



Partners for Justice

**The Status of Lesbian, Gay, Bisexual and Transgender
Rights in Bosnia and Herzegovina**
A Shadow Report

ACKNOWLEDGEMENTS

This shadow report on lesbian, gay, bisexual and transgender rights in Bosnia and Herzegovina was coordinated by Global Rights and the International Human Rights Clinic at the University of Virginia School of Law. In preparing this report, contributions were provided by:

Global Rights

Organization LOGOS

Organization Q

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Introduction

The University of Virginia International Human Rights Law Clinic was very pleased to have the opportunity to work with Global Rights and its partner organizations in Bosnia and Herzegovina in writing this shadow report on the status of lesbian, gay, bisexual and transgender (LGBT) individuals in Bosnia and Herzegovina. Working with Global Rights and in cooperation with Organization Logos and Organization Q, this report serves as a starting point for the promotion and protection of the human rights of all individuals in Bosnia and Herzegovina regardless of their real or perceived sexual orientation or gender identity.

The UN Human Rights Committee regularly reviews submissions from every state party to the International Covenant on Civil and Political Rights (ICCPR). Bosnia and Herzegovina ratified the ICCPR on September 1, 1993 and submitted its initial compliance report. Various non-governmental organizations often submit “shadow reports,” which serve as secondary sources of information for Committee members when reviewing the official government reports. In the reports, the NGOs offer their own evaluation of the states’ compliance with the treaty on a range of human rights issues affecting LGBT persons in Bosnia and Herzegovina.

In this report, we hope the findings will provide useful information for the Human Rights Committee, while also serving as a catalyst for future advocacy efforts.

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The LGBTTIQ (Lesbian, gay, bi-sexual, transgender, transsexual, inter-sex and queer) community in Bosnia and Herzegovina (BiH) is stigmatized, closed in and inert in many respects. The society itself does not offer any support to those individuals who differ from the traditional idea of gender and sexuality, sexual orientation or gender identity and/or expression, making it much more difficult for LGBTTIQ individuals to accept themselves and to secure their lifestyle, and even the rights and freedoms they, as human beings, are entitled to.¹

I. Legal framework for domestic protections of lesbian, gay, bisexual and transgender (LGBT)² rights in BiH³

The Constitutions of the Republic of Bosnia and Herzegovina and its entities

The Constitution of the Republic of Bosnia and Herzegovina (BiH), which was created by the Dayton Accords in 1995, incorporated 16 human rights instruments into domestic law, including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴ Although the Constitution does not explicitly reference sexual orientation, an implicit reference is embedded in Art. II (4) which provides that the rights and freedoms are secured to all persons in Bosnia and Herzegovina (BiH) “without regard to their sex, race, skin color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*”

These rights are further strengthened by Art. II (2), which states, “the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols shall apply directly in Bosnia and Herzegovina and these shall have priority over other laws.” While Bosnian courts still face challenges in the direct application of some aspects of the ECHR, the Constitutional Court does rely on it for interpretive guidance.

The Constitution of the Federation of BiH includes an extensive list of 21 international human rights instruments that are annexed to the Constitution.⁵ It also includes a list of specific human rights and fundamental freedoms, including, but not limited to, the right to life, the right to liberty and freedom from discrimination based on race, sex, color,

¹ *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q (Sarajevo, 2005) at 3.

² Although the preferred identification, LGBTI (lesbian, gay, bi-sexual, transgender and inter-sex) usually includes inter-sex the status of the inter-sex community was outside of the scope of this report, so the report refers solely to the LGBT (lesbian, gay, bi-sexual and transgender) community.

³ In this report, both the terms gay and homosexual are used interchangeably to describe men engaged in consensual same-sex relationships.

⁴ Constitution of the Republic of BiH, Article II, paragraph II, Human Rights and Fundamental Freedoms.

⁵ Constitution of the Federation of Bosnia and Herzegovina Article II, Human Rights and Fundamental Freedoms and Annex 1.

national origin etc.⁶ A list of international tools is not found either in the Constitution of the Republika Srpska (RS) or Brčko District (BD), but both have similar human rights provisions.⁷

Gender Equality Law 2003

The 2003 Gender Equality Law is an important piece of legislation that expanded the rights of LGBT persons in BiH.⁸ As set out in Article 1, the law “governs, promotes and protects the equal treatment of the sexes and guarantees equality of opportunity for all in both the public and the private domain, and prohibits direct and indirect discrimination on the grounds of gender.”

