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PECULIARITIES OF THE IMPLEMENTATION OF HUMAN RIGHTS REGARDING SEXUAL (GENDER) IDENTITY WITHIN THE FRAMEWORK OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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Chugaievska A.V. Kundryk R.S. Peculiarities of the implementation of human rights regarding sexual (gender) identity within the framework of the International covenant on civil and political rights.

It is determined that the universality of international Human Rights is in the focus of the scholars' discussions. This paper considers various disputes challenging the realistic feature of Human Rights and questioning their enforceability. The research examines the peculiarities of implementation of the selected human rights to the controversial culture and regionally factored phenomenon – sexual/gender identity. The ontology and realistic aspects of the application human rights principles to the persons with different sexual orientation under the International Covenant on Civil and Political Rights (herein-after referred to as “ICCPR”) is in the focus. In the course of the research the key aspects affecting the application and protection of human rights of the discussed groups were identified. The analysis conducted on the selected ICCPR guaranteed rights – equality and non-discrimination (Articles 2 and 26) and investigated the right to privacy as outlined in Article 17, freedom of expression per Article 19, and family and marriage rights as specified in Article 23. The overall research illustrates that Human Rights is a concept responsive to social dynamics, which ensures its dual, idealistic and realistic nature. The examination of the evolution of these rights in relation to individuals' sexual orientation and gender identity highlights bottlenecks and challenges within International Human Rights Law. These challenges include the absence of specific characteristics in international law, the progressive role of treaty body jurisprudence in effectively applying protection, and ongoing debates about the universality of human rights. Despite variations in implementation status and timelines, the guaranteed ICCPR rights remained realistic. Moreover, there has been substantial progress, even concerning the most recent and debated rights for LBTI individuals. The gradual and often lengthy process of recognition and implementation of these SOGI-related rights is a natural outcome of the diversity among different countries and societies. While there may be some inconsistencies and complexities in the development of human rights, they do not diminish the inherently progressive nature of civil and political rights and standards.

Key words: international human rights, human rights implementation, sex discrimination, sexual orientation, gender discrimination.

Чугаєвська А.В., Кундрік Р.С. Особливості реалізації прав людини стосовно сексуальної (гендерної) ідентичності у рамках Міжнародного пакту про громадянські та політичні права.

Встановлено що універсальність міжнародних прав людини є предметом дискусій науковців. Зокрема, в цій статті розглядаються різні погляди, що ставлять під сумнів реалістичний характер прав людини та їхню правозастосовність. Дослідження розглядає особливості реалізації окремих прав людини стосовно суперечливого явища, яке знаходиться під впливом культурного та регіонального контексту – сексуальної/гендерної ідентичності. У центрі уваги – онтологія та аспекти

дієвості застосування принципів прав людини до осіб з різною сексуальною орієнтацією згідно з Міжнародним пактом про громадянські та політичні права (далі – «МПГПП»). У ході дослідження було визначено ключові аспекти, що впливають на правозастосування та захисту прав людини стосовно зазначених груп. Був проведений аналіз обраних прав, гарантованих МПГПП – рівність та недискримінація (статті 2 та 26), та досліджено право на приватність, як зазначено у статті 17, свободу вираження поглядів згідно зі статтею 19, а також сімейні та шлюбні права, які зазначені у статті 23. Загалом дослідження ілюструє, що права людини – це концепція, що реагує на соціальну динаміку, що забезпечує її подвійну, ідеалістичну та реалістичну природу. Дослідження еволюції цих прав стосовно сексуальної орієнтації та гендерної ідентичності осіб виявляє вузькі місця та проблеми в міжнародному праві прав людини. Ці проблеми включають відсутність специфічних характеристик у міжнародному праві, прогресивну роль юриспруденції договірних органів в ефективному застосуванні захисту та постійні дебати щодо універсальності прав людини. Незважаючи на різницю в статусі та термінах реалізації, гарантовані права МПГПП залишаються реалістичними. Більше того, досягнуто значного прогресу, навіть щодо найновіших та обговорюваних прав для ЛГБТ-осіб. Поступовий і часто тривалий процес визнання та реалізації цих прав, пов'язаних із сексуальною орієнтацією та гендерною ідентичністю, є природним результатом різноманітності між різними країнами та суспільствами. Хоча в розвитку прав людини можуть існувати деякі невідповідності та складнощі, вони не применшують прогресивного характеру громадянських та політичних прав і стандартів.

Ключові слова: міжнародні права людини, реалізація прав людини, дискримінація за ознакою статі, сексуальна орієнтація, дискримінація за ознакою статі.

