

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Executive summary

Implementation of Employment Directive 2000/78/EC

The Employment Directive 2000/78/EC is in principle properly implemented into Polish law and provides victims of discrimination on the ground of sexual orientation with the possibility of claiming damages. Problems remain, however, as regards two definitions (direct and indirect discrimination) and the way they are implemented into Polish law.

The major weakness is the lack of an equality body or other organ responsible for anti-discrimination policies and legal actions. The Government is still under preparation of a new, complex anti-discrimination law which will enhance the protection of sexual minorities against discrimination and will establish the equality body. However, efforts take already a long time and the non-governmental organizations do not have an expectation that such law will be passed within next two years.

There was only one case pending before Polish employment courts where the claim of sexual orientation was directly raised. It should be noted that the low number of cases is a result of a lack of willingness among individuals to disclose their sexual orientation.

In January 2010 The European Commission sent a reasoned opinion to Poland for incorrectly implementing the Directive 2000/78/EC.

Freedom of movement

Poland does not recognise freedom of movement under Directive 2004/38/EC for partners in partnerships registered in other Member States.

The Polish authorities create obstacles for Polish nationals who wish to enter into same-sex partnership or marriage in a Member State where such a possibility exists. In particular, the offices for civil status refuse to issue certificates stating that a given person is not married to anyone else, which may block a procedure in another EU Member State. This problem may in practice be resolved by obtaining a notary certificate. In June 2008 *Wojewódzki Sąd Administracyjny* [Regional Administrative Court] in Gdańsk ruled a landmark judgement in which it stated that every citizen is entitled to receive such a

certificate without substantiating her/his request what means the office for civil status cannot examine the petitioner's intention.

In the resolution on application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, adopted in April 2009, European Parliament describes as a 'problematic issue' the fact that Poland does not recognise same sex marriages as a reason to grant free movement rights, neither does it recognise registered partnerships, even if certified in another Member States.

Asylum and subsidiary protection

Until 2008 Polish law did not provide explicitly protection from the risk of being returned home to people who were persecuted or harassed because of their sexual orientation or gender identity. The law was however significantly amended in March 2008 in order to implement the Council Directive 2004/83/EC. Sexual orientation is presently recognized directly as "a membership of particular social group" since Article 14 Section 2 of the Law on Granting Protection to Aliens on the Territory of the Republic of Poland states that "depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation; sexual orientation cannot be however understood to include acts considered to be criminal in accordance with Polish law". Practice shows that the refugee status or subsidiary protection are seldom granted due to sexual orientation or gender identity. The report further describes cases of a citizen of Moldova and a citizen of Vietnam who were denied refugee status by the President of the Office for Foreigners and the Council for Refugees which is an appeal body. Also applications of two citizens of Belarus who are homosexual couple were rejected. Their cases before the Council for Refugees are still pending. In one case refugee status was granted to a Chechen national due to problems with gender identification and intimidation in the home country.

Family reunification

Provisions of the Council Directive 2003/86/EC have been properly implemented into Polish law. Neither LGBT organisations nor *Helsinki Fundacja Praw Człowieka* [the Helsinki Foundation for Human Rights (HFHR)] has noted any problems with the application of the law or problems with family reunification. The authors were also not provided with relevant statistics, as they are not gathered.

Freedom of assembly

In recent years Poland has witnessed many significant problems with respect to the organisation of assemblies by the LGBT community.

Paradoxically, attempts to restrict freedom of assembly resulted in court judgments that only strengthen this freedom and which may have positive effects in other parts of Europe – through establishment of standards. One should note in this respect a judgment of *Trybunał Konstytucyjny* [the Constitutional Court] of 18.01.2006 and a judgment of the European Court of Human Rights (ECtHR) in *Bączkowski and others v. Poland* of 03.05.2007.

Following bans on demonstrations in 2005 and court decisions following such bans, gay pride events were organised in Poland without any major problems from the administrative organs.

Nevertheless, a typical problem is the risk of violence and offensive language from participants of counter-demonstrations. Events in Kraków in 2006 and 2007 show that the police are not always effective in exercising their duty to protect participants of legal demonstrations and that attacks by aggressive counter-demonstrators may take place. These events show also that the organisation of assemblies by the LGBT community is still a matter of controversy.

In regard to Equality Marches taking place in 2008 and 2009, it has to be noted that the situation has significantly improved since 2005, when organisers of the Marches had to face serious difficulties. It can be stated that the improvement was to be observed in regard to three main factors: positive attitude of the administrative authorities, better protection offered by the Police and lower activity of the far right, xenophobic organisations trying to disturb the Marches, although they still stay present during most of such events organised in Poland. As an example in June 2010 Warsaw will host the “Euro Pride 2010”.

Hate speech and criminal law

Hate speech towards homosexuals is a problem in Polish political life and in society in general. Polish criminal law does not contain specific instruments aiming to provide protection against hate speech directed at homosexuals. Hate crimes law is regulated in Poland in the Penal Code of 6 June 1997 (Dz.U. [Journal of Laws] of 1997, No 88, item 553, as amended) in Chapter XXVII "Offences against honour and personal inviolability", but the protection offered concerns only those being victims of hatred based on national, ethnic, racial or religious differences or for reason of the absence of any religious belief. However, some effects may be achieved through litigation and reliance on general provisions protecting the individual's reputation and honour (e.g.

criminal defamation or protection of personal rights under the Civil Code of 23 April 1964 (Dz.U. [Journal of Laws] of 1964, No 16, item 93, as amended). In August 2009 a landmark judgement was issued by the Regional Court in Szczecin which proved that a civil action may be used as an efficient tool of protection against homophobic hate speech.

Acts of physical violence against gays and lesbians happen from time to time in Poland. However, there is a lack of willingness on the part of victims to bring their cases to the prosecutor's office or court.

One unresolved problem is a neo-fascist website, Redwatch, which includes data on many left-wing activists and members of NGOs, together with their personal data and incitement to violence against them. Despite efforts by the police, the website is still operational and forms a constant danger for people whose names are listed on it.

In 2008 LGBTQ organisations proposed a joint draft of amendments to the Polish Criminal Code, which would allow to extend the scope of protection provided against hate speech and hate crimes. The draft stipulates that individuals are protected not only as members of national, ethnic and religious minorities and persons who do not belong to any religion, but also in regard to their sexual orientation or identity. However, the official governmental draft of amendments to the Criminal Code which was approved by *Sejm*, omits any references to sexual orientation or identity.

Transgender issues

Polish law and jurisprudence provide for protection against discrimination for transsexuals. Discrimination against them is treated as discrimination on the basis of sex. At the same time, gender identity is recognised as one of the personal goods protected under civil law.

The procedure for changing gender identity was created in result of judgments by the Supreme Court. The changing approach of the Supreme Court created a good deal of inconvenience and so there is a great need for comprehensive legislation balancing the rights of transsexuals and doctors, as well as regulating the procedure for name changes and acts of civil status.

In 2008 *Fundacja Trans-Fuzja* (Foundation Trans-Fuzja) which acts for rights of transgender people was established. One of its initiatives was to create special identity cards for transgender persons. Although this idea reached significant public attention, it was rejected by the Ministry of Interior and Administration.

Miscellaneous

The previous government tried to use homosexuals and attitudes towards them as an ideological weapon, especially in the field of education. The controversy around the book, *Compass – Education on Human Rights* and the draft law on the prohibition of homosexual propaganda in schools are two examples of this approach. Following the most recent elections, there is hope for significant changes in educational policy. This hope has already been confirmed by the new Minister of National Education.

In 2003 a draft law on same-sex partnerships was prepared by the Senate. However, the current government does not appear interested in putting this issue on to the political agenda.

Kampania Przeciw Homofobii [the Campaign Against Homophobia] had some problems with the full implementation of their outdoor advertising campaign due to the attitude of an advertising agency. The agency did not want to work with them, allegedly because of the content of the posters. There were also other examples of business entities' restricting access by LGBT leaders to certain services.

Regulations regarding protection of data collected by the police are wrongly construed. They do not provide full protection of data concerning sexual orientation. Most people affected do not know that their personal data, including data on their sexual preferences and life, are processed by the police. As a consequence, it may be that homosexuals do not report criminal acts against them, fearing that their sensitive data will be collected by the investigative bodies or might be used by unauthorised third parties.

Good practices

Good practices regarding protection of LGBT people can be seen chiefly in the Polish courts. Judgments concerning Equality Marches are meaningful due to protection of basic values in a democratic society. Some of the statements included in these judgments may reverberate in other EU countries, especially new Member States.

Another example of good practice is the positive cooperation between the Polish ordinary courts and administrative courts and NGOs in litigation of precedent cases. Polish courts accept public interest litigation, especially if an organisation is presenting an amicus curiae brief or legal opinion, and may take advantage of views expressed therein. It is of great help in advancing the rights of the LGBT community and may have good effects if the legislator or the executive is not responding correctly to the needs and problems of the given minority.

A. Implementation of Employment Directive 2000/78/EC

The process of full implementation of the Directive 2000/78/EC has not yet ended. Currently, the Polish government is preparing a new anti-discrimination law that would complete the implementation. The most important task for the government is the establishment of an equality body which would comply with the requirements of Directive 2000/43/EC and at the same time help victims of discrimination due to other grounds covered by Directive 2000/78/EC.

A.1. Methods of implementation of Directive 2000/78/EC

In general, Directive 2000/78/EC has been implemented into Polish national law through amendments to three legal acts:

- Act of 26.06.1974 – *Kodeks pracy* [Labour Code]², which in 2003 was amended in order to implement Directive 2000/78/EC and 2000/43/EC³ (hereinafter ‘Labour Code’);
- Act of 20.06.2004 – *Ustawa o promocji zatrudnienia i instytucjach rynku pracy* [Promotion of Employment and Institutions of the Labour Market Act]⁴ (hereinafter ‘Act on Promotion of Employment’),
- Act of 17.11.1964 – *Kodeks Postępowania Cywilnego* [Civil Procedure Code]⁵, which was amended in 2004 in order to implement Directives 2000/78/EC and 2000/43/EC⁶ (hereinafter ‘Civil Procedure Code’).

The Labour Code has been amended through the insertion of the new chapter on equal treatment in employment (Chapter IIa) and the general principle in Article 11³ of the Labour Code stating that any discrimination in employment, direct or indirect, due to sex, age, disability, race, religion, nationality, political opinions, membership of trade unions, beliefs, sexual orientation or part-time employment is prohibited.⁷

² Unified text – *Dziennik Ustaw* [Journal of Laws] of 1998, No. 21, item 94 as amended.

³ Journal of Laws of 2003, No. 213, item 2081.

