TO THE DIRECTIVE AND THE CONCEPT OF "VICTIM OF CRIME"

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### ***The concept of "victim of crime"***

Recital 2 in the preamble to the Directive provides for a definition of a victim, which consists of two parts: First, within the meaning of the Directive, a victim is a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence. Second, a "victim" may also be the family members of a person whose death has been directly caused by a criminal offence and who have suffered harm as a result of that person's death. Judgment of 25 July 2008, *Metock e.a.*, Case C-127/08, ECLI:EU:C:2008:449, paragraphs 98-99.

### ***How should the concepts of "spouse" and "family member" be interpreted according to the Directive?***

The presence of a marriage and marital relationship are governed by the law of the country where the marriage was concluded. However, the European Court of Justice has explicitly determined that the jurisdiction under which marriage was concluded was not decisive for the recognition of its existence.<sup>16</sup> The CoJ's case-law defines as a "family member" "the person who is living with the victim in a committed intimate relationship, in a joint household", emphasizing that this relationship may be both between persons of the same sex and between persons of the opposite sex.<sup>17</sup>

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<sup>16</sup> Judgment of 25 July 2008, *Metock e.a.*, Case C-127/08, ECLI:EU:C:2008:449, paragraphs 98-99.

<sup>17</sup> Judgment of 12 December 2013, Case C-267/12 *Hay*.

Moreover, in the Coman judgment<sup>18</sup>, the European Court of Justice affirms that the concept of "spouse" within the meaning of Directive 2004/38/EC is gender neutral and may accordingly cover a spouse of the EU citizen concerned of the same sex.<sup>19</sup> The CoJ therefore considers that an EU Member State cannot rely on its national law to refuse to recognize in its territory, for the purpose of exercising the right to free movement, the same-sex marriage concluded in another country by an EU citizen.<sup>20</sup> Once recognized, the marital relationship between two persons cannot be deleted for the purposes of another proceeding in the Member States (argumenta fortiori). In this sense, the present author believes that the term "family member" within the meaning of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime should be interpreted more broadly and should not depend on the interpretation of the Member States concerned, and should also cover persons living in a registered or unregistered family cohabitation with a person and who are of the same sex. The majority of the European Court of Justice's interpretations of the concept of "spouse" and "family member" are in the context of the right to free movement of EU citizens and their family members. By analogy, once this interpretation of these terms has been adopted, it should not be modified for the purposes of individual Directives. In this sense, this text will follow the same logic and assume that the concept of "spouse" is independent of the sex of the person and the place of conclusion of the marriage. A similar interpretation should be made in relation to the provisions of the EU Charter of Fundamental Rights. On the one hand, due to the fact that Article 9 of the Charter does not provide that marriage is bound by the opposite sex of the partners, and, on the other hand, that Article 21 of the Charter prohibits discrimination on grounds of sexual orientation in the application of EU law. Such an interpretation is supported by the guidance document of DG Justice emphasizing the obligation for Member States to use inclusive definitions of "family members" when it comes to a victim's partners. The guidelines make it clear that the concept of "spouse" and "family member" should include both spouses in a marriage and those who are in the form of registered and unregistered cohabitation, and their recognition should be independent of national jurisdiction and national law. This interpretation clearly indicates that the concepts should be broadly interpreted to include unmarried couples, same-sex couples and same-sex marriages.<sup>21</sup>

The interpretation of the concept of "spouse" and "family member" should not be considered solely in the sense of EU law and the case-law of the European Court of Justice. It is important to note that considerable progress has been made in the interpretation of

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<sup>18</sup> Judgment on Case C-673/16, Coman.

<sup>19</sup> Ibid, paragraph 35.

<sup>20</sup> Ibid, paragraph 38. See also: Христев, Х., „Свободно движение на гражданите на Европейския съюз – права и предизвикателства пред еднополовите семейства в Република България” (Hristev, H., Free Movement of European Union Citizens – Rights and Challenges to Same-Sex Families in the Republic of Bulgaria), p. 49.

<sup>21</sup> [DG Justice guidance document.](#)



these concepts in the legal practice of the Council of Europe and the ECtHR case-law. In the case of *Vallianatos and Others v. Greece*<sup>22</sup>, the ECtHR recognized the right of couples of the same sex to be formally recognized by the State and found that they were just as capable of engaging in stable and long-lasting relationships as couples of the opposite sex.<sup>23</sup> In view of this, it was logical that it was in the interest of these couples to have legally recognized relationships.<sup>24</sup> The ECtHR went even further in the case concerning the recognition of same-sex couples' right to personal and family life in *Orlandi and Others v. Italy*.<sup>25</sup> Here, the ECtHR found that Italy had committed a violation of Article 8 of the ECHR in refusing to recognize the marriages of six couples concluded abroad. The ECtHR's case-law not only remains at the level of recognition of marriages but also provides legal protection and recognition of partnerships between same-sex partners.<sup>26</sup> The Court concluded that the Italian Government had exceeded its discretion and had failed to fulfill its positive obligation to guarantee to the applicants specific legislation which provided for the recognition and protection of their unions.<sup>27</sup> The ECtHR drew particular attention to the fact that before its judgment in *Oliari and Others v. Italy*, the Italian State had not granted any protection to same-sex partnerships, and the Court held that such partnerships required legal recognition and protection. The ECtHR noted that the legal status afforded by so-called partnerships is close to or the same as that of marriage and that such a system would satisfy the requirements of the Convention.

### **Recommendations regarding Recital 2 of the Directive:**

#### **Recommendation 1**

*Member States should adopt a broader interpretation of the concept of "victim of crime" and recognize this status to LGBTI victims of crime, despite the lack of explicit legislation recognizing the homophobic and transphobic motive of the crime.*

#### **Recommendation 2**

*When interpreting a "family member" of crime victims, Member States should adopt a neutral interpretation that also respects the families of LGBTI people, and introduce a simplified regime for proving a lasting relationship within the meaning of the law.*

<sup>22</sup> *Vallianatos and Others v. Greece*, Applications nos. 29381/09 and 32684/09, Judgment of 7 November 2013.

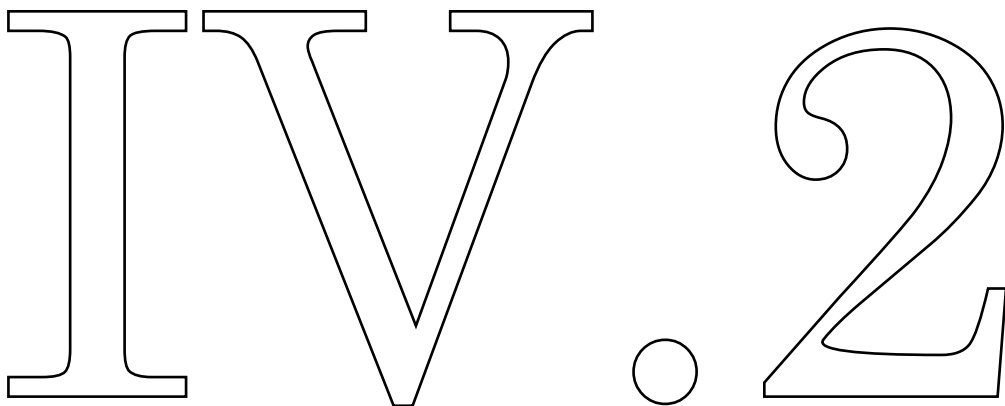
<sup>23</sup> *Ibid*, paragraph 81.