Article 2 expressly prohibits discrimination on the grounds of sexual orientation.⁹ However, while subsequent articles cover direct and indirect discrimination in the fields of education, employment, social care, health care, sport and culture, and public life and media, they do not consistently refer to sexual orientation.¹⁰ Whether this omission was

⁶ Constitution of the Federation of BiH, Article II, Human Rights and Fundamental Freedoms.

⁷ Constitution of the Republika Srpska II, Articles 10-49, Human Rights and Freedoms; Statute of the Constitution of Brčko District, Article I, point 4.

⁸ Gender Equality Law, SG 16/03 from June 2003 Articles 1-3, available at <http://www.queer.ba/udruzenjeq/en/zakoni.htm#>

⁹ Article 2

The sexes have equal rights.

Full equality of treatment for both sexes is guaranteed in all sectors of society, particularly in the fields of education, the economy, employment and labour, social welfare, health care, sport, culture, public life and the media, regardless of marital or family status.

Discrimination on the grounds of gender and sexual orientation is prohibited.

¹⁰ Take, for example, Article 3:

For the purposes of this Law, discrimination on the grounds of gender is defined as all juridical or effective, direct or indirect distinction, privilege, exclusion or restriction on the grounds of gender as a result of which the recognition, exercise or enjoyment of a person’s human rights and freedoms in the political, educational, economic, social, cultural, sports, civil and all other domains of public life are denied or curtailed.

Discrimination may be direct or indirect.

Direct discrimination on the grounds of gender occurs when a person has been, is, or may be treated less favorably on the grounds of gender than another in the same or a similar situation.

Indirect discrimination on the grounds of gender occurs when apparently neutral legal standards, criteria or practices that are equal for all have the effect of leaving a person of one sex disadvantaged by comparison with a person of the other sex.

Standards, criteria or practice that may be objectively justified by the achievement of a lawful aim proportion to necessary and justified measures shall not be regarded as discrimination on the grounds of gender.

intentional remains uncertain, but considering the express reference in Article 2, and the “other status” language in the Constitution, a broad, LGBT inclusive interpretation of this law would seem most appropriate.

Organization Q, an advocacy organization in Bosnia and Herzegovina, has noted however that the “Law on Gender Equality, nor indeed any other law in BiH, defines sexual orientation.” The “definition of gender is very unclear and confusing, suggesting that BiH legislation is only partially complete and could result in clarification having to come through legal processes in the courts.”¹¹

Penal Code Provisions

Same sex sexual conduct between consenting adults is no longer a crime in Bosnia and Herzegovina.¹²

Article 145 of the Penal Code of the Republic of Bosnia and Herzegovina (Republic of BiH) explicitly names sexual orientation as unlawful grounds for discrimination.¹³ It further stipulates prison terms of six months to five years for any official or responsible person in the institutions of the Republic of BiH who denies or restricts the civil rights provided by the Constitution, *ratified international agreements*, law of BiH, or some other regulation, on the basis of, among other things, sexual orientation (emphasis added).

Both the Federation of BiH and RS have similar provisions.¹⁴ The Brčko District also has a similar provision, which carries a punishment of one to eight years’ imprisonment.¹⁵

Pursuant to para. 5 of this Article, the introduction of special measures designed to promote the equal treatment of the sexes and to eliminate existing inequalities or to protect the sexes on the grounds of biological attributes is permitted.

¹¹ *Accessing Health: the Context and the Challenges for LGBT People in Central and Eastern Europe*,” Sheila Quinn, ILGA-Europe (April 2006), p 29.

¹² “Consenting same-sex acts were decriminalized in the Federation in 1996 and the Republika Srpska in 1998.” *Accessing Health*, p. 28. See also, *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q (Sarajevo, 2005), at 3.