⁴ Journal of Laws of 2004, No. 99, item 1001, as amended.

⁵ Unified text – *Dziennik Ustaw* [Journal of Laws] of 1964, No. 43, item 296, as amended.

⁶ Journal of Laws of 2004, No. 172, item 1804. Amendments entered into force on 05.02.2005.

⁷ According to the Campaign Against Homophobia, this list of prohibited grounds of discrimination should also include gender identity. Although one should not expect many examples of discrimination due to this ground, its inclusion may have a positive educational and awareness-raising impact.

This general principle is further enshrined in Article 18^{3a} of the Labour Code, which states that employees should be equally treated with respect to entering into employment contracts or their termination, terms and conditions of employment, promotion to higher positions and access to skills development training, irrespective of their sex, age, disability, race, religion, nationality, political opinions, membership of trade unions, beliefs, sexual orientation or part-time employment.

The Labour Code includes definitions of direct discrimination, indirect discrimination, harassment and victimisation. These definitions – with some minor exceptions (noted below) – are in compliance with the Directive 2000/78/EC.

For example, according to Article 18^{3a} Section 3 of the Labour Code, direct discrimination takes place when an employee is or could be treated, on one of the discriminatory grounds (including sexual orientation), less favourably than another employee in a comparable situation. Article 2 (2) (a) of the Directive 2000/78/EC refers to a hypothetical situation of how another person ‘would be treated in a similar situation’. Thus Directive 2000/78/EC uses the example of ‘another person’ as a comparator, while under the Labour Code the reference is given to an employee and his/her hypothetical treatment in a comparable situation. In practice this discrepancy may cause certain problems in litigation.

Moreover, according to Article 18^{3a} Section 4 of the Labour Code, discriminatory practice in case of indirect discrimination may be allowed if it is justified by ‘other objective criteria’. It should be noted that, according to Article 2 (2) (b) (i) of Directive 2000/78/EC, unequal treatment may be allowed if the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Furthermore, the Labour Code implements too broadly the basic exception from the general principle of non-discrimination. According to Article 4 Section 1 of Directive 2000/78/EC, difference in treatment may be justified, ‘where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’. However, the Labour Code does not refer to a ‘genuine and determining occupational requirement’. Instead, according to Article 18^{3b} para. 1 point 1 of the Labour Code, refusal to employ on one of the discriminatory grounds does not violate the principle of equality in employment, if ‘it is justified due to the type of work, terms and conditions of its performance or professional requirements expected from employees’. Furthermore, there is no principle of proportionality included in this provision (as in Directive 2000/78/EC – ‘objective is legitimate and the requirement is proportionate’). Improper implementation of this provision may have an especially negative impact on employment in such spheres as education or work with young people.

Taking into account the above, Directive 2000/78/EC should be implemented into the Labour Code in a more diligent manner.⁸

As regards the Act on Promotion of Employment, the implementation of Directive 2000/78/EC has been ensured through a new set of obligations on employment agencies. According to Article 18a Section 4 of the Labour Code, employment agencies may not discriminate against people for whom an agency is seeking employment or other payable activity on the grounds listed in Directives 2000/43/EC and 2000/78/EC, including sexual orientation.

Furthermore, in order to implement Article 9 Section 2 of Directive 2000/78/EC, the amendments to the Civil Procedure Code have been adopted. According to Article 61 of the Code, non-governmental organisations may sue on behalf of any victims of discrimination (irrespective of their nationality) claiming damages resulting from a violation of equal treatment. In addition, non-governmental organisations may join civil proceedings which concern claims of discrimination. This provision is of a more general nature and may have application in all discrimination cases pending before the civil courts, not only those relating to employment. By joining proceedings, a non-governmental organisation has almost the same possibilities as the party to the proceedings – it may file legal briefs (including *amicus curiae* briefs), request evidence and appeal against a judgment.

The preliminary condition for bringing a lawsuit on behalf of a victim of discrimination is his/her consent to be represented by the organisation. Similarly, consent is required when the organisation only wants to accede to proceedings. Secondly, the organisation concerned should have the protection of equality and non-discrimination as one of the objectives written in its founding charter.

Except for the above, Directive 2000/78/EC has not been implemented into any other legislative acts which have an impact on the sphere of employment. Consideration should be made of its implementation into laws regulating self-employment or governing professions of public trust, such as attorneys, legal advisors, notaries, architects etc.

In addition, it seems that Directive 2000/78/EC should be promoted more at governmental level. One should expect more activity in the promotion of the principle of non-discrimination in employment in the activities of *Państwowa Inspekcja Pracy* [the Polish Labour Inspection]. There are also no complex governmental plans on how to counteract the discrimination of sexual minorities in Poland. According to the *Kampania Przeciw Homofobii* [the Campaign Against Homophobia], there is also a lack of programmes of cooperation between organisations of employers, trade unions and the government in the field of anti-discrimination laws and practices.

⁸ See statement by the HFHR to the Prime Minister concerning inappropriate implementation of anti-discrimination directives, 18.08.2006.

The European Commission has recently announced that the first stage of infringement procedures has been taken against Poland for improper implementation of Directive 2000/78/EC.⁹ 28 January 2010 The European Commission sent a reasoned opinion to Poland for incorrectly implementing the Directive 2000/78/EC. In the reasoned opinion the Commission pointed out that:

- the prohibition of harassment in Polish legislation does not extend to all categories of trainees;
- regulations on access to certain professions do not contain specific provisions prohibiting discrimination on grounds of religion or belief, disability, age or sexual orientation;
- the obligation of employers to provide reasonable accommodation to disabled workers does not cover job applicants and trainees;
- the law that regulates the conditions of vocational training does not include appropriate definitions of direct and indirect discrimination and instruction to discriminate.¹¹

A.2. Draft proposal for anti-discrimination laws

A new anti-discrimination law is currently under preparation by the Ministry of Labour.¹² The new law will cover different grounds of discrimination, including sexual orientation, and will be applicable to almost all spheres of social life. If adopted, the Polish law would be more comprehensive than the European law is at the moment with respect to anti-discrimination issues. According to the legislative plans of the government, its adoption is planned for the first half of 2008.

The draft anti-discrimination law covers the following areas where discrimination may occur:

- possibility of undertaking professional activity and terms and conditions of such activity (including employment and providing services on the basis of a civil law contract);
- access to the instruments and services of employment agencies and other institutions counteracting unemployment;
- joining and activity in trade unions, employers' organisations, professional self-governing bodies and NGOs;

⁹ Memorandum of 31.01. 2008 No. IP/08/155.

¹¹ Memorandum of 28. 01. 2010 No. IP/10/71.

¹² Poland/*Ustawa o równym traktowaniu (project)* [Draft Law on Equal Treatment] of 31.08.2007, available at <http://www.mps.gov.pl/bip/index.php?idkat=1372> (04.02.2008).

- social security and social aid;
- health services;
- education.

As regards the above areas the draft anti-discrimination law prohibits discrimination on the grounds of sex, race, ethnic origin, nationality, religion or belief, political opinions, disability, age, sexual orientation, civil status and family status.

Furthermore, the draft law prohibits discrimination in the access to and provision of public goods and services. In this regard, however, prohibition of discrimination is restricted to the following grounds: sex and race or ethnic origin. Notably, grounds covered by Directive 2000/78/EC, such as sexual orientation, are not covered by this extended protection against discrimination. However, this is only a draft law and may be subject to modifications and further discussion.

The draft law proposes more effective legal instruments to counteract discrimination. In particular a victim of discrimination would be able to bring legal action to the civil court and to claim apologies and damages for an act of discrimination. Furthermore, there is a possibility to impose a financial penalty of 3,000 PLN (approx. 850 Euro) on the person / institution who committed an act of discrimination.

One of the most discussed issues connected with the adoption of the new anti-discrimination law is the status of the equality body. In a statement of 21.08.2007, the *Helsinki Fundacja Praw Człowieka* [the Helsinki Foundation for Human Rights (HFHR)] expressed its concerns about the status of the planned body, especially its independence of the government and its ability to conduct independent studies on discrimination or to provide legal aid to victims of discrimination. Furthermore, the draft does not contain any provisions regulating dialogue with civil society. There are also objections concerning different definitions and legal constructions adopted in the law.¹³

In the beginning of 2010 the Government still has not concluded the draft of law. The latest draft presented in October 2009¹⁴ contains serious shortcomings. Although sexual orientation is listed among prohibited grounds of discrimination, the draft passes over discrimination on the ground of gender identity. The draft contains neither definition of discrimination by association nor of multiple discrimination. It gives up the idea of the specialized,

¹³ See statements by the HFHR to Joanna Kluzik-Rostkowska, Deputy Minister of Labour, of 15.05.2007 and 21.08.2007, commenting on the draft anti-discrimination law, available at <http://www.hfrpol.waw.pl>. See also opinion by *Polskie Stowarzyszenie Prawa Antydyskryminacyjnego* [Polish Association on the Anti-Discrimination Law], submitted to the Ministry of Labour on 10.09.2007.

¹⁴ Draft of 26 October 2009, available at http://www.mpips.gov.pl/bip/download/Ustawa%20-%20projekt%20z%20dnia%2026.10.2009%20r_12-11-09.pdf

independent equality body and entrusts the Ombudsman with the mandate in the domain of equality, however without providing this body with any effective instruments. In December 2009 the draft was transferred from the Ministry of Labour to *Pełnomocnik Rządu ds. Równego Traktowania* [Governmental Plenipotentiary for the Equal Treatment] who is currently in charge of its preparation.

The ongoing lack of anti-discrimination law in Poland raises serious critique voiced as well on international as on national level. In May 2008 Poland was recommended to adopt anti-discrimination law that would ensure equal treatment and non-discrimination on any grounds, including sexual orientation and gender identity by several states of UN Human Rights Council who examined condition of human rights in Poland within the framework of the Universal Periodic Review¹⁵. In November 2009 UN Committee on Economic, Social and Cultural Rights stated in its concluding observations regarding Poland, that it “*continues to be concerned, in spite of the appointment of a Plenipotentiary for Equal Treatment in April 2008, at the de facto discrimination experienced by some of the disadvantaged and marginalized individuals and groups, such as ethnic minorities, persons with disabilities, and ‘lesbian, gay, bisexual and transgender persons’, in the enjoyment of their economic, social and cultural rights. The Committee is further concerned that the draft Act “on implementation of some of the EU directives in the field of equal treatment” does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights*”¹⁶. Also Polish NGOs express their concerns in this regard. The arguments of Polish civil society were presented i.a. during the debate organized by *Kampania Przeciw Homofobii* [Campaign Against Homophobia] in May 2009. During discussion with Undersecretary of the Ministry of Labour, the representatives of NGOs criticized the delay, the provisions of the draft as well as the lack of consultations with civil society¹⁷.