<sup>24</sup> *Ibid*, paragraph 90.

<sup>25</sup> *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment of 14.12.2017.

<sup>26</sup> *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11, Judgment of 21.07.2015.

<sup>27</sup> *Ibid*, paragraph 185.



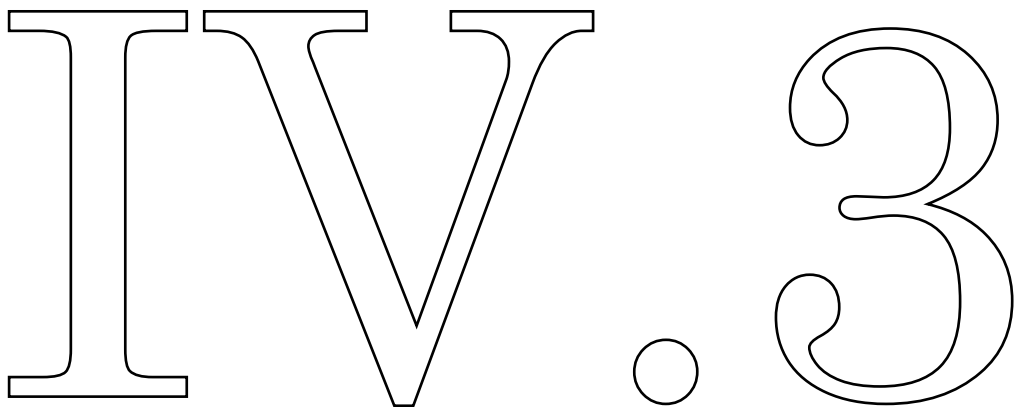
## RECITAL 9 AND THE CONCEPT OF "FULL RESPECT FOR DIGNITY"

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Recital 9 of the Directive guarantees "full respect for the dignity" of crime victims and their family members. Recital 9 states that victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, **gender expression, gender identity, sexual orientation**, residence status or health.

### ***Recommendation regarding Recital 9 of the Directive***

*Member States and their executive bodies should treat victims of crimes on the grounds of gender, gender identity and/or sexual orientation in a respectful manner not violating their dignity.*



## RECITAL 17 AND THE CONCEPT OF "GENDER-BASED VIOLENCE"

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Further down, recital 17 of the Victims' Rights Directive defines "gender-based violence" as

*"violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately".*

Here, the legislature also explicitly refers to gender identity as a protected characteristic under the Victims' Rights Directive.

### **Recommendation regarding Recital 17 of the Directive**

*Member States should define in their legislation the concept of "gender-based violence", which also includes the protection of the gender identity of a victim of a crime.*

# IV.4

## RECITALS 54, 55, 56 AND 57 OF THE VICTIMS' RIGHTS DIRECTIVE

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Recitals 54, 55, 56 should be examined in the aggregate and in terms of the victim's personal life and the fact that they are a member of the LGBTI community. Here, the European legislator attached importance to the secondary and repeat victimization of victims of crime, including law enforcement agencies and prosecutors as a potential cause of this secondary and repeat victimization. This is especially important for LGBTI people, as the low reporting rate is largely the result of secondary victimization of the victim by the law enforcement authorities and the prosecution (Recital 55). On the other hand, it is important to take into account the personal characteristics of the victim, such as age, gender, gender identity, sexual orientation, in the individual assessments that law enforcement agencies are required to make about victims of crime. Therefore, the failure of the police and the prosecution to collect data on the gender identity and/or sexual orientation of the victim creates a number of prerequisites for a violation of Recital 56. First, a likelihood of an inability to identify the motives for the crime is created, and from there, the chances of finding the perpetrator are reduced. Second, preconditions for secondary victimization are created, which would also violate Recitals 54 and 55. Last but not least, establishing the victim's personal characteristics is also relevant to the place of commission of the crime, for several reasons: first, because LGBTI people mostly go to bars that are designated as community members only, they can visit LGBTI centers, but they can also visit special public places known mostly to men who have sex with men where they go for a one-time sexual encounter and where men remain anonymous.

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<sup>28</sup> 2012 European Union Agency for Fundamental Rights survey "European Union lesbian, gay, bisexual and transgender survey".transgender survey".

All of these facts are relevant to the identification of the perpetrator of the crime and, if not established at the stage of police investigation, the entire investigation of the crime remains unfinished and the police and prosecutors would not have taken the necessary action to identify the perpetrator.

Recital 57 underlines the need to assume that specific groups would particularly benefit from the special protection measure.

***Recommendation on Recitals 54, 55, 56  
and 57 of the Directive***

*Member States should avoid the possibilities of secondary victimization by their law enforcement authorities. To this end, individual assessments that law enforcement agencies are required to make about victims of crime should be introduced, and it is important to take into account the personal characteristics of the victim, such as age, gender, gender identity, sexual orientation. This will improve the reporting rates of crime against LGBTI people and increase trust in law enforcement bodies.*

# IV.5

## RECITALS 62, 63 AND 64 OF THE VICTIMS' RIGHTS DIRECTIVE

In these recitals, the European legislator places several very important obligations on the Member States. Recital 62 encourages Member States to “work closely with civil society organisations” working with victims of crime, “in particular in policymaking initiatives, information and awareness-raising campaigns” and “monitoring and evaluating the impact of measures to support and protect victims of crime”. The European legislator says: “Victims should be assisted in finding and addressing the competent authorities in order to avoid repeat referrals. Member States should consider developing ‘sole points of access’ or ‘one-stop shops’, that address victims’ multiple needs when involved in criminal proceedings, including the need to receive information, assistance, support, protection and compensation.”

Recital 63 of the Victims’ Rights Directive, for its part, imposes an even deeper obligation on Member States. Here, the European legislator goes even further in its understanding of what services victims of crime should have access to, saying that in order to avoid repeat victimisation, the victim should have “reliable support services are available to victims and that competent authorities are prepared to respond to victims’ reports in a respectful, sensitive, professional and non-discriminatory manner”, which in turn would increase victims’ confidence in the criminal justice systems. The European legislator says in Recital 63 that practitioners who are likely to receive complaints from victims of crime should receive appropriate training.

Further, in Recital 64 of the Directive, Member States are required to communicate to the Commission statistics on the number and nature of the crimes reported and the level of investigations.

Recitals 62, 63 and 64 of the Victims' Rights Directive are of particular importance to LGBTI people in the European Union. They can be interpreted in the context of the rights of LGBTI people in Bulgaria and their development in the last few years. First, it is important to point out that there are 4 (four) LGBTI organizations in Bulgaria: GLAS Foundation, Billitis Foundation, Single Step Foundation, and Youth LGBT Organization Deystvie Association. Only two of these organizations provide services to the LGBTI community. The Single Step Foundation provides psychological support for young people and, in this regard, has a hotline and chat to help young people at risk. The other organization is the Youth LGBT Organization Deystvie ("Deystvie"). Deystvie provides free legal assistance to LGBTI people who are victims of crime and of discrimination. This is extremely important in the context of the present analysis, as in addition to providing this legal assistance, Deystvie also provides psychological assistance to victims of crime, as well as providing the administration with training on how to deal with LGBTI cases. Most notably, as at April 2020, the organization's team has conducted a training of more than 100 officers of the Ministry of the Interior in collaboration with the latter.