¹³ Penal Code of BiH, Art. 145, Infringement of the Equality of Individuals and Citizens *available at* <http://www.legislationline.org/?tid=218&jid=9&less=false>

¹⁴ Penal Code of RS Art. 162 of RS “whoever, on the grounds of differences in race, skin color, religion, sex, language, political or other belief, sexual orientation, national or ethnic background, economic status, birth or social origin, education or social status, denies or restricts the civil rights enshrined in the Constitution, law or ratified international agreement, or, whoever on the grounds of these differences grants privileges or does favors to individuals contrary to the Constitution, law or ratified international agreement, shall be punished by imprisonment for a term not to exceed three years.”

FBiH Penal Code art 172 (1) “Anyone who inflicts serious bodily injury upon another person or severely impairs her/his health shall be punished by imprisonment for a term between six months and five years.”

¹⁵ Penal Code of Brčko District, Article 177 “who on the basis of differences in race, color, national or ethnic background, and inter alia, sex and sexual orientation, denies or restricts the liberty or civil rights of another or on the basis of these differences unjustly grants privileges or favors to the citizens shall be sentenced to prison term between six months and five years”.

Equality in Labor

The Gender Equality Law of the Republic of BiH prohibits employment discrimination in the fields of advertisement, recruitment and dismissal, but it does not explicitly name sexual orientation.¹⁶ The Federation of BiH does not explicitly mention sexual orientation, however, Article 5 of the FBiH Labor Law protects employees from “being placed at a disadvantage based on race, color, sex, language, religion, political or other opinion, national or social origin, . . . or other circumstance . . .”¹⁷ Also, Article 23 protects the privacy of LGBT persons by prohibiting employers from inquiring about information not directly related to the nature of the work.¹⁸ The Brčko District Labor Law is the only entity that expressly protects individuals from employment discrimination on the basis of sexual orientation.¹⁹

II. Substantive violations of the ICCPR

Articles 2(1) and 26 (non-discrimination and equal access / due process of law)

Articles 2(1) and Article 26 of the ICCPR set out the non-discrimination standards to which signatories will be held. Under Article 2(1), state parties “undertake 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.” Article 26 recognizes that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, prohibits “any discrimination”, and “guarantee[s] 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.” In *Toonen v. Australia*, the Human Rights Committee clearly stated that sexual orientation is included in the reference to sex in the ICCPR.²⁰ Therefore, Articles 2(1) and 26 prohibit discrimination based on sexual orientation.

Bosnia and Herzegovina’s compliance in terms of legislation does not provide the full range of protection envisioned under the ICCPR. For instance, there is currently a legal lacuna, which does not address discrimination based on gender identity or expression. These individuals are not protected from hate speech or hate crimes. And there is no legislation that would provide legal, social or health care to transsexual individuals, with clear implications under Article 14 of the European Convention on Human Rights and

¹⁶ Gender Equality Law, SG 16/03 from June 2003 Articles 1-3, available at <http://www.queer.ba/udruzenjeq/en/zakoni.htm#>

¹⁷ Labor Law of FBiH, Art 5 “a person seeking employment, as well as a person who becomes employed, shall not be placed at a disadvantage based on race, color, sex, language, religion, political or other opinion, national or social origin, property status, birth or any other circumstance (...).”

¹⁸ Labor Law of FBiH, Art 23.

¹⁹ Brčko District Labor Law, Article 4.

²⁰ *Toonen v. Australia*.

Fundamental Freedom and, consequently, under articles 2(1) and 26 of the ICCPR, as explained with reference to the right to privacy below.²¹

The European Union's Council Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation prohibits direct and indirect discrimination on grounds of, *inter alia*, sexual orientation, as well as harassment and instruction to discriminate, in the field of employment and occupation.²² The directive also requires states to implement in their legal systems effective preventive, judicial and extra-judicial remedies against discrimination. All EU member states, as well as candidate countries, have an obligation to implement European directives within their national legislation. National judges should also interpret the law according to the content of the Directives. As a candidate country, Bosnia and Herzegovina must now expand its antidiscrimination legislation with particular consideration to European requirements.