A.3. The equality body and its history

The first body which was responsible for the implementation of Directives 2000/78/EC and 2000/43/EC was *Urząd Pełnomocnika do spraw Równego Statusu Kobiet i Mężczyzn* [Office of the Plenipotentiary for the Equal Status of Women and Men], headed by Magdalena Środa. It was created in December 2001 and the Plenipotentiary had the rank of Secretary of State in the Chancellery of the Prime Minister. The Office had a fairly comprehensive policy regarding the issue of discrimination of sexual minorities. Unfortunately, the Office was never transformed into the equality body.

¹⁵ Report of the Working Group on the Universal Periodic Review of 23 May 2008, A/HRC/8/30.

¹⁶ Concluding observations of 20 November 2009, E/C.12/POL/CO/5, § 12.

¹⁷ <http://pomocnik-ngo.kph.org.pl/eu.html> (access on 30 January 2010).

Following the elections in October 2005, the Office of the Plenipotentiary for the Equal Status of Women and Men (responsible for monitoring Directives and other actions required under them) was dismantled. Until then the Plenipotentiary actively promoted non-discrimination programmes in Poland, including non-discrimination of sexual minorities. However, the decision to close the Office of the Plenipotentiary signalled a shift in political attitude. Abandoning the focus on discrimination, the new government instead emphasised the value of the family, protection of children and equality of women.

The phasing out of the Office of the Plenipotentiary for the Equal Status of Men and Women was severely criticised by NGOs in Poland as a breach of EU law. It should be noted that the Office of the Plenipotentiary was not in fact even a fully-fledged equality body, as required under the Directives. Such a body, despite legislative proposals, was not established.

Following the phasing out of the Office of the Plenipotentiary, certain of the competences under Directives 2000/78/EC and 2000/43/EC have been taken over by non-independent bodies and personalities:

- the Undersecretary of State in the Ministry of Labour, Joanna Kluzik-Rostkowska, who supervised (within her sphere of competences) *Wydział do spraw Kobiet, Rodziny i Przeciwdziałania Dyskryminacji* [Department for Women, Family and Counteracting Discrimination];
- a special department in the Ministry of Internal Affairs dealing with racial and ethnic discrimination and the protection of national and ethnic minorities.

The field of discrimination in employment as regards disability has been the competence of *Pełnomocnik do spraw Osób Niepełnosprawnych* [the Government Plenipotentiary for Disabled Persons], both during the period of functioning of the Plenipotentiary for Equal Status of Women and Men and following the liquidation of this office.

Following the elections in October 2007, the above structure has not been changed. The Head of the Department for Women, Family and Counteracting Discrimination was Berenika Anders and activities of this department were supervised by the Minister of Labour, Jolanta Fedak. Despite the change in government following the elections, the government in the beginning has not changed its policies significantly regarding the establishment of the equality body.

Please note, however, that on 8 March 2008, the Prime Minister has decided to appoint Ms. Elżbieta Radziszewska as *Pełnomocnik Rządu ds. Równego Statusu Prawnego* [Governmental Plenipotentiary for the Equal Legal Status]. On 22 April 2008 formal establishment of the Office of the Plenipotentiary took place under the official name of *Pełnomocnik Rządu do Spraw Równego*

Traktowania [Government Plenipotentiary for the Equal Treatment]¹⁸. She has the rank of *sekretarz stanu w Kancelarii Prezesa Rady Ministrów* [Secretary of State in the Chancellery of the Prime Minister] and is responsible for the coordination of the governmental policies with respect to equality. It seems that her appointment is a step towards creation of the equality body under the projected law. Actions against sexual orientation discrimination are within her field of competence. In her first public interviews, Ms. Elżbieta Radziszewska stated that she is against discrimination of LGBT people, especially at the workplace. However, she will not agree on introduction of same-sex marriages or partnerships in Poland.¹⁹

The results of the actions against discrimination of LGBT, undertaken until now by the Plenipotentiary, are commonly considered to be unsatisfactory and disappointing. Negative remarks concern i. a., the refusal to establish, within the Office of Plenipotentiary, a division which would deal with the issue of discrimination on ground of sexual orientation. Moreover, the Plenipotentiary informed on its website that the situation when an employer demands from an employee a medical statement if he/she is affected or infected by HIV and AIDS. is an example of discrimination on ground of sexual orientation.²⁰ This was described by the LGBT organisations as strengthening the stereotype according to which HIV/AIDS are the diseases of homosexuals. Asked about her attitude towards the issue of same-sex marriages or partnerships, Ms. Radziszewska repeated her previous statements when she said she is against the introduction of legal regulations in that regard in Poland.²¹

As a result of all negative aspects mentioned above, 12 Polish LGBTQ organisations issued in December 2009 an appeal to the Polish Prime Minister Donald Tusk, asking for a dismissal of Ms. Radziszewska.²²

The latest draft of anti-discrimination law, introduced in October 2009, includes no references to the appointment of the independent Equality Body.²³ All competences of such body are thus to be passed to the existing Office of

¹⁸ The text of the Governmental Disposition of 22.04.2008, Dziennik Ustaw [Journal of Laws] of 2008, is available at <http://www.rownetraktowanie.kprm.gov.pl/userfiles/file/Pelnomocnikdo spraw Rownego Traktowania-rozporzadzenie.pdf>

¹⁹ Interview for RMF FM radio on 26 March 2008, available at

http://fakty.interia.pl/fakty_dnia/news/prezydent-naruszyl-godnosc-geja.1081549,

²⁰ Information available at <http://www.rownetraktowanie.kprm.gov.pl/index.php?id=266>

²¹ Press information of 21.11.2009, http://fakty.interia.pl/fakty_dnia/news/radziszewska-nie-dla-legalizacji-zwiazkow-partnerskich.1400267

²² The text of the letter is available at <http://www.kph.org.pl/pl/allnews/15-kph/285-damy-odwoania-minister-radziszewskiej>

²³ In that regard, annual World Report of the Human Rights Watch, issued on 20.01.2010, states that in Poland: ‘The government-controlled Office of the Plenipotentiary for Equal Treatment, created in 2008, lacks autonomy, and does not have a mandate to take complaints or assist individual victims, but the government resisted calls to establish an independent anti-discrimination body.’ Human Rights Watch 2009 World Report is available at <http://www.hrw.org/en/reports/2010/01/20/world-report-2010>

Rzecznik Praw Obywatelskich [Commissioner for Civil Rights Protection/Ombudsman]. Many negative aspects of this solution are to be noted. According to the draft, no real competences and tools which would allow the Ombudsman to initiate particular action, are admitted. For that reason, the Ombudsman would not be able e. g. to initiate a legal proceeding against public and private subjects or to offer legal aid to the victims of discrimination. The proposal of amendments to the Commissioner for Civil Rights Protection Act stipulates that his activities will be mostly of research or educational nature. Article 17 b Section 2 of the draft states unclearly that the Ombudsman has the competences to: ‘initiate and fulfil the activities which aim at the reduction of consequences of violating the equal treatment principle’.

It is also to be noted that in January 2010 *Wydział do spraw Kobiet, Rodziny i Przeciwdziałania Dyskryminacji* [Department for Women, Family and Counteracting Discrimination] acting within the Ministry of Labour and Social Policy, was dissolved. One of the reasons of this decision was the planned concentration of all tasks and prerogatives in the area of countering discrimination within the Office of the Plenipotentiary. The decision was criticised as the activities of the Department were always estimated as very efficient.²⁴

A.4. The Ombudsman and its legal position

As explained above, there is no yet equality body established in Poland. However, the Ombudsman, which is a constitutional organ elected for five years, may undertake certain interventions before the courts with respect to discrimination cases. The Ombudsman may join any court proceedings (civil or criminal), when it is necessary for the protection of constitutional rights and freedoms. This applies also to discrimination cases. In the course of the intervention, the Ombudsman may present a legal opinion or brief and support arguments of the claimant or assist the court in reaching a correct resolution.

In practice, the Ombudsman rarely uses the possibility of intervention in court proceedings. However, the Ombudsman recently joined proceedings in Mirosław Sielatycki’s dismissal case (referred to below) and the proceedings before the administrative courts concerning the ban on the Equality March in Poznań in 2005. Furthermore, the Ombudsman may accede to any constitutional complaint submitted to *Trybunał Konstytucyjny* [Constitutional Court], as well as ask for an abstract review of unconstitutional laws.

The former Ombudsman (Professor Andrzej Zoll) successfully requested a review of *Ustawa – Prawo o Ruchu Drogowym* Road Traffic Act (referred to

²⁴ Press information of 13.01.2010, http://www.dziennik.pl/wydarzenia/article525049/Rzad_zamyka_departament_ds_kobiet_i_rodziny.html

below), with the result that provisions which unconstitutionally restricted freedom of assembly have been abolished. The Ombudsman often urges other organs to take legal actions to improve the legal situation of LGBT people in Poland (such memoranda have been sent to the President of Warsaw, the Minister of Health, the Minister of National Education and the President of the Human Rights Commission of the European Parliament). They are written as a result of the submission of complaints to the Ombudsman and meetings with representatives of NGOs. Most recently the Ombudsman addressed in a similar way *Marszałek Sejmu RP* [Marshall of the Sejm], *Prezes Zarządu TVP* [Polish Public TV Board's President] and *Komendant Warszawskiej Straży Miejskiej* [Chief Commissioner of the City Guard in Warsaw].²⁵

In 2000-2007 the Ombudsman received 26 complaints concerning discrimination of LGBT people. We were not provided with division into particular years. However, only ten cases qualified for further investigation, while there was no probability of any rights violation in the remaining 16 cases. Taking into consideration the substance of these complaints, they raised issues of discrimination in organising public assemblies, lack of respect for the human dignity of LGBT people during public debates, discrimination in employment and in the course of law enforcement activities undertaken by the police, as well as voluntary blood donation.²⁶

Since April 2008 there has been a continuation of consultation meetings with LGBT NGOs representatives, organised regularly by the Ombudsman. However, in October 2009, LGBT organisations announced their withdrawal from the participation in the meetings which were, in their opinion, disappointing and aimless as they brought no substantial change and improvement in the situation of LGBT people.²⁷

In 2009 the Ombudsman supported the initiative of introducing the penalization of homophobic hate speech and hate crimes into the Polish Criminal Code.²⁸ He also requested *Minister Spraw Wewnętrznych i Administracji* [Minister of the Interior and Administration] to consider the possibility of creating the system of

²⁵ The texts of all interventions of the Ombudsman are to be found on the website of the Ombudsman's Office, <http://www.rpo.gov.pl/>

²⁶ Letter by Mirosław Wróblewski, Dyrektor Zespołu Prawa Konstytucyjnego i Międzynarodowego w Biurze Rzecznika Praw Obywatelskich [Director of the Constitutional and International Law Division in the Office of Ombudsman], of 13 February 2008, No. RPO-580873-I-08/AK.