### **Recommendation on Recitals 62, 63 and 64 of the Directive**

*In order to achieve the objective of these Recitals, Bulgaria must provide training for officers in all regional Mol departments in the country, and they must also be trained in being contact points for hate crimes against LGBTI people. It is of the utmost importance that law enforcement agencies hold regular meetings with the LGBTI community in order to build trust between the Mol and LGBTI people and increase the rate of crime reporting.*

# IV.6

## THE DIRECTIVE AND ASPECTS OF PROTECTION OF VICTIMS' RIGHTS

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Article 1 of the Directive regulates the purpose of this EU legislation, namely:

*The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.*

The main aspects of the protection of the rights of victims of crime are addressed in the articles of the Directive, but in order to emphasize their importance to the Member States, the European legislator has already put them in the recitals of the Directive. For the purpose of the analysis, they will not be examined in detail to avoid repetition. There are several important aspects, however, that need to be reiterated: the definition of a victim of crime, a broad interpretation of a "family member" including persons in homosexual relationships, the right to access to information, the right to access to support services and the right to support from these services to victims. Member States should ensure that a victim is freely involved in criminal proceedings without them being deprived of access to justice.

**Obstruction of access to justice would be present if an LGBTI person is a victim of a crime and, due to lack of legislation, the competent authorities, in the case - of Bulgaria, refuse to initiate pre-trial/criminal proceedings.**

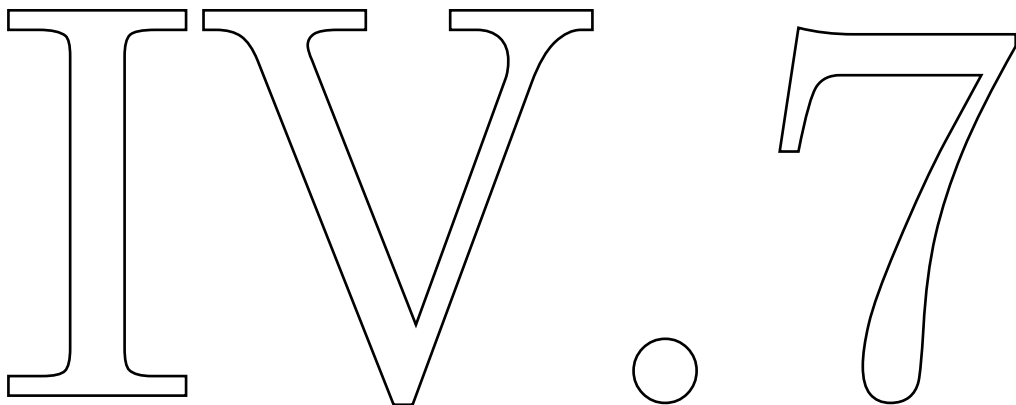


Article 18 of the Victims' Rights Directive requires Member States to ensure that a wide range of protection measures are in place to protect victims and their family members from secondary and repeat victimisation, intimidation and retaliation. It also requires Member States to protect victims and their family members from physical, emotional or psychological harm. In addition, the dignity of victims must be protected during questioning and when testifying. Other possible measures to protect the dignity of victims during questioning include restrictions on the number of times victims can be questioned, how investigators ask questions, and ensuring that victims are respected and recognized as victims in the process of pre-trial and criminal proceedings. **All these considerations are of particular importance to LGBTI victims.**

The Directive sets out four basic principles for the protection of victims during criminal investigations. The four principles set out in Article 20 are as follows:

Директивата определя четири основни принципа за защита на жертвите по време на наказателно разследване. Четирите принципа, установени в член 20, са следните:

1. Interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;
2. The number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;
3. Victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;
4. Medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.



## THE DIRECTIVE AND THE IDENTIFICATION OF VICTIMS WITH SPECIFIC PROTECTION NEEDS

The individual assessment of victims to identify their specific protection needs is one of the most important things in the Directive. The purpose of the individual assessment is to determine whether the victim is particularly vulnerable to secondary and repeat victimization, intimidation and retaliation during criminal proceedings. It is important for this to be understood in order to determine the appropriate extent and scope of the questions asked to the victim in this assessment. There are three main criteria that professionals need to consider when assessing a victim:

1. The victim's personal characteristics;
2. The type or nature of the crime; and
3. The circumstances of the crime.

The Directive also pays particular attention to victims of crimes with a discriminatory motive and states that such victims require particular attention from law enforcement authorities in the relevant jurisdictions. Particular attention should also be paid to victims who have suffered significant harm due to the severity of the crime, as well as to victims whose relationships and dependence on the perpetrator make them particularly vulnerable. It can be concluded that LGBTI people as victims of crimes with a discriminatory motive such as sexual orientation, gender identity and/or gender expression fall into this category and therefore have specific protection needs. Victims should be closely involved in the assessment and their wishes should be taken into account: victims may also refuse to benefit from special measures. It is important to note that an individual assessment needs.

Victims should be closely involved in the assessment and their wishes should be taken into account: victims may also refuse to benefit from special measures. It is important to note that an individual assessment needs to be updated during criminal proceedings and this approach allows for the adaptation, extension or reduction of services to meet the victims' real needs.

Article 23 of the Directive describes the specific measures within the level of investigation established as a result of an individual assessment.

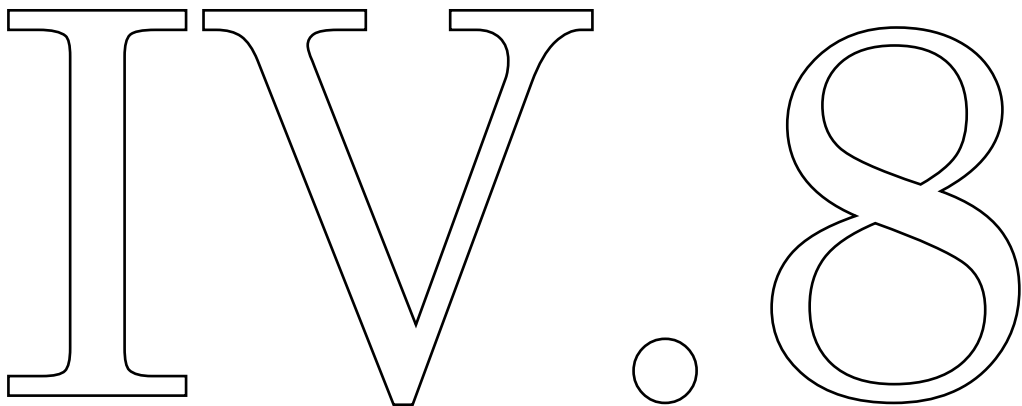
1. Interviews with the victim being carried out in premises designed or adapted for that purpose;
2. Interviews with the victim being carried out by or through professionals trained for that purpose;
3. All interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;
4. All interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

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If and when a victim with special protection needs is involved in legal proceedings, the following measures must be applied:

1. Measures to avoid visual contact between victims and offenders including during the giving of evidence, by appropriate means including the use of communication technology;
2. Measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
3. Measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and
4. Measures allowing a hearing to take place without the presence of the public.