Unfortunately, to the contrary, according to the reports of NGOs monitoring LGBT rights in BiH, obstacles to ending discrimination exist both in terms of gaps in legal protections and in cultural and social perceptions.²³ The U.S. State Department, in two consecutive annual human rights reports, reiterated that openly LGBT persons were “frequently fired.”²⁴ The 2005 report noted that some “dismissal letters explicitly stated that sexual orientation was the cause of termination, making it extremely difficult to find another job.”²⁵ The International Helsinki Federation for Human Rights has also reported cases of employment discrimination.²⁶

Discriminatory animus is also informed by biased media coverage concerning LGBT issues. In 2004, the U.S. Department of State highlighted some of these issues. For example, the host of a popular TV talk show stated that homosexuality is a disease, and that Bosniaks who are homosexual are “un-Islamic traitors” who give the world a bad image of Bosniak people.²⁷

²¹ *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q (Sarajevo, DATE), at 3.

²² Council directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation,

http://ec.europa.eu/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf

²³ The International Helsinki Foundation for Human Rights observed, “Despite legal inconsistencies, the main obstacle preventing sexual minorities to exercise their human rights was the general social and cultural environment.” *Human Rights in the OSCE Region: Europe, Central Asia and North America (Events of 2004)*, International Helsinki Foundation for Human Rights, at 10 (2005). Similarly Organization Q described the LGBTI community as one that is “stigmatized, closed in and inert in many respects” because the society does not “offer any support to those individuals who differ from the traditional idea[s] of gender and sexuality.” *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q (Sarajevo, 2005) at 3.

²⁴ U.S. State Department Country Conditions Report on Bosnia and Herzegovina 2004 (March 8, 2005, hereafter: “State Department Report on BiH”), *available at*,

<http://www.state.gov/g/drl/rls/hrrpt/2004/41673.htm>, and Country Conditions Report 2005 (March 8, 2006), *available at*: <http://www.state.gov/g/drl/rls/hrrpt/2005/61640.htm>.

²⁵ Department of State Country Report 2005, <http://www.state.gov/g/drl/rls/hrrpt/2005/61640.htm>.

²⁶ Int'l Helsinki Foundation, *Human Rights in the OSCE Region*, p. 10.

²⁷ State Department Country Report 2004.

Organization Q, one of the leading organizations to protect the rights of LGBT individuals, conducted a study focusing on a number of media outlets in BiH to measure the severity of the media's bias. The results of the study demonstrated the prevalence of extreme stereotyping, discrimination and homophobia in media portrayals of LGBT individuals.²⁸

Article 3 (equal rights of men and women)

The purpose of Article 3 is to ensure the equal rights of men and women “to the enjoyment of all civil and political rights set forth” in the ICCPR. Both the Bosnian Constitution and the 2003 Equality Law set forth specific provisions for gender equality. This article is often used to analyze the ways in which women are marginalized or otherwise disadvantaged within society. In the context of the LGBT community in BiH, there are also instances of disparate treatment between gay men and lesbians.

Lesbians face extraordinary discrimination based on the intersection of their identities (as women and lesbians). The International Helsinki Foundation for Human Rights, however, has also documented that older homosexual men, especially those who may self-identify as “effeminate”, are exposed to even more pronounced discrimination and intimidation.²⁹ The stigma of being an older homosexual man has given this group a degree of exposure that may often lead to profound instances of harassment.

Many lesbian women face a larger culture of ‘invisibility’ within society. The media tend to use only the term *homoseksualac* and *homoseksualci* which excludes by definition and implication female homosexuals, making their position in society ever more ‘invisible’ and potentially more vulnerable.³⁰

Article 6 (right to life)

Article 6 guarantees the protection of persons against extrajudicial killings based on sexual orientation. Organization Logos in Bosnia stated that many incidents are not reported for social and cultural reasons, and even the ones that are reported do not proceed to court.³¹

In April 2005, a 21 years old self-identified gay man from Sarajevo reported that his father had paid professional killers in order to eliminate him, after he had discovered his son's sexual orientation. The victim remained in hiding for almost a month and eventually

²⁸ *Analysis of Terminology pertaining to LGBTTIQ Persons and Human Rights in Printed Media in Bosnia and Herzegovina*, Organization Q (Sarajevo 2004) at 19, 22-27, *on file with Global Rights*.