²⁷ News release of the Polish Press Agency of 27.10.2009, <http://www.rpo.gov.pl/index.php?md=7680&s=1>

²⁸ Letter by dr Janusz Kochanowski *Rzecznik Praw Obywatelskich* [the Ombudsman] of 08.05.2009, No. RPO-607860-I-09/MK/KMŁ, to Minister Sprawiedliwości [Minister of Justice], <http://www.rpo.gov.pl/pliki/12490294600.pdf>

identity cards with two photos for transsexuals, transgender people, and cross-dressers.²⁹ However, as yet, no results in that regard have been achieved.

As a result of the publication of FRA's 'Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation' in 2008, the Ombudsman requested Ms. Elżbieta Radziszewska, *Pełnomocnik Rządu ds. Równego Traktowania* [Governmental Plenipotentiary for the Equal Treatment] to present the Plenipotentiary's position on the conclusions of the Study regarding the situation of LGBT persons in Poland and to inform about its presumptive initiatives and actions undertaken in order to implement FRA's recommendations.³⁰ In her written reply, issued on 24.02.2009, the Plenipotentiary informed the Ombudsman that Directive 2000/78/EC has already been implemented into the Polish national law through amendments to *Kodeks pracy* [Labour Code]. Ms. Radziszewska has also stated that the process of drafting the new anti-discrimination laws is still in progress, and the draft will include specific regulations in regard to the functioning of the Equality Body.³¹

The authors are aware of only two cases decided by the Polish courts which referred to discrimination in employment and where the issue of homophobia was raised. The reason for such a low number of cases may be the fact that people rarely disclose their sexual orientation. Even if they are discriminated against in the workplace, they do not want to litigate cases, because it would mean their 'coming out'. According to the report of the Campaign Against Homophobia covering 2005-2006, the majority of employees (approx. 80 per cent) conceal their sexual orientation or it is only known to the people closest to them. At the same time approximately ten per cent had the feeling that they were treated not equally in their place of employment due to their sexual orientation.

The first case in which sexual orientation was raised as the reason for discrimination was the case of B. K. In 2005 B. K. was employed as a cleaner by the private company CZA-TA, which provided cleaning services to the local supermarket in Płock. At some point, he terminated his employment contract. He claimed, however, that his decision was a result of intimidation and harassment of his person due to sexual orientation.

²⁹ Letter by dr Janusz Kochanowski *Rzecznik Praw Obywatelskich* [the Ombudsman] of 19.06.2009, No. RPO-615323-I-09/MK, to *Minister Spraw Wewnętrznych i Administracji* [Minister of the Interior and Administration], <http://www.rpo.gov.pl/pliki/12490294600.pdf>

³⁰ Letter by dr Janusz Kochanowski *Rzecznik Praw Obywatelskich* [the Ombudsman] of 07.11.2008, No. RPO-599671-I-08, to *Pełnomocnik Rządu ds. Równego Statusu Prawnego* [Governmental Plenipotentiary for the Equal Treatment], <http://www.rpo.gov.pl/pliki/12384977680.pdf>

³¹ Information on the activities of the Ombudsman for the period of January – March 2009, available at <http://www.rpo.gov.pl/pliki/12472206110.pdf>

³³ f T. Davies, 'Use the compass to find the right way', in: *Gazeta Wyborcza*, 02.10.2006.

B. K. lodged a suit with the District Court in Płock seeking compensation of PLN 30,000 (approx. 8,500 Euro) for being a victim of discrimination on the ground of his sexual orientation. He relied on the new provisions of the Labour Code. The HFHR decided to accede to proceedings and to support B. K. in his litigation. For this purpose the HFHR relied on the newly introduced Article 61 of the Civil Procedure Code.

In the course of the trial, all witnesses who observed the work of B. K. were heard. The trial attracted the attention of the local media. The HFHR submitted to the court an *amicus curiae* brief, in which it referred to various general principles involved in the case. Most importantly, the HFHR presented standards for shifting the burden of proof in discrimination cases.

On 16.03.2006, the District Court in Płock declared that there was no discrimination in the case and that the termination of B. K.'s employment, as well as the negative attitude of other employees and the management, were due to objective reasons – non-fulfilment or improper fulfilment of his duties. The judgment of the District Court in Płock was quite controversial and, according to the HFHR, did not respond to many arguments or issues raised in the court proceedings. B. K. and his representative submitted an appeal to the court of higher instance. However, due to a procedural mistake, an appeal was dismissed on formal grounds and the case was never heard by the court of second instance. Nevertheless, the case itself and the conduct of the proceedings delivered a lot of interesting observations as regards the approach of the courts towards discrimination cases, especially where major evidence may be interpreted in both ways (discrimination vs. objective reasons of dismissal).

Another case which needs special attention is the case of Mirosław Sielatycki, Director of *Centralny Ośrodek Doskonalenia Nauczycieli (CODN)* [National In-Service Teacher Training Centre (NTTC)]. He was dismissed by the Minister of National Education, Roman Giertych, for publishing (within the framework of the NTTC's activities) the official Council of Europe (CoE) guide for teachers, *Compass – Education on Human Rights*. In the opinion of the Minister of National Education this guide includes statements which may be regarded as a promotion of homosexuality.

The dismissal of Mirosław Sielatycki attracted a lot of public attention, including from Terry Davis, Secretary General of the Council of Europe³³, the CoE Commissioner for Human Rights³⁴, the Polish Ombudsman and the mass media. Mirosław Sielatycki also decided to bring a case to the District Court in Warsaw for unfair dismissal and discriminatory treatment in employment on the grounds of his political opinions.

³⁴ Para. 53, Commissioner for Human Rights of the Council of Europe – Memorandum to the Polish Government. Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, Strasbourg, 20.06.2007, CommDH(2007)13.

The District Court in Warsaw, in a judgment of 05.06.2007, following a thorough examination of the case, found unfair dismissal and discrimination and decided to award Mirosław Sielatycki approximately 19,000 PLN (5,700 Euro) in damages. It was almost the exact sum claimed by Mirosław Sielatycki which, to some extent, underlined the importance of the case. The District Court in Warsaw decided that there was discrimination in employment. However, it is interesting to note that the court found that the ground for discrimination was the different approach by Mirosław Sielatycki and by the Minister of National Education to the vision of education in Polish schools.

In the opinion of the District Court in Warsaw Mirosław Sielatycki is a proponent of tolerant schools with vibrant freedom of speech and the possibility to talk about different human rights issues (including discrimination on the grounds of sexual orientation). At the same time the then Minister of National Education, Roman Giertych, was of the opinion that education should have a more restrictive character and teach only about such human rights as are recognised by the Minister. Accordingly, although discrimination on the grounds of sexual orientation was in the background of the case (due to the content of the manual), the real ground for discrimination were different political beliefs. Nevertheless, the case was decided on the basis of the Labour Code provisions introduced in order to implement Directives 2000/43/EC and 2000/78/EC.

Please note that on 31 March 2008, *Sąd Okręgowy w Warszawie* [the Regional Court in Warsaw] has issued a second judgment in the case, following the appeal by the Minister of National Education. The Regional Court in Warsaw confirmed the discrimination in the dismissal of M. Sielatycki. However, it decided to lower the amount of compensation to approx. 6,000 PLN (approx. 1,800 EUR).

The case of Mirosław Sielatycki was also noted by the European Committee of Social Rights of the Council of Europe. In its Conclusions of November 2008 regarding implementation by Poland of the European Social Charter, the Committee made reference to Sielatycki's case as well as to data concerning discrimination of homosexuals on the Polish labour market. The Committee asked for the next report to provide information on the application by the courts of the legislation prohibiting discrimination at work on the ground of sexual orientation, the activities and campaigns organised by the Polish authorities to combat this type of discrimination and the outcome of the judicial proceedings initiated following the dismissal of the director of the national teacher training centre³⁵.

³⁵ Conclusions XIX-1 of November 2008.

B. Freedom of movement

In Poland the right of family members of European Union citizens to move and reside freely within the territory of the Member States is guaranteed in the Law of 14.07.2006 on entry to Polish territory, residence on and exit from this territory by European citizens and their family members (hereinafter 'Law on Entry into Polish Territory')³⁶.

Article 2 Section 4 of the Law on Entry into Polish Territory provides for a legal definition of a family member. A family member is an alien who does or does not have a citizenship of the European Union and:

- is married to a European Union citizen;
- is her/his direct descendant or is a direct descendant of the spouse of the EU citizen (the sponsor) if under 21 years of age or their dependant; or
- is her/his direct ascendant or is a direct ascendant of the spouse of the sponsor if s/he remains their dependant.

The Polish Law transposing Directive 2004/38/EC does not provide for the extension of the notion of 'family members' as anticipated in Article 1 Section 2b of the Directive, which stipulates that a family member is also 'the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State'. The Polish legislation does not treat registered partnerships as equivalent to marriage. It does not attach any legal consequences to the fact of cohabitation of same-sex partners either.

It should be noted that the restrictive approach of the Polish authorities towards any form of recognition of same-sex marriages or partnerships has been additionally underlined through the adoption of the Declaration attached to the Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community, concerning the EU Charter of Fundamental Rights. According to this Unilateral Declaration made by Poland upon signing the Reform Treaty:

'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law as well as the protection of human dignity and respect for human physical and moral integrity.'

³⁶ Poland/*Ustawa z dnia 14 lipca 2006 r. o wjeździe na terytorium Rzeczypospolitej Polskiej, pobycie oraz wyjeździe z tego terytorium obywateli państw członkowskich Unii Europejskiej i członków ich rodzin, Dziennik Ustaw* [Journal of Laws] of 2006, No. 144, item 1043.

According to the Law on Entry into Polish Territory, LGBT partners of EU citizens cannot derive any legal rights from their status as family members of EU citizens in other Member States unless they are legally married. There is no case law regarding this issue yet. However, it is possible that the explicit exclusion of same-sex married couples from the right to move and reside will be found incompatible with the Directive³⁷. In the view of the authors of this report Article 18 of the Polish Constitution is likely to be used against recognition of same-sex marriages concluded abroad.

Article 3 Section 2 of Directive 2004/38/EC lays down a clear obligation for the host Member State to facilitate³⁸, in accordance with its national legislation, entry and residence for:

- any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen;
- the partner with whom the EU citizen has a durable relationship, duly attested.