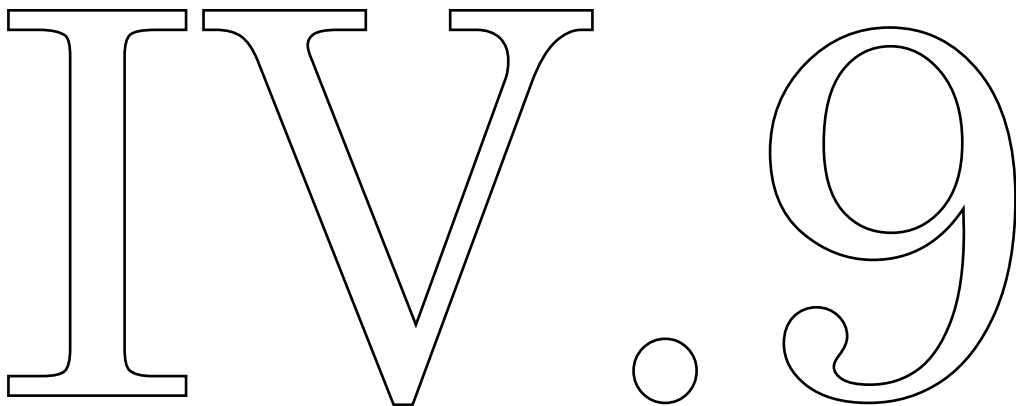
Logically, the Directive does not specify the number of protection measures to be applied – the decision for this is left to the national courts.



## THE DIRECTIVE AND THE OBLIGATION FOR TRAINING OF POLICE OFFICERS

Chapter Five of the Directive provides for training for practitioners and cooperation with and coordination of services. Article 25 recommends that all professionals having a contact with victims be trained – the list of professionals consists of, but is not limited to police officers and court staff, prosecutors, attorneys, judges, victim support services and restorative justice services. As explained in the guidance document of DG Justice, Member States' obligations in the field of training include raising awareness of the needs of victims in a professional and non-discriminatory manner. Article 26, for its part, emphasizes the importance of cooperation between Member States, indicating the minimum scope for such cooperation as:

1. The exchange of best practices;
2. Consultation in individual cases; and
3. Assistance to European networks working on matters directly relevant to victims' rights.



## THE DIRECTIVE AND THE OBLIGATION FOR AWARENESS RAISING

The Directive foresees and emphasizes the need for awareness raising, as Member States are required to take appropriate action, including through the Internet, aimed at:

1. Raising awareness of the rights set out in this Directive;
2. Reducing the risk of victimisation;
3. Minimising the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation.

Such actions must be targeted, in particular, to groups at risk such as children, victims of gender-based violence and violence in close relationships. The Directive proposes, but does not limit, such action to information and awareness raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders. This also means that Member States must ensure that there are common awareness raising campaigns and that information is accessible to the general public (leaflets, advertising campaigns, websites, etc.) and at places where victims are likely to go to as a result of crime (hospitals, school nurse, accommodation and employment centers, women's organizations, embassies, consulates, etc.).



## ***The doctrine of crime***

*What is a crime? Public nature, historical conditioning, danger to society. Crimes with a discriminatory motive.*

For the purposes of this legal analysis, the doctrine of crime will not be examined in its entirety, but only parts of it, such as the definition of crime, the danger to society of a crime, the unlawfulness of the act, the criminality and the historical conditionality of the criminal law doctrine. They will be examined in order to analyze the change in public relations and to motivate the need to criminalize crimes committed because of sexual orientation, gender identity or gender expression of the attacked person.

The current Criminal Code, in its Article 9 (1), defines a crime as "an act dangerous to society (action or omission) which has been culpably committed and has been declared punishable by law". The second paragraph underlines, however, that "an act which, although formally containing the elements of crime provided by law, because of its insignificance is not dangerous to society or its danger to society is obviously insignificant, shall not be considered to be criminal". This definition of crime emphasizes the need for is to actually undermine public or private interests.<sup>29</sup>

The danger to society of the act is its fundamental, objective, non-legal and determining attribute which characterizes it in terms of its negative impact on the existing social relations. Article 10 of the Criminal Code characterizes an act as being dangerous to society when it "endangers or damages the individual, the rights of citizens, property, the legal order established in the Constitution in the Republic of Bulgaria, or other interests protected by law". The danger to society is the damage to certain interests. But in order for an act to be unlawful, that unlawfulness must be established in a prohibition under criminal law. The unlawfulness of the act is its objective and legal attribute. Therefore, in order for an act to be considered a crime, it must adversely affect the interests of an individual, a group of individuals or of society as a whole.<sup>30</sup> It is this adverse effect that determines the need for criminal law protection, which aims to motivate citizens to refrain from such acts by providing for penalties for various acts.

*What happens, however, with an act that is not considered a crime? What happens with an act whose public consequences, although adversely altering reality, have not been declared unlawful?*

<sup>29</sup> A. Стойнов, Наказателно право. Обща част (A. Stoynov, Criminal Law. General), 1999, Ciela.

<sup>30</sup> A. Стойнов, Наказателно право. Обща част (A. Stoynov, Criminal Law. General), 1999, Ciela, p. 144

Legislative initiative is there when public relations that affect the rights and interests of all members or a particular group of society must be regulated. And since social relations are not something invariable, but evolve over different historical periods, it is only after the emergence of a certain type of social relations that their importance to society can be manifested, and hence the need for their protection through criminal law can be specified. Attitudes towards events that adversely affect public relations are changing, thus leading to a change in criminal law, including criminalization, decriminalization of certain acts, as well as a change in the existing criminal law framework.<sup>30</sup>

## ***Current legislation***

### ***Crimes with a discriminatory motive - definition***

Crimes with a discriminatory motive, or the so-called in the practice hate crimes, are called crimes in which the perpetrator chooses their victim because of the victim's actual or alleged belonging to a particular group in society, i.e. the victim has been chosen because of them having an actual or supposed characteristic. Different national legislation frameworks recognize different protected characteristics, such as: race, ethnicity, nationality, religion, sexual orientation, disability, social status, age, gender, gender identity. Crimes with a discriminatory motive can be any type of crime: murder, bodily injury, misappropriation of property, etc., i.e. they can be any act that is considered crime. In these crimes, there are all the main characteristics of the act: a conscious, purposeful, willful act, triggered by a certain need, which is externally manifested under certain conditions of time, place and environment. In the case of hate crimes, however, the leading motive is the perpetrator's motivation; i.e. the leading motive is to achieve an objective that is detrimental to the public interest from the perspective of the perpetrator's value system.

All crimes are aimed at negatively altering the existing reality, i.e. any crime entails danger to society. The difference between crimes as such and hate crimes is in the form of the danger to society. While crimes per se may take only one form, either damaging or threatening the object of the crime, hate crimes contain both forms of public danger. Not only do they harm the object of the crime, but they also threaten all persons who may be classified as belonging to the group to which the attacked person belongs. Therefore, the negative impact is not only on the victim, but in the case of hate crimes, in addition to the effect on the victim themselves, there is also an effect on the target group: generalized horror in the group to which the victim belongs, instilling a sense of vulnerability among its other members who could be the next victims of hate crimes. It also has an impact on other vulnerable groups – threatening effects on minority groups or on groups that identify with the target group, especially when that hatred is based on ideology or doctrine that

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<sup>31</sup> А. Стойнов, Наказателно право. Обща част, 1999, Сиела. сmp. 141-143.



preaches against several groups at the same time. The most significant effect is the effect on the community as a whole. This is about the effect that impunity has on a broad group of people called society. Non-criminalization of a particular behavior that has a negative impact on social reality leads to normalization of that behavior and its turning into one that is not only tolerated but also encouraged by the law.