The identification of the problem.

The overall discussion on the concepts of the international Human Rights either leads to claiming its universality and enforceability or deems Human Rights as rather declarative and culture and regionally factored phenomenon. The practical implementation of the key international human rights treaties and covenant illustrate certain progress in some areas. Though it also exposes the controversial and ambiguous challenges undermining the nature of human rights when tackling a new social/cultural trend, extended freedoms, braving through of cultural and religious believes and paradigm. The examination of the human rights applications to such socially sensitive feature as sexual orientation under the key covenant ICCPR may give us a good subject to study the extremes of the human rights implementations in real context.

The Objective of the research

This paper will examine the ontology and realistic aspects of the implementation of human rights regarding the persons with different sexual orientation under the ICCPR. In the course of the study the key aspects affecting the application and protection of human rights of the discussed groups will be identified.

The current level of elaboration of the problem.

The realism of the Human Rights concept has been in the focus of number of scholars [2; 5; 6; 9; 14; 16; 19; 20; 21; 22; 34]. A lot of work was done in justifying a feasible approach to the increasing the efficiency of the ICCPR implementation in regard to certain categories of person. However, there are not many attempts to build the consistent and cohesion Human Rights concept based on the ICCPR for protecting the persons with different sexual orientations. There is need to continue to analyze the various jurisprudences and practice for identification and resolving challenges of the Human Rights concept.

The research

The realistic or utopian nature of Human Rights can be studied from two perspectives: in terms of its ontology, and in terms of questioning the efficiency of the practice of its implementation.

The short review of the essence of the Human Rights' association with "utopia" will inform the approach for further examination of the ICCPR[13] rights implementation, with a primary focus on the equality and non-discrimination rights envisioned by Articles 2 and 26 of ICCPR in the realm of the application to the LGBT(I) [18] or SOGI (Sexual Orientation and Gender Identity).

The Preamble of the UN Charter reads the nations' determination to "reaffirm faith in fundamental human rights"[3]. The wording of the respective Human Rights treaties states certain values and standards engaging the nations to achieve them. The "faith" and "values" build a ground for questioning whether the International Human Rights Concept is realistic, or solely "a universal point of reference" [34] –

some perfect ideal world. This discourse is also fueled by a discussion of Human Rights “universality” which led to critics of its enforceability and efficiency of implementation. Given the above, International Human Rights were perceived as a new “ideology”, a “new ideal society concept”, bringing the discourse of scholars on its “utopian” nature [22, p. 12–23]. For instance, Habermas invented the term “realistic utopia” referring to a society of just, and moral values to be implemented through human rights [9, p. 468]. Other scholars ground the foundation of human rights on a metaphysical basis rather than a social discourse [5, p. 7] tending to “utopian” thinking. At the same time, recognizing the human rights features which question the reality of human rights, Tedeschini concluded that “contemporary human-rights discourse cannot be equated to utopianism” [22, p. 13]. In his study, he noted that human rights present “themselves as the last utopia – realistic one...” [22, p. 23]. Thus, for further analysis, it is assumed that the Human Rights mechanism encompasses realistic endeavours and achievable objectives.

The research is focused on the protection of equality and non-discrimination rights envisioned by Articles 2¹ and 26² of the ICCPR.

The application of rights guaranteed in Articles 2 and 26 of ICCPR is based on its explicit terms and principles communicated by the UNHRC³ in a series of decisions [21]. In particular, the UNHRC noted the link between Article 26 of ICCPR and Article 7 of the UDHR [32], which reads the equality before the law and universal prohibition of discrimination “in violation of this Declaration”. Also, the UNHRC pointed out that Article 26 does not contain any obligation of the states except a requirement to any law or practice to comply with the requirement of prohibition of discrimination and ensuring effective protection against discrimination [1]. In regard to justification of the lawful, reasonable discrimination and identifying criteria for discrimination, the Committee stated that “A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26” [1]. Finally, it should be noted that discrimination is “not only be understood to imply exclusions and restrictions but also preferences” [10].

The further analysis of the selected rights implementation is focused on the application of the above protection to a certain category of people – LGBTI. As for the LGBTI, these people are subject to various discrimination and abuse. In many countries same-sex behaviour is criminalized, also discrimination of this category in different areas is legalized and allowed. In terms of rights violations of the people based on the SOGI, this phenomenon is worldwide [16, p.331]. For example, in Uzbekistan, the shadow report found the criminalization of same-sex activities in the Criminal Code [26], similar situation in Cameroon [24], Serbia, in particular, was reluctant to undertake steps to acknowledge and protect transsexual individuals [25], even in the US, a signatory of the UN Statement on Human Rights, Sexual Orientation and Gender Identity, shadow report pointed out the hate crimes, discrimination at work, prohibition to have a family etc. [15].