The Law on Entry into Polish Territory does not envisage any mechanism facilitating the above-mentioned categories of family members not covered by the legal definition who request admission. Such administrative procedure is required by Directive 2004/38/EC.

Consequently, there is no set of criteria on the basis of which Polish authorities would examine and deny admission to such categories of people. It is doubtful whether the non-discrimination argument is valid in such a scenario – for the reason that Poland does not recognise the right of non-married partners of Polish citizens to move and reside, there is no discrimination in rejecting partners of EU citizens.

Up to date, there is no official or unofficial statistics illustrating the existing practice, in particular the way how the Law on Entry is interpreted and applied in relation to the LGBT people. Upon our written request for public information, the Ministry of Interior replied it was not in possession of any relevant data. We are not aware of any case law regarding freedom of movement of LGBT people.

³⁷ Compare *Ustawa o cudzoziemcach* [Law on Aliens] Article 53 Section 2 -1, where it is explicitly stated that a marriage relationship must be recognised by Polish law, whereas the Law on Entry into Polish Territory uses the term ‘married to an EU citizen’ which implies legally married under the law of the respective Member State notwithstanding whether there is an equivalent of such a marriage in Poland. In any case, there is a risk that same-sex marriages contracted by an EU citizen will not be recognised as valid in Poland on public policy grounds.

³⁸ According to Directive 2004/38/EC, Member States are not obliged to treat other categories as family members eligible to be admitted under family reunification rules.

Summing up, only persons belonging to the narrowly defined category of family members – spouses, direct dependant descendants or ascendants – can enter Polish territory and enjoy the benefits deriving from the right to move and reside freely foreseen in the Law on Entry into Polish Territory. This includes same-sex spouses validly married under the laws of another EU Member State. However, it is to be expected that same-sex marriages will not be recognized in Poland on the public policy ground.

On 02.04.2009 European Parliament adopted resolution on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Resolution contains direct references to Poland: it indicates, as a “problematic issue”, the fact that Poland does not recognise same sex marriages as a reason to grant free movement rights, does not recognise registered partnerships, even if certified in another Member States. It also states that information in this regard provided by the Commission, the FRA and NGOs further proves legal uncertainty on this issue. Resolution calls on Member States of the EU to:

“... fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life; calls on Member States to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages; in this regard, calls on the Commission to issue strict guidelines, drawing on the analysis and conclusions contained in the Fundamental Rights Agency report and to monitor these issues;”³⁹

The adoption of the resolution was a result of the report on the application of Directive 2004/38/EC by Member States, prepared by the EP Committee on Civil Liberties, Justice and Home Affairs in March 2009. The report indicated Poland as one of the EU Member States which do not recognize same sex-marriages or partnerships whether they take place on their territory or abroad, what is regarded as misleading and giving rise to ‘frustration and exclusion of some citizens of the Union’.⁴⁰

³⁹ The text of the resolution is available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0203+0+DOC+XML+V0//EN#ref_1_14

⁴⁰ The text of the report is available at
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0186+0+DOC+PDF+V0//EN>

B.1. Situation of Polish citizens returning to Poland after moving to another EU Member State in order to enter into a civil partnership

It is also worth mentioning the situation of Polish citizens who take advantage of the right to move freely to the territory of another Member State where registered same-sex partnerships or marriage are legal. In order to register their partnership or marriage abroad, they usually need to present a certificate issued by the *Urząd Stanu Cywilnego* [the Civil Status Office] stating that the person concerned is unmarried. The position of the Ministry of Internal Affairs and Administration was that Polish law does not foresee the institution of such certificates. In case of refusal to issue the certificate, the person concerned has the right to appeal to a higher instance (governor of the *województwo* [voivodship]).

Upon a motion to disclose public information, the Campaign Against Homophobia was provided with a copy of the official instruction of the Deputy Director of *Departament Rozwoju Informatyki i Systemu Rejestrów Państwowych Ministerstwa Spraw Wewnętrznych i Administracji* [Department of IT Development and State Registries of the Ministry of Interior] of 03.04.2002, addressed to all governors of voivodships.⁴¹

According to this instruction, a certificate stating that there are no obstacles to enter into marriage (as regulated in Article 4¹ of the Family and Guardianship Code⁴²), may only be issued to persons who wish to enter into heterosexual marriage, and not same-sex partnership, as the latter is not regulated or recognised by Polish law.

As a result of this situation, people wishing to enter into same-sex marriage or partnership must obtain special notary certificates, confirming that they are not married to anyone. Such notary certificates (and the well-established practice aimed at avoiding administrative difficulties, presented above) offer a practical solution to the problem, because they are recognised by the authorities of other countries. Nevertheless, the problem of the activities of the civil status offices still exists. Refusal to issue such certificates to homosexual persons constitutes a violation of the relevant administrative law provisions and means additional notary costs must be borne.

⁴¹ Statement of 03.04.2002, No. DIR-V-6000-21-2731/2002.

⁴² Poland/*Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy*, *Dziennik Ustaw* [Journal of Laws] of 1964, No. 9, item 59, as amended.

Although there has been no individual complaint put forward to the Ombudsman, representatives of LGBT organisations⁴³ drew the Ombudsman's attention (at a meeting in November 2007) to problems with obtaining notary certificates from the civil status offices by same-sex couples who plan to legalise their relationship in the form of civil partnership abroad. They claim that it is discrimination and that civil status offices are acting without a legal basis. The Ombudsman promised to take action only upon a complaint indicating a violation in a particular case.⁴⁴

A landmark judgement concerning issuance of certificate stating that there are no obstacles to enter into marriage was issued by *Wojewódzki Sąd Administracyjny* [Regional Administrative Court] in Gdańsk in June 2008⁴⁵. A case was lodged by a female citizen of Poland who wished to register a partnership with a female citizen of Germany under provisions of German law which recognize same-sex partnership. The woman was refused to receive a certificate by the Head of the Civil Status Office claiming that she did not have any legal interest to obtain such a certificate. She made an appeal to the Governor of the Voivodship which was also dismissed. Finally she lodged complaint to the Regional Administrative Court. The Court overruled the decisions of the first and the second instance as they were grossly contrary to the law. It stated that the law does not allow to examine if, with whom or where an applicant wishes to contract marriage or to test authenticity of her/his intentions. The only task of the body entitled to issue certificates is to examine if a person fulfil conditions stipulated by Polish law which are necessary to be fulfilled in order to get married. A citizen is entitled to receive such certificate without substantiating her/his request and in any case her/his intentions cannot be prerequisite for the refusal. The Court remarked also that the assumption that the lack of intention to get married makes it impossible to receive the certificate, would lead to peculiar conclusion that organs of administration are entitled to examine the most personal intentions of the citizens. Such entitlement would be contrary to the constitutional principle that the Republic of Poland shall be a democratic state ruled by law. The problem of issuing certificates to homosexual persons was broadly commented in media. It resulted in oral question to the European Commission addressed by Lidia Geringer de Oedenberg, Polish deputy of the European Parliament, who suggested that the refusal to issue the certificate breaches the basic human right to found a family and of a fundamental principle of the European Union, the free movement of persons and asked the Commission to clarify the matter⁴⁶. The Commission announced that since there is not at present any Community instrument concerning the issue of civil status certificates, the

⁴³ The Campaign Against Homophobia has now been dealing with this problem for around four years. It receives several questions (complaints) every month from homosexual people in such situations.

⁴⁴ Letter of 29.01.2008 from Mirosław Wróblewski, Head of the Constitutional and International Law Team at the Office of the Ombudsman.

⁴⁵ Judgement of 6 August 2008, No. III SA/Gd 229/08.

⁴⁶ Oral question of 10 July 2008, No. H-0575/08

Commission intends to begin work on the recognition of civil status acts and public acts legislation in the European Union, with a view in particular to enabling citizens' marriages and partnerships to be taken into consideration in countries other than the one where these marriages or partnerships were entered into. Similarly, a legal framework allowing for the recognition of the property consequences of marriages and partnerships will be proposed⁴⁷.

The problem was also a subject of the complaint addressed in 2008 by *Kampania Przeciw Homofobii* [Campaign Against Homophobia] to the European Parliament. The organization reported about numerous cases of persons who face obstacles while applying to receive the certificate in order to register same-sex partnership abroad⁴⁸.

It should be noted that after the individual's return to Poland, the registered partnership does not have any legal significance and such persons are treated as unmarried (single) under Polish law. In 2009 the European Parliament listed Poland in its report on the application of Directive 2004/38/EC as one of the countries that do not recognize same-sex marriages or partnerships whether they take place on their territory or abroad⁴⁹.

⁴⁷ Written answer of 4 September 2008, No. H-0575/08

⁴⁸ <http://www.kph.org.pl/pl/allnews/15-kph/98-parlament-europejski-zajmie-si-petycji-kph> (access on 29 January 2010).

⁴⁹ Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 23 March 2009, A6-0186/2009

C. Asylum and subsidiary protection

Until 2008 the Law on Granting Protection to Aliens on the Territory of the Republic of Poland⁵⁰ which provides condition of granting refugee status did not explicitly protect people who were persecuted or harassed because of their sexual orientation or gender identity from the risk of being returned home⁵¹. The law was however significantly amended in March 2008⁵² in order to implement the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. According to article 13 Section 1 “An alien is granted the refugee status if owing to well-founded fear of being persecuted in his/her country of origin for reasons of race, religion, nationality, political opinion or membership of a particular social group is unable or unwilling to avail himself/herself of the protection of that country”. Article 13 Section 2 stipulates that refugee status is granted also to a minor child of a person who was granted refugee status if a child was born on Polish territory. While considering rights of homosexuals, Article 14 is the crucial one. This article lists factors that should be taken into account while the reasons for persecution are being assessed. According to Article 14 Section 2 “Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation; sexual orientation cannot be however understood to include acts considered to be criminal in accordance with Polish law”. Article 14 Section 3 stipulates that well-founded fear of being persecuted in the country of origin may exist even if someone does not possess particular features but these features are attributed to him/her by entities who commit persecutions. The law does not make any reference to persecutions caused due to gender identity, but it seems that Article 14 Section 1 may be applied in such a case. It stipulates that “a group shall be considered to form a particular social group where in particular that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society and its members share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.”. The Law on Granting Protection to Aliens on the Territory of the Republic of Poland offers three types of the protection: refugee status, permission for tolerated residence (*zgoda na pobyt tolerowany*) and subsidiary protection (*ochrona uzupełniająca*). Subsidiary protection was introduced by the amendment of March 2008. It is granted if a

⁵⁰ Poland/*Ustawa z dnia 13 czerwca 2003 o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, Dziennik Ustaw* [Journal of Laws] of 2006, No 234, item 1695, as amended.