²⁹ *Human Rights in the OSCE Region: Europe, Central Asia and North America (Events of 2004)*, International Helsinki Foundation for Human Rights, at 10 (2005).

³⁰ *Analysis of Terminology pertaining to LGBTTIQ Persons and Human Rights in Printed Media in Bosnia and Herzegovina*, Organization Q (Sarajevo 2004) at 19, 22-27.

³¹ Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

left the country in May 2005. He was determined not to press charges against his father or to take any other legal action whatsoever.³²

Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment)

To the extent to which sexual orientation is a ground for torture and inhuman treatment, the UN Special Rapporteur noted in a 2001 report that failure to conform with rigid gender constructions would subject LGBT persons to humiliation and violations that are intended to dehumanize them.³³

The use of sexual torture in the context of same-sex sexuality aimed at shaming and dehumanizing “the other” was well known during the war, as evidenced in testimony before the United Nations International Criminal Tribunal for the Former Yugoslavia in a case concerning the prison camp at Omarska, where a male prisoner was forced to sexually harass and then castrate another prisoner, Fikret Harambasic, by biting his testicles, eventually causing the death of the man.³⁴

This legacy of sexual torture from the war years has carried into the post-war period. In January 2005, the OHCHR unofficially confirmed a new case of harassment based on sexual orientation and gender identity or expression. The victim is a young self-identified homosexual male from RS, who fled to Sarajevo after being beaten and severely injured several times in his hometown.³⁵

In 2004, some human rights activists were individually approached by two self-identified lesbians who offered serious claims about violence directed at them by family members (primarily parents) after coming out to them as lesbians. The details remain confidential due to personal privacy concerns.³⁶

A recent survey conducted by Organization Q concluded that gays and lesbians are more likely to be attacked after they are ‘fully out’, which places extra pressure on gays and lesbians in particular because they feel that by being out they are exposing themselves to a substantial risk of violence.³⁷

³² Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

³³ Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/56/156, July 3, 2001, p. 6.

³⁴ International Criminal Tribunal for the Former Yugoslavia, the Prosecutor of the Tribunal against Dusan Tadic a/k/a “Dule” – Goran Borovnica, Indictment, Case no. IT-94-1-I, at 5.1.

³⁵ Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

³⁶ Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

³⁷ The Invisible Q: Human Rights issues and concerns of LGBTIQ persons in Bosnia and Herzegovina, Organization Q, p. 45, (Sarajevo 2006) *on file with Global Rights*.

Article 9 (right to liberty and security of person)

The right to liberty and security is a fundamental human right recognized in treaty and domestic law. The provisions of the ECHR and the UN Declaration of Human Rights lend further support and weight to Art. 9 of the ICCPR. While the international legal and human rights standards are unambiguous, in reality, those with alternative sexual orientations and practices remain targets of indirect discrimination through social stigma and, very often, cultural misunderstanding. Evidence of this emerged in a report by the International Helsinki Foundation for Human Rights, which purports that “Homosexuals faced misunderstanding virtually everywhere – in the family, on the street, in the workplace, in the education process, in contacts with public administration, in the media, etc.”³⁸

While the criminal law in BiH, RS, and BD explicitly holds sexual orientation as unlawful grounds for discrimination, the laws relating to public order contain provisions that potentially jeopardize the rights of sexual and gender minorities. For example, open homosexual behavior in public places can be regarded as “[a threat to] public morality” or “insulting [towards] the patriotic, national, religious and moral feelings of citizens.” In RS, the law further bans behavior in public places that could “call into question the rights of citizens to personal security, peace, privacy and human dignity.” Such broad formulations give judges a great deal of leeway for interpretation and have been used against LGBT persons.³⁹

Article 17 (freedom from arbitrary interference with privacy, family and home)

The 'right to privacy' is also a fundamental right afforded to all members of society. This right is often violated due to the perceptions and misconceptions of society, which are often fueled by sensationalist, insensitive and, at times, inaccurate media reports and publications. A prevalent area where homosexual men in particular are subjected to the prying and judgmental spotlight of the media is when discussing the topic of HIV/AIDS.⁴⁰