First of all, the International Human Rights Law does not have a special reference to the LGBTI groups or SOGI features. Such circumstances obviously hinder the protection of this category of people in terms of SOGI and brings a ground for questioning the association of sexual orientation or gender identity with recognized human rights and their universal nature [7, p. 66], undermining further development of the protection instruments.

However, it should be noted that both terms either LGBTI group or SOGI refer to sexual orientation or identity and despite the absence of the “sexual orientation” term in Articles 2 and 26 of the ICCPR, there are terms “sex” somehow close to “sexual orientation” and colocation “other status”, which means that the list of protected characteristics is not limited. Consequently SOGI “is on its face an obvious case of an ‘other status’ by which human beings are singled out for invidious discrimination” [7, p. 20]. A similar argument is supported by the EU practice since the Explanatory Report reads that “inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive” [4, p. 5].

¹ Article 2(1) reads: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

² Article 26 reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³ United Nations Human Rights Committee

Respectively UNHRC in *Toonen v Australia* stated that Article 2 of the ICCPR with “sex” and Article 17 regarding the right to privacy cover “sexual orientation” [28]. In another decision [33], UNHRC recognized the discrimination against same-sex couples as a violation of Article 26, including the “sexual orientation” into the category “other status” of Article 26.

Although, these jurisprudences were considered as providing “explicit protections against discrimination on the basis of sexual orientation” [14, p. 86], and laid down the ground for further development. In terms of the arguments in favor of the protection of sexual orientation by international human rights law should be noted that the prohibited grounds of discrimination are not exhausted, and the jurisprudence of the treaty bodies constitutes and contributes the international law [12]. At the same time, this approach and interpretation did not receive universal recognition and the discussion has not been finished.

It should be noted that the history of recognition of the protection of the rights of LGBT or SOGI is a multistage lengthy process with a lot of back and forth. As an illustration, even in 1950 same-sex conduct criminalization was justified by the European Court of Human Rights [19, p. 618]. It was also noted that in the period of 1940s – 1960s sexual orientation-based discrimination was permissible in international law [6, p. 66].

However, gradually, the situation has been changing. The last UN Ground-breaking statement on sexual orientation and gender identity by a record number of 85 States [29] though demonstrates certain progress, also reflects the lack of consent in the area, regardless of the gradually increasing number of countries from 67 in 2007 and 54 in 2006 respectively. In particular, the other 57 countries made the opposite statement – a response with critics of the attempt to introduce “notions that have no legal foundations in any international human rights instrument” claiming that these notions are not “universal” human rights [11, p. 2]. The universality of human rights has been a subject of strong questioning regarding inclusion of the sexual orientation [20, p. 15]. One of the important steps forward was adoption of UNHRC Resolution # 17/19 Human Rights, sexual orientation and gender identity [31] which explicitly expressed concern “at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”. Despite certain constraints, the UN has strengthened the efforts in the area of protection against violence through the establishment of a mandate of the “Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity” [17].

Apart from equality and non-discrimination, there are other rights susceptible to violations when it comes to SOGI (Sexual Orientation and Gender Identity): the right to privacy as outlined in Article 17, freedom of expression per Article 19, and family and marriage rights as specified in Article 23.

The same-sex marriage issue, in particular, is the focus of scholars and practice. The researchers argue that same-sex marriage grounds on Articles 23 and 26 of ICCPR, since the non-recognizing of same-sex marriage demonstrates inequality and discrimination against the person willing to marry another person of the same sex [2, p. 24]. UNHRC in his General Comment #19 recognized the existence “of various forms of family” [11, p. 2]. Also, some step forward was made when UNHRC recognized the protection of unmarried same-sex couple in the same manner as unmarried heterosexual family [30].

Also, special attention should be paid to the violation of the freedom of expression envisioned by Article 19 of the ICCPR in the case of the “laws against LGBT propaganda.” In 1982 in the case *Hertzberg v Finland* UNHRC did not find the violation of Article 19 when the radioprogramme dealt with homosexuality was banned. Later on in 2012 in the case *Irina Fedotova v. Russian Federation* the UNHRC found that the conviction of the person for the LGBT propaganda is “a violation by the Russian Federation of article 19, paragraph 2, read in conjunction with article 26 of the Covenant” [13]. Thus, the applicability of sexual orientation was found regarding new Article 19 and protection of freedom of expression was supported.