⁵¹ However, some of provisions gave the authorities a scope of appreciation that could be used to prevent such a risk. These provisions are outlined in the version of this report from 2008.

⁵² *Dziennik Ustaw* [Journal of Laws] of 2008, No. 70, item 416. The amendment came into force on 29 May 2008.

person does not fulfil conditions prescribed for the refugee status but is under risk of death sentence, execution, tortures, inhuman or degrading treatment or his/her life would be in serious risk because of an armed conflict if such a person would be returned to his/her country of origin.

The Polish law does not contain any explicit provisions granting refugee status to LGTB partners as family members in the context of asylum and subsidiary protection.

There is a lack of data or any other information concerning sexual orientation of aliens or refugees and whether such information is taken into account when considering applications to remain on the territory of Poland or for granting refugee status.

There is also no statistics available showing social reality of the existing law for LGBT people in the area of asylum and migration.

In order to obtain information for the purposes of this report, the authors contacted several NGOs and other institutions which provide social and legal aid to aliens and refugees.

The authors also obtained information from the *Urząd do spraw Cudzoziemców* [the Office for Foreigners] that the scope of collected data does not include data on sexual orientation (which is regarded as so-called sensitive data under *Ustawa o ochronie danych osobowych* [Law on Protection of Personal Data] as regards foreigners and EU citizens residing on the territory of Poland who are subject to administrative proceedings. Accordingly, the Office for Foreigners could not provide data on the number of LGBT foreigners residing in Poland and the number of administrative proceedings concerning such persons.

The authors were informed by one NGO *Stowarzyszenie Interwencji Prawnej* [Association for Legal Intervention] that they were contacted by a Chechen refugee (from Ingushetia), who was not accepted in her locality and in the family due to problems with gender identity. The woman left the country afraid of losing her life. On 03.01.2007 she submitted an application for refugee status in Poland. Due to the complexity of the case, the proceedings took several months. On 01.10.2007 the President of the Office for Foreigners took a positive decision on granting refugee status. The individual is now living in one of the centres for refugees.

The authors were also informed by *Centrum Pomocy Prawnej im. Haliny Nieć* [Halina Nieć Centre for Legal Aid] (hereinafter 'Halina Nieć Centre') about the case of a national of Moldova, Mr X., who claims that he was discriminated against in his country of origin due to his sexual orientation. He claims that ten years ago he participated in a religious demonstration and was arrested by the

police. At the police station he was raped and it was recorded on video tape. This video tape was then used to blackmail him. One of the officers wanted to compel him to go to Turkey in order to provide prostitute services. Therefore, there is a doubt that he was a victim of human trafficking.

Mr X left Moldova and went to France where he applied for refugee status in 2002. Before the end of procedure he went back to Moldova, where he claimed still to be subject of illegal pressure. Therefore he escaped to Poland where he submitted an application for refugee status. The Office for Aliens refused in December 2007 to grant such status. The case is now the subject of appeal before *Rada do spraw Uchodźców* [Council for Refugees]. According to lawyers from the Halina Nieć Centre, the Office for Aliens did not take the trauma of Mr X sufficiently into consideration. Furthermore, it stated that the situation of gays is relatively good in Moldova and that they are not subject to intimidation there. It should be noted that on 05.02.2008 the Campaign Against Homophobia submitted an opinion to the Council for Refugees about the situation of LGBT people in Moldova. For this purpose, the organisation relied on Article 31 Section 5 of the Code of Administrative Procedure⁵⁴, which gives a possibility for NGOs to submit a view in a given case, even if the organisation does not participate in proceedings. It seemed to be the first case to be decided by the appeal body, the Council for Refugees, in which sexual orientation (and threat of intimidation due to this fact) are raised as a ground for refugee status.⁵⁵ The appeal was however dismissed by the Council for Refugees which maintained decision not to grant refugee status⁵⁶.

The HFHR has been contacted four times in recent years by different people who raised the issue of their sexual orientation. These people were from Ukraine, Belarus and Russia. They contacted the HFHR in order to receive information on the possibility of obtaining refugee status in Poland. One of these people raised the fact that he was victimised in Ukraine due to his sexual orientation. Other people were rather considering to what extent they may try using this argument in order to obtain refugee status. All these cases ended up with an oral consultation and the HFHR was not involved in litigation of any such case. The authors are also not aware of whether such cases have been further pursued.

On the basis of information obtained from a number of institutions and non-governmental organisations the authors can claim that the conclusions are quite positive. Secondly, only a few foreigners raise the issue of sexual orientation as a ground for refugee status. It seems to be a marginal problem. Only in one case has gender identity been a justified ground for granting refugee status.

⁵⁴ Poland/*Ustawa z dnia 14 czerwca 1960 r. – Kodeks postępowania administracyjnego*, unified text - *Dziennik Ustaw* [Journal of Laws] of 2000, No. 98, item 1081, as amended.

⁵⁵ The official numbers of the cases before the Council for Refugees are RdU-178/S/07, and DP-II-732/SUB/2007.

⁵⁶ Information received from the representative of the Campaign Against Homophobia.

⁵⁸ Biuletyn Monitoringu Dyskryminacji Osób LGBT w Polsce, Styczeń-Maj, 5/2009.

In May 2009 the Campaign Against Homophobia reported about two cases of homosexuals searching for asylum in Poland in order to avoid persecutions caused by their sexual orientation⁵⁸. One of cases concerned a citizen of Vietnam who arrived legally to Poland in 2005. In 2009 he applied for refugee status claiming that in his country of origin he was persecuted due to his sexual orientation. He substantiated his claims stating that due to his homosexuality he was unable to continue education and to find an employment. He was also refused to perform military service since the authorities made an inquiry concerning his sexual orientation in his school and surroundings. In decision of 2009 the President of the Office for Foreigners refused to grant refugee status to the applicant stating that there were no objective circumstances indicating that homosexuals were persecuted in Vietnam. It was also indicated that “manifestations of reluctance or discrimination are not identical to persecution”. The applicant appealed to the Council for Refugees. He was supported by the Campaign Against Homophobia which submitted an opinion to the Council. The appeal was however dismissed by the Council in 2009⁵⁹. Another case concerned a homosexual couple from Belarus. Both men felt persecuted in their country of origin due to their homosexuality. One of them was also a member of opposition movement what reinforced persecutions against him and his partner. Both men stated that they were arrested and interrogated because of their homosexuality, as well as experienced physical and mental violence. They were also notoriously called to serve in the army despite the fact that both of them performed obligatory military service in the past.. Both of them applied in Poland for refugee status. In decisions of September 2008 they were refused the status. The President of the Office for Foreigners found that “the situation of people of different sexual orientation in Belarus does not warrant to acknowledge that Belorussian authorities persecute this group”. The Campaign Against Homophobia appealed on behalf of both applicants to the Council for Refugees. It questioned the estimation of the situation of homosexuals in Belarus made in the decisions as well as the fact that homosexuality was recognized to be “different sexual orientation” instead of “sexual orientation”. Proceedings before the Council are still pending in both cases⁶⁰.

There is no information of using in Poland phallometric testing during the asylum procedure.

⁵⁹ Information received from the representative of the Campaign Against Homophobia.

⁶⁰ Information received from the representative of the Campaign Against Homophobia.

D. Family reunification

Article 4 Section 3 of Council Directive 2003/86/EC has been implemented by the Law of 22.04.2005 amending the Law on Aliens⁶¹. Article 53 Section 2 of the Law on Aliens provides that a family member is:

- a person in a marriage relationship *recognised by Polish law*;
- a minor child of the alien or of the person in a marriage relationship recognised by Polish law, as well as their adopted child;
- a minor child of the alien, as well as her/his adopted child, who is dependent on the alien and where the alien has real custody power;
- a minor child of the person defined in the first point, as well as her/his adopted child, who is dependent on that person and where the alien has real custody power.

Therefore there is no mention about the entry and residence of unmarried partners who are third country nationals and remain in a duly attested, stable, long-term relationship or in a registered partnership. Moreover, the Law on Aliens stresses that the marriage relationship must be recognised by Polish law. Such wording implies an even narrower interpretation of marriage than resulting from the Law implementing the Free Movement Directive (above). Nevertheless, the issue presented here could not be substantiated with any relevant statistics or unofficial data because they do not exist. Even LGBT organisations have not yet been informed about cases regarding family reunification of unmarried (cohabitating) partners or registered partners.

In consequence, there is no statistics available showing social reality of relevant legislation for LGBT people.

Upon our request, the Ministry of Labour and Social Policy informed us that it does not monitor or register the number of gays and lesbians (or members of their families) who exercise their right to free movement.

At the time of writing this report, there is no relevant case law in this area.

⁶¹ Poland/*Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach*, unified text - *Dziennik Ustaw* [Journal of Laws] of 2006, No. 234, item 1694, as amended.

E. Freedom of assembly

Restrictions on the exercise of the freedom of peaceful assembly by the LGBT community has been a major problem in Poland in recent years, attracting the attention of foreign politicians and NGOs. As of the date of this study, this problem seems to have been resolved. However, it cannot be guaranteed that in some cities bans on gay prides (or equality marches) may not take place in the future.

Perhaps the most famous gay pride march to take place in Poland was *Parada Równości* [Equality Parade], due to the events of 2005 (described below). At the very beginning the Equality Parades were organised in 2001, 2002, and 2003 by *Międzynarodowe Stowarzyszenie Gejów i Lesbijek na Rzecz Kultury* [International Gay and Lesbian Association for Culture] in Poland. However, in these years these gay pride marches did not attract much attention, either from politicians or participants, and were organised without any significant problems. There were also no problems with registering these assemblies with the authorities.

E.1. Equality Marches in 2004

On 07.05.2004, *Marsz Tolerancji* [March for Tolerance] was organised in Kraków, within the framework of an annual Kraków Festival of Gay and Lesbian Culture, *Fundacja 'Kultura dla Tolerancji'* [Foundation 'Culture for Tolerance']. Around 1,200 people participated in the peaceful demonstration. However, it was attacked by football hooligans and extreme right-wing and nationalistic groups with eggs, stones and other dangerous items. A number of people were injured. One police officer was also injured after fights with the police in the main square in Kraków. The events in Kraków were the subject of a documentary film by Diana Voxerbrant entitled 'Tolerance'.