For this reason, crimes with a discriminatory motive are of particularly high danger to society, because they are not directed at the particular individual per se, but at a wide group of people united by one of the protected characteristics listed in the law.

### ***Hate crimes under the Criminal Code - scope***

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#### *Hate crimes based on race, nationality and ethnicity*

In Chapter Three, Crimes Against Citizens' Rights, Section Crimes Against Citizens' Equality, the Criminal Code considers as crimes the preaching and inciting discrimination, violence or hatred based on race, nationality, and ethnicity through word, printed media, other the mass media, through electronic information systems, or otherwise. The use of violence against others or against the property of others based on race, nationality and ethnicity is also considered a crime. Here, the legislator has not set a condition for the degree of force used. On the contrary, when the force is at all used against someone because of their race, nationality or ethnicity, this is a sufficient condition for the initiation of criminal proceedings for a general crime rather than a private one. The acts of incitement to hatred and use of force against one person's faith and religious temples, as well as against citizens' political beliefs, are also considered crimes. The formation, leading and membership in an organization or a group that seeks to commit the acts described above, as well as the admission itself, shall be punishable. The instigators, leaders and accomplices in groups assembled to attack groups of the population, individual citizens or their property in connection with their nationality, ethnic or racial origin shall also be punishable.

#### *Hate crimes on religious grounds*

Art. 164 of the Criminal Code considers the preaching of hatred on religious grounds, which act must have been committed through speech, print or other mass media, through electronic information systems or otherwise. The desecration, destruction or damage of a religious temple, a house of worship, a sanctuary or an adjoining building, their symbols or tombstones, are also considered a crime. As with hate crimes based on race, nationality and ethnicity, the use of force or threat preventing citizens from freely professing their religion or performing their religious practices and services are also considered crimes. The Criminal Code provides punishments for the instigators, leaders and accomplices in groups assembled to attack groups of the population, individual citizens or their property in connection with their religious affiliation.

### *Hate crimes based on political beliefs*

The Criminal Code also protects persons against whom a crime has been committed related to the person's political affiliation.

### *Other corpora delicti concerning hate crimes*

Art. 172 of the Criminal Code considers a crime the intentional creation of an obstacle to one's employment or the compulsion to quit their job because of their nationality, race, religion, social origin, membership or non-membership in a trade union or other organization, political party, organization, a political movement or coalition, or because of their political or other beliefs.

Article 419a of the Criminal Code states that anyone who in any way justifies, denies or grossly belittles a crime against peace and humanity, thereby creating a risk of violence or hatred against individuals or groups of persons united by race, skin color, religion, origin, nationality or ethnicity shall also be subject to criminal liability. Incitement to this crime shall also be subject to criminal liability.

### *Corpora delicti – Racist and Xenophobic Motives*

The Criminal Code only contains corpora delicti for the crimes of murder and bodily injury with hooligan, racist or xenophobic motives (Article 116, paragraph 1, item 11, and Article 131, paragraph 1, item 12). However, sexual orientation, gender identity and gender expression are not considered aggravating circumstances under the Bulgarian Criminal Code.

## ***Hate crimes based on sexual orientation, gender identity and gender expression***

The Constitution of the Republic of Bulgaria, in its Art. 6, proclaims equality before the law on the basis of the characteristics of race, nationality, ethnicity, gender, origin, religion, education, beliefs, political affiliation, personal and social status and wealth. Sexual orientation, gender identity and gender expression are not included in the text of the Constitution.

The Criminal Code does not contain any provisions characterizing an act as a crime and/or hate speech based on sexual orientation, gender identity, and/or gender expression. There are also no provisions to characterize this motive as an aggravating circumstance.

Protection against hate speech on the basis of sexual orientation can be obtained through an administrative or civil procedure under the Protection Against Discrimination Act. The PADA, however, does not recognize the protected characteristic of "gender identity" and/or "gender expression". Hypothetically, protection on these grounds can be sought under Art. 4 of the Protection Against Discrimination Act.

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EXAMPLES FROM EXISTING CASES

Unlike other signs, such as gender, skin color, religion, age, and many cases of disability, very often sexual orientation other than the heterosexual one remains hidden and invisible. On the one hand, this determines the limited opportunities for attacks against LGB men and women, insofar as the latter are not often and widely seen in society. This also causes difficulties in identifying cases of criminal assault on the basis of homosexual or bisexual orientation. In some cases, this discriminatory motivation for the act may not only be not self-evident to an objective observer, but also to the victim itself. And even when the victim is aware of the discriminatory motivation, they have a number of reasons to stop them from communicating to the authorities what they have suffered – shame, fear of revealing their sexual orientation (especially when the latter is a secret from the victim's loved ones), as well as fear from revictimization by law enforcement bodies.

All these factors make documented cases of crimes with a homophobic or biphobic motives rare in Bulgaria. However, since 2004, we have been able to identify about a dozen cases of such violence.

A case in point is the murder of the 25-year-old medical student Mihail Stoyanov committed on the night of 30 September 2008 at the Borisova Gradina Park in Sofia. For two years after Stoyanov's death, there were no detainees in the case, but in June 2010, police detained two suspects, a 19-year-old and a 20-year-old young men, who told investigators that they had been part of a group of five men who had been "cleaning out" the park of gay men. Investigators received records of at least another 10 assaults on which evidence were sought. Later, the victim's mother, Hristina Stoyanova, told the media that she did not know for sure if her son was gay or not.<sup>32</sup> Then why did a group of strangers attack him and why did they look for gay men at the Borisova Gradina Park at all. This case reveals one of the main characteristics of crimes incited by homophobic reasons – the subcultural features of the gay men community that were known to the assailants and based on them they selected their victim.

In order to understand why Stoyanov was attacked precisely at this place, one must first of all know that it is common practice for gay men in almost all parts of the world to meet at certain meeting places, public places not often visited by casual passers-by and serving as a tacitly designated place for anonymous one-time sexual encounters. This practice – still popular in parts of the gay men's community and not typical for that of gay women – was, in the past, before opportunities for anonymous online communication were discovered, one of the main and preferred means for meeting people for gay men. Targeted by public disapproval, and sometimes persecuted by authorities in their own countries, gay men have used this method to meet their sexual needs at a minimal risk of being revealed by their loved ones. In many large urban conglomerations, and often in smaller ones, knowledge of such phenomena is transmitted apocryphally, from person to person within the community. Some of the meeting places have existed for years, others appear and disappear depending on the processes of construction and cultivation, but among the traditional meeting places are parks, public toilets and industrial areas.