The further development of the application of international human rights to the people in regard to their sexual orientation and gender identity was stated in the Yogyakarta Principles [27], which encompass comprehensive recommendations and guidelines for promoting and implementing equality and a non-discriminatory environment for LGBTI.

Conclusions

The analysis conducted on the selected ICCPR guaranteed rights – equality and non-discrimination (Articles 2 and 26) – illustrates that Human Rights is a dynamic concept, responsive to social dynamics, which ensures its dual, idealistic and realistic nature. The examination of the evolution of these rights

in relation to individuals' sexual orientation and gender identity highlights bottlenecks and challenges within International Human Rights Law. These challenges include the absence of specific characteristics in international law, the progressive role of treaty body jurisprudence in effectively applying protection, and

ongoing debates about the universality of human rights.

Despite variations in implementation status and timelines, the guaranteed ICCPR rights remained realistic. Moreover, there has been substantial progress, even concerning the most recent and debated rights for LGBTI individuals. The gradual and often lengthy process of recognition and implementation of these SOGI-related rights is a natural outcome of the diversity among different countries and societies. While there may be some inconsistencies and complexities in the development of human rights, they do not diminish the inherently progressive nature of civil and political rights and standards.

REFERENCES:

1. Case of Brooks, S.W.M. v. Netherlands, Application No. 172/1984. April 09 1987, URL: <https://www.hrlibrary.umn.edu/undocs/session42/172-1984.htm> (date of access: 2023-10-30).
2. Brown, J.E. Human Rights, Gay Rights, or Both? International Human Rights Law and Same-Sex Marriage. *Florida Journal of International Law*. 2016. № 28/2. P. 218–239.
3. Charter of the United Nations: international treaty: adopted 26 June 1945: entered into force 24 October 1945. Treaty Series. 1945. Vol. 1. P. XVI.
4. Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe. URL: <https://www.rm.coe.int/090000016800cce48> (date of access: 2023-10-30).
5. Dembour, M. What Are Human Rights? Four Schools of Thought. *Human Rights Quarterly*. 2010. № 1. P. 32.
6. Donnelly J., Whelan D. International Human Rights. New York: Taylor & Francis Group, 2017. 392 p.
7. Donnelly, J. Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime. *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights*. Royal Netherlands Academy of Arts and Sciences, 1999. P. 20.
8. Fedotova v. Russian Federation, Communication No. 1932/2010 dated of 31.10.2012 by UNCHR, case no. CCPR/C/106/D/1932/2010. URL: <https://www.juris.ohchr.org/casedetails/1272/en-US> (date of access: 10.08.2025).
9. Habermas, J. The Concept of Human Dignity and Realistic Utopia of Human Rights. *Metaphilosophy*. 2010. № 4. P. 465-479.
10. Haraldsson and Sveinsson v. Iceland, Communication No. 1306/2004 dated of 24.07.2007 by UNCHR, case no. CCPR/C/91/D/1306/2004. URL: <https://www.juris.ohchr.org/casedetails/1375/en-US> (date of access: 10.08.2025).
11. Human Rights Committee. General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (arts. 23). *International Human Rights Reports*. 1990. Vol. I. P. 1–32.
12. International Human Rights Law and the Criminalization of Same-sex Sexual Conduct. *International Commission of Jurists*. URL: <https://www.icj.org/wp-content/uploads/2012/06/International-human-rights-law-and-the-criminalizaion-of-same-sex-sexual-conduct-anyalsis-brief-2010.pdf> (date of access: 10.08.2025).
13. International Covenant on Civil and Political Rights. *UN, 16 December 1966*. URL: <https://www.refworld.org/docid/3ae6b3aa0.html> (date of access: 10.08.2025).
14. Kukura, E. Sexual Orientation and Non-Discrimination. *Peace Review: A Journal of Social Justice*. 2005. № 17. P. 181–188.
15. Lesbian, Gay, Bisexual, and Transgender Rights in the United States . *The Council for Global Equality*. 2010. URL: https://www.globalequality.org/storage/documents/pdf/iccpr_lgbt_shadow_report_2010_final.pdf (date of access: 10.08.2025).
17. About LGBTI People and Human Rights. *Office of the High Commissioner for Human Rights (OHCHR)*. URL: <https://www.ohchr.org/en/sexual-orientation-and-gender-identity#:~:text=LGBTI%20stands%20for%20lesbian%2C%20gay%2C%20bisexual%2C%20transgender%20and%20intersex> (date of access: 10.08.2025).