Medical staff are allowed to ask their patients questions that are strictly related only to their medical treatment. Personal information (in particular the details related to HIV/AIDS treatment), used for the state statistics on diseases and similar purposes, may be used only if the patient's identity remains fully anonymous. There have, however, been

³⁸ International Helsinki Foundation for Human Rights observed, “Despite legal inconsistencies, the main obstacle preventing sexual minorities to exercise their human rights was the general social and cultural environment.” *Human Rights in the OSCE Region: Europe, Central Asia and North America (Events of 2004)*, International Helsinki Foundation for Human Rights, at 10 (2005)

³⁹ International Helsinki Foundation for Human Rights observed, “Despite legal inconsistencies, the main obstacle preventing sexual minorities to exercise their human rights was the general social and cultural environment.” *Human Rights in the OSCE Region: Europe, Central Asia and North America (Events of 2004)*, International Helsinki Foundation for Human Rights, at 10 (2005)

⁴⁰ Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

several cases involving misuse of such data by the media adding fuel to common perceptions that a patient's disease is directly connected with his or her real or perceived sexual orientation and/or gender identity.⁴¹

By failing to recognize the legal status of post-operative transsexual individuals and to explicitly provide healthcare service for gender reassignment, Bosnia and Herzegovina violates the decisions of the European Court of Human Rights (ECtHR), which are directly binding in the country and before its judiciary. In its case law, the ECtHR has established that the above-mentioned omissions constitute, inter alia, a violation of the right to private life under article 8 of the European Convention on Human Rights and Fundamental Freedom. Similarly, transsexual and transgender persons are entitled to protection from arbitrary interference with privacy with reference to Articles 17 of the ICCPR. As a result, Bosnia and Herzegovina should be held accountable for denying legal recognition and not providing healthcare services to transsexual individuals under the ICCPR.

In particular in *Goodwin v. UK* (2002), the ECtHR held that the UK government failed to adhere to Article 8 (right to privacy) and Article 12 (right to marry) of the Convention by denying a post-operative transsexual's right to be recognized in her new gender which, as a consequence, would affect the right to formally obtain the status as a woman with her own separate and distinct identity for National Insurance purposes, as well as her fundamental right to marry a person of the opposite sex enshrined under both Article 12 ECHR and Article 23 ICCPR. Furthermore, according to the judges, "the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention."⁴² The Court also emphasized the importance of the provisions of Article 8 and their relevance to the case by arguing that "gender identity is one of the most intimate areas of a person's private life"⁴³

In the case of *Van Kück v. Germany* (2003), the Court held that the German government was in breach of Article 6 (right to a fair trial), Article 8 (right to private life) and Article 14 (principle of non discrimination) for failing to provide a means of redress for the transition phase of a post-operative transsexual, which included hormone therapy and surgery, the latter of which an insurance company refused to pay. Also, in its decision "[t]he Court reiterates that where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sex, a problem may arise under Article 14 of the Convention."⁴⁴

⁴¹ Organisation Logos, Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina, (October 2006) *on file with Global Rights*.

⁴² *Goodwin v United Kingdom*, 588 Eur. Ct. H.R. available at <http://www.worldlii.org/eu/cases/ECHR/2002/588.html>

⁴³ *Van Kück v. Germany*, 37 Eur. Ct. H.R. Rep. at 73 (2003) available at <http://www.worldlii.org/eu/cases/ECHR/2003/285.html>

⁴⁴ *id* at 90

Article 19 (freedom of expression)

A telling example of the limited scope of this right is illustrated in the reaction, and the debate that ensued, following the release in Bosnia of the 2005 film “Go West”, about the lives of gay men in Sarajevo. The film provoked outrage amongst religious groups condemning the nature of the film and expressing disgust at its subject matter.⁴⁵ According to BBC reports, the director, Ahmed Imamovic, received death threats resulting in the delay of the film’s public screening.⁴⁶

In the wake of the screening of “Go West”, the prominent national magazine *Walter* issued three articles attacking homosexuality. This precipitated a media confrontation in Bosnia and Herzegovina. While much of the debate was very provocative, it re-confirmed the existence of prejudices and stereotypes in the country’s dominant hetero-patriarchal social system.⁴⁷

Article 22 (freedom of association)

Freedom of association is another fundamental right afforded to citizens of BiH through various provisions including Article 22 of the ICCPR.⁴⁸ According to the International Helsinki Foundation for Human Rights, the Law on Associations and Foundations was adopted in 2001.⁴⁹ This law is in full compliance with the ECHR. It allowed NGOs and other public associations to register for activities within the territory of BiH.