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<sup>32</sup> An article entitled "They killed him while he was crying bloody tears", published by [www.24chasa.bg](http://www.24chasa.bg) on 06.06.2010, and [accessible online here](#)

Traditionally such a place in Sofia, which has been popular with the community for decades, is the Yavorov alley in the Borisova Gradina Park. This explains why Mihail Stoyanov's attackers chose this particular park, precisely for the purpose of "clearing" the park of gay men. Following their arrest, the two perpetrators were charged with murder with hooligan motives. Before the court, the prosecutor on the case justified as "hooliganism" the "disrespect for people with different sexual orientation", where the unnamed zero characteristic is heterosexuality, the "different" of which being homosexuality. However, since the homophobic motives are different from the hooligan ones, the court acquitted the perpetrators of this charge and found them guilty only for the corpus delicti of murder committed in a particularly cruel manner.<sup>33</sup> This ruling was also upheld by the Appellate Court.<sup>34</sup> Despite the lack of sexual orientation as a characteristic that classifies the acts as more severely punishable, both instances recognize homophobic motives as aggravating circumstances. Unfortunately, the cassation instance erased these rulings. In its ruling in the case, the Supreme Court of Cassation found no aggravating circumstances and reduced the sentences of the perpetrators.<sup>35</sup> This court did not discuss the existence or absence of homophobic motives; it just went completely omitted that issue.

In the same year in which Mikail Stoyanov was killed, the first gay pride parade in Sofia – Sofia Pride, took place.<sup>36</sup> This was an event of a crucial importance not only for the LGB community, but also for the transgender and intersex communities, as well as for the democratic society as a whole. Not only did it increase the visibility of these otherwise invisible and therefore stigmatized and marginalized communities, it was also a supreme expression of the fundamental human and constitutional right to of people freely assemble. And since, as has been noted many times before, non-heterosexuality is a phenomenon that often remains invisible in a heteronormal society, this event attacking precisely this central issue of invisibility and concealment was a point of multiple worries, moral panic and aggressive opposition. This was exactly what triggered the violent reactions in the summer of 2008, when the main religions in Bulgaria – the Orthodox Christian and the Muslim religion, football extreme right agitators and ultranationalist organizations with neo-totalitarian ideology declared their consolidation against the Pride. On the day of the march, 88 people were arrested, including 18 minors, detainees including people carrying bats, pyrotechnics, brass knuckles and cold weapons trying to reach the march.<sup>37</sup>

In its report from 2012 entitled "Let's change the laws, Let's change the consciousness: Countering hate crimes with homophobic and transphobic motives",<sup>38</sup> the international human rights organization Amnesty International reported for an assault on a transgender woman and a bisexual man in Sofia in June 2009.

<sup>33</sup> Sentence No. 199 of 22.06.2015 under criminal case No. 3766/2013 of the Sofia City Court, 28th Panel.2

<sup>34</sup> Decision No. 330 of 22.06.2015 under appellate criminal case No. 84/2016 of the Sofia City Court, 5th Panel.

<sup>35</sup> Decision No. 39 of 21.06.2018 under criminal case No. 1258/2017 of the Supreme Court of Cassation, 3rd criminal section.

<sup>36</sup> It should be noted that the first documented open public gathering of non-heterosexual people in Bulgaria actually took place on May 17, 2005 on the occasion of the International Day Against Homophobia. The march was organized in Sofia by the non-governmental organization BGO Gemini, with participation of about 500 people and being named "March FOR Equal Rights". See, on this topic, the article "Gay societies around the world protest against homophobia" published by [www.dnevnik.bg](http://www.dnevnik.bg) on 17.05.2005 and accessible online at [www.dnevnik.bg](http://www.dnevnik.bg).

<sup>37</sup> Article "88 people arrested for provocations during Gay Pride Parade" published by [www.btvnovinite.bg](http://www.btvnovinite.bg) on 29 June 2008 and accessible online [www.btvnovinite.bg](http://www.btvnovinite.bg).

<sup>38</sup> [Accessible online](#)

The crime also happened in Borisova Gradina Park, and they were both walking in the park on their way to a concert. Two patrolling officers responded when they heard the cries of the attacked persons but failed to capture the attackers. However, the police officers did not call for urgent medical assistance or did not take the victims to the district police department to take their testimony.

On 20 March 2012, seven of the members of Youth LGBT Organization Deystvie were attacked during a protest organized by them in the town of Pazardzhik. The reason for the protest was a new ordinance on public order in the municipality approved by the local authorities, which banned "public display and expression of sexual and other orientation in public places". On the day of the protest, a crowd of over 100 gathered against the protesters, some of them shouting "You will die here" and "Gays - in Uganda". Fifteen minutes after the start of the peaceful protest, counter-protesters broke through the police chain that separated the two groups, and hit several of the activists. One of the activists had a concussion. The activists were escorted by the police to Sofia, and eight of the attackers were detained and arrested and were imposed with fines for the administrative offense "hooliganism".

Amnesty's 2012 report also reported an attack on five volunteers involved in the organization of the Sofia Pride March in 2011. The five people were attacked while returning home from the event. They did not carry any insignia, which was a sign that they were observed and followed just before the end of the procession. Three of the five people were physically hurt, they were knocked to the ground and kicked. Reporting to the police about the attack, the victims were first asked if they had "provoked" their attackers. A video from a store camera was secured as evidence, but its poor quality prevented the attackers from being recognized. Police did not collect the videos from eleven other foreign embassy cameras along which the victims and their attackers passed on their way. Amnesty stated in their report that they visited Bulgaria and interviewed the chief of the 5th district police department on the territory of which the crime was committed. The chief of the police department stated his opinion before the organization's investigators that the five persons were attacked because they were "dressed in colorful clothes", spoke "in loud voices and freely" and exchanged "jokes" and "intimacies". He even imitated in a hyperbolic manner how he thought the victims were walking down the street, which was the thing that, according to him, provoked their attackers. Asked about the videos that had not been seized, the chief of the police department said that the efforts made so far were "more than the usual ones".

The hate speech that preached or incited violence can, in many cases, carried a danger to society big enough to consider the act a crime. The question of whether this is the case has been raised in several occasions of such public speech.

Thus, in 2012, on the eve of Sofia Pride, a Sliven priest from the Bulgarian Orthodox Church made a statement to the "Standard" newspaper, published on June 6, stating: "Our entire society must in every way oppose the gay parade that is being prepared. That is why I call on everyone today who considers themselves Christian and Bulgarian. Stoning is a good option." In the interview, the priest further stated that mayors and ministers who tolerated such manifestations "should have a millstone put on them and should be cast into the deepest place in the sea".

Subsequently, in a television interview, the priest refused to distance himself from these words, though he did not repeat them. An application was submitted against him to the prosecutor's office by a member of the Pride Organizing Committee. Pre-trial proceedings were initiated, which were subsequently terminated, but the decision was not served to the applicant, since the prosecutor's office found the crime to be formal and that it could not have had a specific victim or person entitled to receive this decision. This ruling was upheld by the Sofia District Court and the Sofia City Court.

The applicant challenged the act through the way of instance control by the above prosecutor's offices. All of them confirmed the termination of the pre-trial proceedings. In its final and non-appealable ruling, the Supreme Prosecutor's Office of Cassation found that the priest had not made a clear incitement to commit a crime, that he had motivated himself in his positions with "the Gospel, the Bible, and John Chrysostom", as well as with the "position of the Church regarding male homosexuality". According to the decision, stonethrowing was something the Bible prescribed, which was why the priest's statements were an exposition of religious beliefs, "a theological interpretation and a religious position", and "no one can be judged for their religious beliefs". The refusal of the Bulgarian authorities to subject the priest to criminal liability is the subject of a case presently pending before the European Court of Human Rights before this paper has been issued.