16. O'Flaherty, M. Sexual Orientation and Gender Identity. *International Human Rights Law*. Oxford University Press. 2010. P. 322–330.
17. Independent Expert on Sexual Orientation and Gender Identity. *Office of the High Commissioner for Human Rights (OHCHR)*. URL: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity> (date of access: 10.08.2025).
18. About LGBTI people and human rights. *Office of the High Commissioner for Human Rights (OHCHR)*. URL: www.ohchr.org/en/sexual-orientation-and-gender-identity#:~:text=LGBTI%20stands%20for%20lesbian%2C%20gay%2C%20bisexual%2C%20transgender%20and%20intersex (date of access: 10.08.2025).
19. Otto D., Between pleasure and danger: lesbian human rights. *European Human Rights Law Review*. 2014. Vol. 6. P. 618–628.
20. Saiz I., Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the UN [Working paper No. 2]. Sexual Policy Watch. URL <https://sxpolitics.org/wp-content/uploads/2009/03/workingpaper2.pdf> (date of access: 10.08.2025).
21. Taylor, P. Article 26: Equality before the Law. In: *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*. Cambridge University Press, 2020. P. 729–786. URL: <https://www.cambridge.org/core/books/commentary-on-the-international-covenant-on-civil-and-political-rights/article-26-equality-before-the-law-equal-protection-of-the-law/E907CF808F5D592180D6C042F3438461> (date of access: 10.08.2025).
22. Tedeschini, M. Human Rights as a Limit to Utopian Thinking? *MenschenRechtsMagazin*. 2019. № 24.1/2. P. 12–23.
23. Lesbian, Gay, Bisexual, and Transgender Rights in the United States. *The Global Equality*. URL: www.globalequality.org/storage/documents/pdf/iccpr_lgbt_shadow_report_2010_final.pdf (date of access: 30.10.2023).
24. The Status of Lesbian, Gay, Bisexual and Transgender Rights in Cameroon 2010. *Office of the High Commissioner for Human Rights (OHCHR)*. URL: https://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBTI_Cameroon_HRC99.pdf (date of access: 30.10.2023).
25. The Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender Individuals in Serbia. *Heinrich Böll Stiftung*. URL: <https://www.boell.de/en/democracy/promotion-of-democracy-shadow-report-violations-rights-lgbt-serbia-12907.html> (date of access: 30.10.2023).
26. The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Uzbekistan. *Organization for Security and Co-operation in Europe (OSCE)*. URL: <https://www.osce.org/files/f/documents/0/a/68798.pdf> (date of access: 30.10.2023).
27. The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity. *Yogyakarta Principles*. URL: <https://www.yogyakartaprinciples.org> (date of access: 30.10.2023).
28. Toonen v. Australia, Communication No. 488/1992 dated of 31 May 1994, case no. CCPR/C/50/D/488/1992 by *UN Committee on Civil and Political Rights*. URL: <https://juris.ohchr.org/casedetails/702/en-US> (date of access: 30.10.2023).
29. Ground-breaking statement on sexual orientation and gender identity by record number of 85 States. *International Service for Human Rights (ISHR)*. URL: <https://new.ishr.ch/news/ground-breaking-statement-sexual-orientation-and-gender-identity-record-number-85-states> (date of access: 30.10.2023).
30. Complaint No. 1361/2005. *UN Human Rights Committee*. URL: https://digitallibrary.un.org/record/602323/files/CCPR_C_89_D_1361_2005-EN.pdf (date of access: 30.10.2023).
31. Human Rights, Sexual Orientation and Gender Identity. Report of the Human Rights Council. *UN Human Rights Council*. URL: <https://www.docs.un.org/en/A/66/53> (date of access: 30.10.2023).
32. Universal Declaration of Human Rights dated 10 December 1948. *United Nations*. URL: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (date of access: 30.10.2023).
33. Case of Young v. Australia, Application No. 941/2000. *UN Committee on Civil and Political Rights*. URL: <https://juris.ohchr.org/casedetails/1076/en-US> (date of access: 30.10.2023).
34. Zeid Ra'ad Al Hussein. Do Not Dare To Tell Me Human Rights Are Not Universal. *The Raoul Wallenberg Institute of Human Rights and Humanitarian Law*. URL: <http://www.rwi.lu.se/2017/11/28/not-dare-tell-human-rights-not-universal> (date of access: 30.10.2023).