In May 2004 there was also an attempt to organise an Equality Parade in Warsaw by the International Gay and Lesbian Association for Culture in Poland. However, due to the ban issued by the Mayor of Warsaw, the march did not take place. Instead, organisers held a spontaneous *Wiec Wolności* [Assembly for Freedom]. However, they did not undertake any significant legal actions to protest against the ban on the exercise of the freedom of assembly.

The Equality March in Poznań was organised on 16.11.2004, within the framework of the Days of Tolerance and Equality. After 200 metres, the Equality March was blocked by counter-demonstrators, who threw eggs, bottles and other missiles. Counter-demonstrators had fights with the police and the participants in the Equality March had to walk back and have a stationary assembly.

E.2. Equality Marches in 2005

E.2.1. General comments

In 2005, the March for Tolerance in Kraków was cancelled by the organisers due to the death of Pope John Paul II. However, two other equality marches (usually organised annually) formed a test in 2005 for the respect for liberal values in Poland.

E.2.2. Equality Parade in Warsaw 2005

The Equality Parade was to take place on 11.06.2005 in Warsaw. Organised for the fifth time, the goal of the Parade was to draw attention to legal and social prejudice against sexual minorities and other minorities, including national, ethnic and religious minorities, as well as against people with disabilities and women.

The Equality Parade was banned by a decision of the President of Warsaw on 03.06.2005, based on Article 65 of the Road Traffic Law. The main reason for the ban was that the *Fundacja Równości* [Equality Foundation] failed to present a ‘traffic organisation scheme’, although no official letter required such a document from the Foundation. Following the decision, people connected with the Equality Parade decided to organise eight ‘stationary’ rallies in various locations throughout Warsaw so that moving from one rally to another actually formed the Equality Parade. With its decisions of 09.06.2005, based on *Ustawa – Prawo o Zgromadzeniach* [Law on Assemblies]⁶², the Mayor of Warsaw banned six of the eight planned rallies. In the end, the Equality Parade did take place. However, it had features of an illegal demonstration, an act of civil disobedience, with politicians and celebrities participating.

It was clear that the real motive for banning the Equality Parade was political and the presented legal arguments were instrumentally abused. Three weeks before the planned date of the event, the Mayor of Warsaw publicly declared his attitude towards sexual minorities and their exercise of the freedom of assembly. Answering the question on his decision regarding the Equality Parade application, he stated *inter alia*:

‘I will ban the demonstration regardless of what they have written. I am not for discrimination on the ground of sexual orientation, for example by ruining people’s professional careers. But there will be no public propaganda of homosexuality.’

⁶² *Dziennik Ustaw* [Journal of Laws] of 1990, No. 51, item 297, as amended.

After the illegal Equality Parade (an act of civil disobedience), the Equality Foundation filed an appeal to *Samorządowe Kolegium Odwoławcze* [Self-Governmental Appeals Court] (regarding the ban on the Equality Parade). At the same time, the rally organisers filed an appeal with the Mazowieckie Voivodship governor. On 17.06.2005 the decisions of the President of Warsaw of 09.06.2005 on six rallies were repealed by the Mazowieckie Voivodship governor. Similarly, on 22.08.2005 the Self-Governmental Appeals Court repealed the decision on the Equality Parade based on the Road Traffic Law for formal reasons.

The ban on the Equality Parade resulted in different sets of legal proceedings. On the one hand, events in Warsaw were a cause for the Ombudsman to question provisions of the Road Traffic Law (I). On the other hand, organisers of the Equality Parade submitted an application to the ECtHR (II).

Judgment of the Constitutional Court of 18 January 2006 on the Road Traffic Law

Following the ban on the Equality Parade on the basis of the said provisions of *Ustawa – prawo o ruchu drogowym* [Road Traffic Law]⁶³, and bearing in mind that similar problems had also arisen for other ‘left-wing’ organisers earlier in Warsaw, the Ombudsman decided to refer the case to the Polish Constitutional Court for abstract review. The Constitutional Court declared that the said provisions of the Road Traffic Law were unconstitutional for a number of reasons. One of the most important principles stemming from the judgment is, however, the analysis of the very essence of constitutional freedom of assembly in the context of power exercised by state authorities.⁶⁴

The Constitutional Court, in its judgment dealing with the constitutionality of the Road Traffic Law provisions, reaffirmed the basic principles of the freedom of assembly. It stated that freedom of assembly may not be limited because of the lack of symmetry between the purposes of the freedom of assembly (or its potential results) and the functions, aims or intentions of the organisers and participants in a given assembly attributed to it by media, commentators or public officials.⁶⁵

According to the Constitutional Court, the constitutional guarantee of the freedom of assembly contains a prohibition against denying freedom of assembly by the public authorities due to ideological differences or when the ideas expressed by the assembly are contrary to the system of values represented by the public officials. The Court underlined that the ‘moral

⁶³ *Dziennik Ustaw* [Journal of Laws] of 2005, Nr. 108, item 908, as amended.

⁶⁴ Judgment of the Polish Constitutional Court of 18.01.2006, No. K 21/05.

⁶⁵ Judgment of the Polish Constitutional Court of 18.01.2006, No. K 21/05, English summary available at www.trybunal.gov.pl

convictions of the public officials are not a synonym for “public morality” as a limitation of the freedom of assembly’.⁶⁶

The Constitutional Court considered that the special requirement in the Road Traffic Law in order to organise an assembly was unconstitutional. The Constitutional Court underlined that the exercise of any freedom may not be dependent upon the authorisation of the state authorities. According to the Court, only the model of notifications (as provided in the Law on Assemblies) is applicable.

Judgment of the European Court of Human Rights in *Bączkowski and others v. Poland*

The organisers of the Equality Parade 2005 in Warsaw submitted their application to the ECtHR claiming violation of Articles 11, 13 and 14 of the Convention. On 03.05.2007 the ECtHR issued a judgment in the case *Bączkowski and others v. Poland*⁶⁷. It was a long-awaited decision, especially in view of the bans of gay pride marches taking place in other capital cities in Europe, e.g. in Riga and Moscow.

The ECtHR did not state directly that sexual minorities, LGBT movements or those combating discrimination had a right to protest or that such views might be shared at the assembly. Taking into account the special context of the *Bączkowski* case, the ECtHR considered this issue as self-explanatory, without any need to place any special emphasis on it. Instead, the ECtHR started its consideration of the case by underlining basic principles connected with the freedom of assembly.

Referring to its earlier case law, the ECtHR underlined the value of the European Convention on Human Rights in promoting the ideals and values of a democratic society.⁶⁸ It referred to the role played by political parties and associations for democracy and pluralism, which is built ‘on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts’.⁶⁹ According to the Court, ‘the harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a

⁶⁶ Judgment of the Constitutional Court of 18.01.2006, No. K 21/05.

⁶⁷ *Bączkowski and others v. Poland*, application No. 1543/06, judgment of 03.05.2007 (IV Section).

⁶⁸ *Bączkowski v. Poland*, § 61.

⁶⁹ *Bączkowski v. Poland*, § 62.

large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively'.⁷⁰

In the opinion of the ECtHR, 'although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.⁷¹ Taking into account the above background, the ECtHR confirmed the positive obligation on the part of the state to secure the enjoyment of rights and freedoms for persons holding unpopular views or belonging to minorities.

The ECtHR indicated that in its previous case law it had pointed out that the state should be the ultimate guarantor of the principle of pluralism⁷². It reiterated that the freedom of assembly may not be reduced to a purely negative concept (mere duty of non-interference by the state), because it would not be compatible with the Convention and with the purpose of Article 11 of the Convention.

The judgment in *Bączkowski* also confirmed that a violation of human rights may result from a situation where individuals are compelled to disobey the law (as in the Equality Parade) in order to test its compatibility with constitutional or international guarantees of human rights. Such a situation creates a chilling effect on the freedom of assembly and may deter persons from participating in demonstration due to the threat of legal sanctions ('chilling effect').

Secondly, the ECtHR established a new standard concerning the exercise of the freedom of speech by politicians who concurrently hold administrative office. The Court stated that politicians, 'when exercising their freedom of expression... may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants, whose employment and careers depend on their approval'.⁷³ In this regard, the Court referred to statements made by the Mayor of Warsaw on his position towards gay pride marches, expressed well before the issuing of a formal decision in case of the Equality Parade.

Thirdly, the ECtHR established a standard according to which the procedural rules concerning organisation of the Equality Parade should be constructed in such a way as to exhaust all domestic remedies before the date of the assembly. Otherwise, freedom of assembly may be meaningless, because authorities may use procedural arguments in order to ban an assembly and before the date of such an assembly there is no possibility for a domestic court to review the

⁷⁰ *Bączkowski v. Poland*, § 62.

⁷¹ *Bączkowski v. Poland*, § 63.

⁷² *Informationsverein Lentia and Others v. Austria* (Judgment of 24.11.1993, Series A no. 276, p. 16, § 38).

⁷³ *Bączkowski v. Poland*, § 98.

decision. The Court underlined that the date of assembly has the essential meaning to exercise of this freedom.

In 2009, almost three years after the ECtHR issued a judgment in *Bączkowski* case, its ruling still has not been implemented into the Polish legal order. In April 2008 the Campaign Against Homophobia directed an official letter to the Minister of the Interior and Administration, asking for the actions undertaken in order to ensure the fulfilment of the ECtHR's judgment.⁷⁴ The Campaign Against Homophobia underlined that Polish regulations in regard to freedom of assembly still lack proper components which would be in compliance with the European Convention's standards established in *Bączkowski* judgment.

In December 2009 draft amendments to *Ustawa prawo o zgromadzeniach* [Law on Assemblies] were presented.⁷⁵ The draft includes amendments to Article 7 Section 1 and Article 9 of the Law, ensuring the implementation of the *Bączkowski* judgment, as the substance of the project states. The amended provisions will thus guarantee that in case of banning a public assembly by the decision of the authorities, the exhaustion of all available domestic remedies of challenging such decision before the date of the planned assembly will be possible. The draft is currently being examined by the particular governmental departments.

E.2.3. Equality March in Poznań in 2005

In November 2005, LGBT groups in Poznań wanted to organise an Equality March. The Mayor of Poznań and the Wielkopolskie Voivodship governor banned the demonstration, despite massive protests by several non-governmental organisations and politicians. The Mayor of Poznań banned the 2005 Equality March, arguing that because of the risk of counter-demonstrators attacking the March (taking into account events of the previous year), there was a danger to public property and the health and lives of the demonstrators. Accordingly, the very feature of the freedom of assembly (possibility of meeting aggressive opponents) was used in order to exclude the possibility of the assembly at all.