On 3 December 2014, a gay man was attacked by a strange young man and his girlfriend. The victim was kicked and called "faggot". The complainant is an effeminate gay man and it was probably why the attacker has identified him as the target of the crime. The attack happened in front of a McDonald's restaurant on the corner of Vitosha Blvd. and Alabin Str. in Sofia – the crossroads in front of the Courthouse. The victim reported the attack at the 1st District Police Department. Police said there were no cameras at the Courthouse that could have recorded the incident. The only one – the one at the restaurant itself – did not record, but was only used for instant surveillance. By a decree, the Sofia District's Prosecutor's Office refused to initiate pre-trial proceedings on the grounds that no data were collected on a crime.

In 2014 and 2016, Sofia Pride again became the cause of referral to the prosecutor's office. In the first case, the reason was the multiple calls for violence and implicit threats addressed at gay people publicly on Facebook in the announcement of the upcoming Pride. In the second case, the reason was a Facebook post of the director and far-right activist Miroslav Paskalev – Zorets, with which he instructed people to wait for the participants in Sofia Pride at city transport stations after the end of the march and to attack them. In both cases, the prosecutor's office refused to initiate pre-trial proceedings. In the case from 2014, the prosecutor's office ruled six months later than the date on which Sofia Pride actually took place and in connection with which event the calls for violence and threats were made. Part of the comments on Facebook that contained the speech had already been deleted at this time, but in their acts the prosecutor's office indicated that they had all been deleted. The applicant's objection in the case that some of the comments were still available and public was not only refused to be discussed, but was not even mentioned in the prosecutor's office's acts.

In the case from 2016, the prosecutor's office determined the public instructions on how to attack participants in the Pride as "opinions disagreeing with the social orientation [sic] of the participants in the march", finding that no crime had been committed under Art. 320, para. 1 of the Criminal Code, since the public Facebook post was not speech made before a lot of people, and even if it were, the authorship of the publication could not be verified because data allowing the tracing of the communication between the communication devices from which the publication was made was not trackable. Art. 159a of the Criminal Procedure Code permitted them to be collected only in the case of grave intentional crimes (punishable by more than 5 years of imprisonment). The case from 2014 is a subject of a pending case before the ECtHR. An application about the failure of the Bulgarian authorities to act on the case from 2016 was declared inadmissible by the ECtHR in 2018.

On 1 May 2015, a gay man was assaulted in a bar in Plovdiv.<sup>39</sup> After another bar customer introduced himself to him and asked him if he was gay, later that night he attacked the victim before other visitors in front of the bar itself, shouting "faggot", then chased him and beat him once again, minutes later, again before eyewitnesses in a city park. When he went to the 4th District Police Department on May 2 to file a complaint, the victim was told that his injuries apparently constituted a minor injury and he could not complain about it, as it was a crime of a private nature. He was advised to find a forensic doctor to testify for his injuries. However, the doctor recommended by law enforcement officers only worked during the week and only before noon. When he called the national emergency telephone line 112, the operator also failed to direct the victim to a forensic doctor on duty over the weekend in the city of Plovdiv. In the end, the victim gave up and did not file any complaint, nor took further action on the case.

The most recent case, also covered by major television media, was the attack on Galya Petkova in Sofia on 18 February 2019.<sup>40</sup> Petkova was walking near the National Palace of Culture in the morning hours when a stranger, passing her by, called her "dirty faggot". The two of them went their own ways, but a few minutes later, apparently followed, the victim was hit with in the face with a blow so strong that several of her teeth fell. He told her: "Don't you dare coming back to the neighborhood!" and ran away. Pre-trial proceedings was initiated on the case, but there were no sources of data allowing the identification of the perpetrator. Proceedings was suspended.

One specific question remains open and its answer is yet to be clarified in the case-law. This is the issue of domestic violence. As victims of crime, LGB people suffer more unfavorable treatment even when the crime has been committed in the conditions of domestic violence. Under the Criminal Code in force, such are the corpus delicti of murder and bodily injury, abduction and unlawful imprisonment, coercion, the threat of murder and systematic stalking. According to Art. 93, item 31 of the Criminal Code, a crime is committed "in the conditions of domestic violence" if it has been committed against an ascending relative (mother, father, grandmother, grandfather, etc.) descending relative (daughter, son, granddaughter, grandson, etc.), a spouse or ex-spouse, a person with whom the victim has had a child, a person with whom they are or have been in de facto spousal cohabitation,

<sup>39</sup> Статията „Гей мъж е бил нападат пред заведение в Пловдив“, публикувана от [www.gamanews.net](http://www.gamanews.net) на 20.05.2015 г.

<sup>40</sup> Video news report "A fist in the jaw. How a woman got beaten up because she looked like a gay person", published on 12.02.2019 by [www.svobodnateleviziya.bg](http://www.svobodnateleviziya.bg); as well as an article and a video news report "HATE CRIME: Gay woman beaten up in the middle of Sofia", published 12.02.2019 by [www.nova.bg](http://www.nova.bg).



or a person with whom they live or have lived in the same household. This qualifying circumstance only found its place in the Criminal Code in the beginning of 2019<sup>41</sup> and there is still not much case-law with regard to the new provisions. Therefore, a question should be raised as to whether they protect the victims of domestic violence by a partner of the same sex (i.e. LGBT people in their role as victims). The practice in criminal cases does not give an answer so far, but the practice in civil cases under the Protection Against Domestic Violence Act does not allow much hope, since it fails to recognize that the same-sex relationship is a family relationship. In the practice, a family relationship is accepted as such only when it consists of people of different gender, since the concept of "spousal" is used in the Protection Against Domestic Violence Act, and the word "spouses" is understood only as married persons, which under Bulgarian law can only be persons of different gender.<sup>42</sup> It is evident from the wording of Art. 93, item 31 of the Criminal Code, the same expression – "de facto spousal cohabitation" – has been used in the criminal law. Leaving aside the problem that the lexeme "spouse" is in no way exclusively related to the marriage institution because it simply means "two persons who are together"<sup>43</sup> (and its usage only for married persons comes from the lack of any other legal form for engaging in family relationship), the case-law of the European Court of Human Rights has unequivocally recognized that the life of persons in the de facto cohabitation within a same-sex couple constitutes "family life" within the meaning of Art. 8 of the European Convention of Human Rights. To use interpretative formalism to deny, on the one hand, the de facto cohabitation and, on the other hand, to deprive individuals in such families of real and effective protection, of violence nonetheless, is cynical and contrary to the principles of non-discrimination, justice and morality.

The cases described above are only the ones that are known to the authors from the media, from reports of NGOs and from their personal professional involvement with some of the cases. Some of the problems they outline are not specific to offenses with a discriminatory element. For example, a common problem is the ineffective investigation of crimes in Bulgaria, the reasons for which we could speculate and which could hardly be reduced to a single explanation.