Organization Q became the first official LGBTIQ organization in BiH, when it was formally registered in 2004.⁵⁰ The initiative to form the organization began in 2002. While Organization Q has the same legal status as any other organization or NGO, it continues to face obstacles in the form of prejudice, misunderstanding and bigotry.

⁴⁵ Nick Hawton, Gay War Film Stirs Bosnian Anger, BBC NEWS, March 21, 2005, <http://news.bbc.co.uk/2/hi/entertainment/4368077.stm>.

⁴⁶ Nick Hawton, Gay War Film Stirs Bosnian Anger, BBC NEWS, March 21, 2005, at 1.

⁴⁷ *Analysis of Terminology pertaining to LGBTIQ Persons and Human Rights in Printed Media in Bosnia and Herzegovina*, Organization Q (Sarajevo 2004) at p 24.

⁴⁸ The Constitution of the Republic of BiH, Art. II, sect. H, I, para. 3

⁴⁹ *Human Rights in the OSCE Region: Europe, Central Asia and North America (Events of 2004)*, International Helsinki Foundation for Human Rights, at 10 (2005).

⁵⁰ *The Invisible Q: Human Rights issues and concerns of LGBTIQ persons in Bosnia and Herzegovina*, Organization Q, p. 15, (Sarajevo 2006).

Article 23 (family life)

In *Joslin v. New Zealand*, the Human Rights Committee (HRC) held that the ICCPR does not require state parties to recognize same-sex marriage.⁵¹ However, two members of the Committee argued that the denial of legal recognition of same-sex marriage could constitute the basis for a claim under article 26 ICCPR. In *Young v. Australia*, the Committee found that failure to recognize to same-sex couples benefits that were granted to unmarried opposite sex couples in the context of pension benefits is a violation to Article 23 of the ICCPR.⁵²

The ECtHR upholds equal treatment of unmarried different-sex and same-sex partners as well. In *Karner v. Austria (2003)*, the ECtHR held that a law that supports different treatment between de facto same-sex and opposite-sex couple (in this case the entitlement of a surviving partner to preserve the tenancy agreement upon the death of the other) constitutes discrimination as it violates Article 8 of the European Convention (“Everyone has the right to respect for his private and family life [and] his home”) and Article 14 (non discrimination principle), the latter taken in conjunction with article 8.⁵³

Those decisions have implications in the context of different treatment based on family life. For instance, under the Bosnian law, the issue of paid leave of absence highlights similar considerations. Under the Labor Law of the FBiH, paid leave is possible only in the following circumstances: marriage, serious illness, or a death in the immediate family.⁵⁴ What encompasses ‘family member’, ‘partner’ or ‘spouse’ within a legal context excludes same-sex couples, but includes opposite-sex de facto partners.⁵⁵

The Bosnian legal system defines marriage as a legal union between a man and a woman, meaning that two persons of the same sex may not enter into marriage and therefore cannot enjoy the privilege of a paid leave of absence in exceptional family emergencies involving sickness or death, a privilege that is extended to unmarried different-sex couples.⁵⁶ Same-sex couples have no legal status or even the possibility to register their

⁵¹ Communication No. 901/1999.

⁵² Comm. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), at 10.4

⁵³ *Karner v. Austria*, 395 Eur. CT. H.R. (2003) available at <http://worldlii.org/eu/cases/ECHR/2003/395.html>.

⁵⁴ FBiH Labor Law, Art. 46. *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q, p 18 (Sarajevo, DATE).

⁵⁵ FBiH Labor Law, Art. 46 (2) id at 19.