<sup>41</sup> The reason for these changes in the Criminal Code is not some progressive thinking and attitude towards domestic violence in the Bulgarian legislature or among the Bulgarian public, but the heated debate over the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, better known in short as the Istanbul Convention. The debate on the ratification of the Convention was raised in Bulgarian society by socially conservative groups and activists opposed to "the state's interference in the family", i.e. the measures against vicious patriarchal models and stereotyped gender roles. To this end, a conspiracy theory was successfully implemented in the Bulgarian society through an aggressive media campaign, according to which the word "gender" used in the text of the Convention is a concept, part of an imaginary ideology (called "gender ideology"), which seeks to erase gender differences and the concept of gender in general. After the ratification of the Convention was successfully sabotaged to respond to the growing public discontent with the increasing number of publicly reported deaths of women who were victims of severe domestic violence, and to respond to international pressure, the Bulgarian government made the decision to accept some half-hearted, very limited amendments to the Criminal Code as a "substitute" to ratifying the Convention. These amendments are only one part of a broader package of amendments that have been prepared to bring Bulgarian law into line with the Convention right after umc possible future ratification. As explained above, the "replacement measures" adopted by the Bulgarian Government at the end of 2018 only apply to domestic violence, and not to gender-based violence, as envisaged by the Istanbul Convention. The tragedy of these events about the situation of Bulgarian men and women and gender equality in Bulgaria is yet to be assessed over time.

<sup>42</sup> Order No. 26 of 07.10.2014 on civil case No. 53154/2014 of the Sofia District Court, 3rd Civil Section, 83rd Panel.

<sup>43</sup> In Old Bulgarian with the meaning "a pair of harnessed oxen"; literally "harnessed together".

A common problem is also the tendency of the prosecutor's office to avoid initiating pre-trial proceedings in cases where the crime is not grave or there is no moderate or serious bodily injury, even though it is a general crime. In these cases, the prosecutor's office often resorts to a non-statutory ex-ante review, the actions under which are not subject to judicial review, but only to the ex officio or instance control by the higher prosecutor's offices. One of the most common motives for refusal is the lack of sufficient data on the commitment of a general crime. In theory, this means that the alleged offense does not, at the very least, reveal the characteristics of a *corpus delicti* of a crime that is necessarily prosecuted at the discretion of the state prosecutor's office. However, in practice, this phrase – "there is insufficient data" – is used in many prosecutorial acts with the meaning of "there is insufficient evidence", i.e. the committing of the act cannot be demonstrated with a high degree of likelihood. This is particularly problematic given that sufficient data means that there are clues, indications that give rise to an assumption rather than a certainty. The pre-trial proceedings begin on the basis of a substantiated assumption, a reasonable degree of probability. The presence of such a degree of likelihood is a prerequisite for pre-trial proceedings. Achieving a high degree of certainty about the facts is its task.

A specific problem related to crimes with a discriminatory element against LGB people is obviously the lack of legislation that makes the discriminatory elements related to sexual orientation, gender identity and gender expression mandatory for investigating and discussing and obligatorily establishing increased liability in response to the greater danger to society of these acts. However, even if this problem were resolved, there is another one who will still not allow an effective investigation of crimes with a homophobic element. This other problem is the low sensitivity of law enforcement and the judiciary bodies to the position of non-heterosexual people in society and their lack of knowledge of their culture and subcultural characteristics. Bodies that do not have any empathy for the situation of marginalized groups; who are inherently prejudiced and even openly discriminated against them; who are unaware of the psychological barriers to victims of such acts from talking about their sexuality and about what they have experienced; who have no knowledge of the places where these groups socialize and the dynamics of their socialization (for example, why and in what ways anonymous, and therefore risky for personal safety, meetings for one-time sexual contacts are conducted); such authorities are doomed to fail in recognizing the discriminatory element in such crimes even in the many cases where it is obvious. This second problem – awareness of and empathy for the victims – is a prerequisite for resolving all the other ones. The way to resolving it is not an easy one and it goes through a thorough social change – a change in the visibility of the marginalized community, in the awareness of the general public as a whole and of the professionals in law enforcement and judiciary bodies in particular on the issues of LGB people and in the communication, the personal, direct contact with people from these marginalized communities and their experiences in general. The person who manages to "step into the shoes" of the other one is the one who is able to see and understand fully and clearly. And therefore – to implement the law correctly, vigorously and effectively, even if that law is imperfect. On the contrary, a perfect law without proper, vigorous and effective implementation cannot lead to overcoming negative social phenomena, such as crimes with a discriminatory element.

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<sup>44</sup>And, apropos, also gender and disability.

WILL

IN CONCLUSION

We can say that if we consider the laws transposing Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, we can conclude that the Republic of Bulgaria has transposed it correctly and does not violate the European legislation. We can say that the Criminal Code of the Republic of Bulgaria provides sufficient protection for the rights of victims of crime. On paper. However, the Criminal Code in no way responds to the specific needs of victims of crime on homophobic and transphobic grounds. This is evident from the case-law of the Bulgarian court collected and objectified above. On the contrary, LGBTI people are prevented from accessing justice at several levels. First of all, there is no explicit provision in the Criminal Code, in which the attacks on the life and integrity of the personality and the property of LGBTI persons are considered crimes. There is also a lack of qualified panels to impose a larger sentence in cases of crimes with homophobic and transphobic motives, including the fact that they are not recognized as aggravating circumstances. On the basis of missing legislation, investigative bodies cannot classify these crimes into a specific group and, accordingly, cannot make an individual assessment of the case, which in turn entails a series of restrictions on the right to access to protection: limitation of the persons who can receive protection, carrying out medical examinations that are contrary to the rights to personal integrity of LGBTI people, and, in particular, trans and intersex people, limitation of the right to access to specialized support services. In summary, we can conclude that, although the Criminal Code of the Republic of Bulgaria seems to provide protection of the rights of victims of crime, this is not the case for LGBTI people.

On the other hand, from 2019 to April 2020, the Youth LGBT Organization Deystvie has trained just over 100 (one hundred) Mol employees. These trainings are the result of the joint work of the organization and the Ministry of the Interior. We should emphasize, however, that the 3-day training in June 2019 conducted in the town of Velingrad, has been fully funded by the Youth LGBT Organization Deystvie. In February 2020, Deystvie organized and conducted 4 regional trainings funded by Deystvie, and the Mol agreed to pay the travel expenses of its employees. This puts the trainings for hate crime against LGBTI people in a dependent position because of the funding the organization receives, and makes those trainings unsustainable. The Ministry of Interior of the Republic of Bulgaria has never conducted an awareness campaign on the rights of LGBTI people. One was conducted by the Youth LGBT Organization Deystvie in 2019, and for this purpose posters were sent to all Mol Regional Directorates in Bulgaria explaining the rights of LGBTI persons who have been victims of crime. If the conclusions of this report are followed and the necessary action is undertaken by the competent authorities of the Republic of Bulgaria, then Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime would be successfully implemented. Such a conclusion cannot be drawn at this time.



**Deystvie is an organization dedicated to bringing change to the lives of LGBTI people in Bulgaria. Our vision is to accomplish full rights recognized by the law, and to gain full social inclusion for LGBTI people in a society where they feel safe and respected.**

We are providing pro-bono legal services

Use strategic legislation and advocacy tools for legislation changes

Organizing mass public events, protests, marches (such as Sofia Pride, Sofia Pride Film Festival, Equality March, Women's March)



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