⁵⁶ FBiH Family Law, Art. 46, RS Family Law, Art. 14, Brčko District does not have its own Family Law. It abides by the Family Law of the Republika Srpska north from the division line, and by the Family Law of the Federation of BiH south from the division line. *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q, p 27.

union, as is possible in the Republic of Croatia following the adoption of the Law on Same-Sex Unions.

Article 16 of the Family law of FBiH defines marriage as legal union between two consenting individuals of the opposite sex before a municipal administrative body in charge of maintaining register of births.⁵⁷ According to this specific definition, same-sex marriage is illegal.⁵⁸

Denying same-sex couples rights granted to unmarried opposite-sex couples raises serious concerns under Articles 23 and 26 of the ICCPR. Family law distinguishes between full and partial adoption.⁵⁹ While the right of full adoption is restricted to married opposite sex couples, the right to partial adoption is granted to unmarried opposite sex couples, if certain requirements are met.⁶⁰ This right, however, does not extend to same-sex couples.⁶¹

It is clear that the law in this area is not in conformity with the case law or the overriding spirit of the human rights instruments to which Bosnia and Herzegovina has committed itself. This, it is submitted, is an area in which progressive legislation is required to serve two purposes. First, to conform with the spirit of the ICCPR and the European Convention in upholding and extending the ambit of human rights to all members of society, and second, to take a further step in embedding a human rights based approach into the drafting and interpretation of laws in Bosnia and Herzegovina.

III. Recommendations for HRC

- While the Gender Equality Law of 2003 is considered a positive step, the implementation of this law and its interpretation in context with other legislation must be continuously monitored. According to Organization Q, it is the responsibility of the state to harmonize the Gender Equality Law with other laws, to promote all articles of the law, to ensure mechanisms for its implementation and to advocate and represent internationally those same standards, which exist within BiH. In BiH, an appropriate body for this task would arguably be the Ministry of Human Rights and Refugees.
- Despite the significant development of European law on the issue, there is very limited and often no means for a person discriminated against on the grounds of his or her sexual orientation or gender identity to seek effective redress under the law in BiH. Employment tribunals dealing with gender discrimination in the

⁵⁷ *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q, p 18 (Sarajevo, 2005).

⁵⁸ *Id.* at 19

⁵⁹ Article 12 of FBiH Family Law.

⁶⁰ Organization Logos, *Interview concerning Three Personal Cases of Violations of Human Rights and Freedoms of LGBTIQ Persons in Bosnia and Herzegovina*, (October 2006)

⁶¹ *Rights and Freedoms of Sexual and Gender Minorities in Bosnia and Herzegovina: An Analysis of the Relevant Legislation*, Organization Q, p 34 (Sarajevo, 2005): 34

workplace should be set up and the civil court procedures streamlined to facilitate claims relating to sexual orientation or gender identity discrimination.

- A report by Organization Q report analyzing legislation that affects the rights of LGBT persons demonstrates that there are no provisions at the present time to ban discrimination based on gender identity or expression, nor any legal provisions which directly address hate crimes (including verbal harassment). Nor are there appropriate provisions that explicitly recognize and extend protection to transsexual and transgender persons in the form of legal aid and social inclusion initiatives, as required by the European regional system of protection of human rights that Bosnia integrated into its domestic system through its Constitution.
- BiH has not properly regulated or legally stipulated sex change/sex modification procedures and the consequences thereof, such as social welfare, healthcare (and health insurance) or medical counseling. BiH has not instituted standardized procedures to change social security numbers, personal data or the specification of sex in personal documents.
- Within the LGBT population, transgender and transexual persons are stigmatized, discriminated against, and vulnerable. Legal protection is necessary to regulate instances of gender-phobia and trans-phobia.
- It is unclear from the Constitution whether the phrase “other status” includes LGBT persons. It is important for the government to address this issue and formally extend Constitutional protections to LGBT persons through national dialogue.
- According to Organization Q, representatives in BiH institutions publicly declare their desire to enter the European Union, but in reality, little has been done to conform to European anti-discrimination standards. Effective steps should be taken to conform with EU anti-discrimination directives. This would involve a more accurate definition of discrimination to cover all aspects of discrimination, whether through deliberate acts or quiet subjugation or exclusion.