Despite the ban, the demonstration took place. Since it was illegal, constituting an act of civil disobedience, it was brutally dispersed by the police. The police used disproportionate force, but the then Minister of Internal Affairs and Administration, Ludwik Dorn, named this action as 'exemplary'. One week later, Poland witnessed a series of demonstrations under the title '*Reanimacja Demokracji – Marsz Równości idzie dalej*' ['Reanimation of Democracy – the

⁷⁴ The text of the letter is available on http://monitoring.kampania.org.pl/index.php?option=com_content&view=article&id=18:wyr-oku-europejskiego-trybunau-praw&catid=1:news

⁷⁵ The text of the project is available at www.bip.mswia.gov.pl/download.php?s=4&id=5817

Equality March Continues’]. Civil society thus strongly expressed its refusal to accept violations of the freedom of assembly in Poland.

Decisions by the authorities in Poznań were quashed as ill-founded first by *Wojewódzki Sąd Administracyjny* [Regional Administrative Court] in Poznań⁷⁶ and then (upon cassation appeal by the Wielkopolskie Voivodship governor) by *Naczelny Sąd Administracyjny* [Supreme Administrative Court]⁷⁷. In particular, the Supreme Administrative Court had to review whether the decisions of the authorities in Poznań were in compliance with the provisions of law. Once again, the Mayor of Poznań referred to ideologically neutral criteria when banning the assembly.

Nevertheless, the Supreme Administrative Court included in its *obiter dicta* statements underlining the special value of the assembly. The Court said that, when assessing the notification of an assembly by the municipal authorities, the level of controversy of views expressed by participants in the assembly should not be taken into account, unless the purpose of the assembly is not contrary to law. According to the Supreme Administrative Court:

‘It is the role of neither the public administration nor the administrative courts to analyse slogans, ideas and views shared at the assembly, which are not contrary to law, especially through the prism of the moral convictions of public officials or judges judging in the administrative court, or through the prism of the convictions of majority of society. Such analysis would thwart the constitutional freedom of peaceful assembly.’⁷⁸

With this statement the Supreme Administrative Court indirectly referred to the alleged practice by the authorities in Poznań of analysing slogans on banners held by demonstrators, following the submission of the notification of the assembly. The Court underlined that such practice would not be acceptable. However, this does not mean that the Court was authorising the expression of any statements during demonstrations, including those violating the dignity of other people. In such a case, criminal law rules should apply (see below, point F).

As regards the risk posed by counter-demonstrators, the Supreme Administrative Court without any hesitation referred to standards established in the jurisprudence of the ECtHR, i.e. that merely the intent or expected possibility of counter-demonstration may not deprive organisers of their freedom of assembly.⁷⁹

The Supreme Administrative Court also referred to the cost of organising the public assembly, as it was one of the issues raised in the public debate. The

⁷⁶ Judgment of the Regional Administrative Court in Poznań of 14.12.2005, IV SA/Po 983/05.

⁷⁷ Judgment of the Supreme Administrative Court of 25.05.2006, No. I OSK 329/06.

⁷⁸ Judgment of the Supreme Administrative Court of 25.05.2006, No. I OSK 329/06.

⁷⁹ E.g. by referring to case *Plattform Ärzte für das Leben v. Austria*, application No. 10126/82, DR 44/65.

Supreme Administrative Court compared the organisation of assemblies and respective state obligations with the approach towards a sporting event. The Supreme Administrative Court held that:

‘If, with considerable use of different measures and forces, protection is provided for participants at various sporting events, including marches of ‘fans’, which usually end up with significant material damage and threats to health or life, then there is no special reason why there should be no protection for assemblies resulting from the exercise of constitutional freedom’.⁸⁰

The above argument is one of the best to counter the widely used thesis that public assemblies cost citizens too much money and time. Facilitating the organisation of such assemblies and the positive duty to protect them is a cost of democracy and it must be covered by the state authorities.

It can be claimed that judgments by the Constitutional Court issued on 18.01.2006 and by the Supreme Administrative Court issued on 25.05.2006 were a good lesson for the Polish local authorities that under the law there is no possibility of banning demonstrations by sexual minorities. The impact of these judgments, as well as of the subsequent judgment in the *Bączkowski* case, is significant. Their most immediate consequence has been that, from their date of issue, there have been no particular problems for the LGBT community in organising assemblies. However, there have been certain problems with protecting participants in such assemblies, especially against the risk of attack by counter-demonstrators. This issue is, however, not a legal issue, but rather an issue of the effectiveness of the police in exercising its functions – the duty to protect legal demonstrations from the risk of violence.

E.3. Equality Marches in 2006

The Equality Parade in Warsaw was held on 10.06.2006 and had around 3,000 participants. This time the Equality Parade was not banned. The Equality Parade attracted the attention of many politicians, including politicians from Germany, Sweden, Finland and the Netherlands. The massive participation in the 2006 Equality Parade was to some extent a reaction to events in previous years. The absence of significant legal problems with the Equality Parade was the result of the precedent judgment by the Constitutional Court.

The March for Tolerance in Kraków was held on 28.04.2006 and attracted around 2,000 participants. On the same day *Młodzież Wszechpolska* [All-Poland Youth] organised a counter-demonstration entitled the March for Tradition and Culture. As in previous years, the March for Tolerance was attacked by counter-demonstrators, but the attacks were blocked by the police. Nevertheless,

⁸⁰ Judgment of the Supreme Administrative Court of 25.05.2006, No. I OSK 329/06.

counter-demonstrators insulted participants in the March for Tolerance and threw stones on them. One participant in the March for Tolerance was injured by a stone hitting her head. Eleven of the most aggressive hooligans were arrested by the police and several people were fined. Amnesty International in its report of 2007 considered this March for Tolerance and the events taking place during it as an example of intolerance towards sexual minorities.

Also in 2006 a March for Equality was held in Poznań, on 18.11.2006, entitled 'In solidarity against discrimination'. Contrary to the previous years the Mayor of Poznań did not object to the whole planned route of the March through the streets of Poznań. Participants were also able to march along the whole planned route. The March for Tolerance had around 500 participants.

E.4. Equality Marches in 2007

In 2007, the equality marches were organised without problems from the administrative authorities.

On 21.04.2007, the 2007 March for Tolerance was held in Kraków. It was organised within the framework of the Kraków Festival of Gay and Lesbian Culture 'Culture for Tolerance'. The March for Tolerance had around 2,000 participants.⁸¹

At the same time a counter-demonstration took place, entitled 'March for Tradition and Culture', organised by far right groups (including skinheads) with participation by around 300 people. Participants in the counter-demonstration attempted to disturb the March of Tolerance many times, by throwing eggs, shouting homophobic slogans or by blocking the route of the March. However, thanks to the action of the police, there was no confrontation between the two demonstrations. The police were attacked by counter-demonstrators and had to use tear gas and stop 13 of the most aggressive participants in this demonstration, including five juvenile persons. Two of them had pyrotechnic materials.

The March for Tolerance 2007 was preceded by poster campaigns by two opposing groups. On the one hand, the organisers of the March for Tolerance invited the inhabitants of Kraków to participate in the March. On the other hand, far right groups placed posters with homophobic statements and inviting the inhabitants of Kraków to protest against the March for Tolerance.

On 19.05.2007, the Equality Parade organised by the Equality Foundation took place in Warsaw. Around 4,000 people took part along the route from *Sejm* [the Polish Parliament] to *Plac Bankowy* [the Bank Square]. Counter-demonstrations were organised in opposition to ideas expressed in the Equality Parade. Both

⁸¹ See http://pl.wikipedia.org/wiki/21_kwietnia

demonstrations were kept separate by the police, thanks to which violence was avoided, despite attempts by counter-demonstrators to pass through the police cordon.

On 17.11.2007, an Equality March was held in Poznań, within the framework of the Days of Equality and Tolerance (08-17.11.2007). One of the most discussed issues in Poznań connected with the Equality March was the place of the start of the demonstration (see below). Ultimately, the march started as planned at the very beginning – at Pl. Mickiewicza. The Equality March attracted around 300 participants and was peaceful. As in previous years, the main theme of the march was protest against any forms of discrimination, including the fight against exclusion and the protection of employees' rights.

Over recent years, a demonstration by feminists, entitled 'Manifa', has taken place every year on a date close to International Women's Day (8 March). On 04.08.2007, the Manifa VIII took place. One of the co-organisers of this event is *Porozumienie Lesbijek* [the Association of Lesbians].

E.5. Equality Marches in 2008

In 2008 equality marches were organised in biggest Polish cities. As in 2007, there were no reports about problems or obstacles from the administrative authorities which could obstruct the organisation of marches. However, as in previous years, the marches met with counter-demonstrations, trying to disturb them, sometimes in a violent, aggressive manner.

The most aggressive and brutal behaviour of the opponents of Equality Marches was to be noted in Poznań, where on 15.11.2008 such march, within the framework of the 'Days of Equality and Tolerance', took place. However, the beating of some of March's participants, members of *Federacja Młodych Socjaldemokratów* [Young Social Democrats Federation], happened after the March, when they were coming back home. The Police immediately stopped perpetrators of this violent act. The Equality March was protected by over 400 policemen, who also intervened in cases of abusive shouts from the counter-demonstrators' side and didn't allow any physical confrontation between two opponent groups.⁸²

On 17.05.2008, the first March of Equal Chances for Everyone, organised by the local division of the Campaign Against Homophobia, was held in Katowice. It gathered around 100 participants. Sparse representatives of far right groups placed posters with homophobic statements, protesting against the march. However, thanks to the presence of 300 policemen who effectively protected

⁸² Press information of 16.11.2008, <http://wiadomosci.wp.pl/kat.1348,title.Pobito-kilku-uczestnikow-Marszu-Rownosci-w-Poznaniu.wid.10573305.wiadomosc.html?ticaid=171b6>

the participants of the march, confrontation between the two groups was avoided.⁸³

On 07.06.2008 next edition of Equality Parade organised by the Equality Foundation took place in Warsaw. According to the organisers, there were around 7 000 – 8 000 participants, while the Police informed about 2 000. As in previous years, Equality Parade promoted the idea of equal rights for LGBT people. Moreover, organisers and participants wanted to show to the public, that they form a significant part of Polish society. The attempts to disturb the March by the counter-demonstrators using homophobic slogans – mainly activists of Młodzież Wszechpolska [All-Poland Youth] and Obóz Narodowo – Radykalny [National – Radical Camp], were effectively restrained by the Police.⁸⁴

The 2008 March for Tolerance, organised within the framework of the Kraków Festival of Gay and Lesbian Culture ‘Culture for Tolerance’, was held on 26.04.2008 in Kraków. Again the March was preceded by a poster campaign, organised by its opponents. The posters presented the pictures of the 2006 and 2007 March participants and a phrase ‘Homosexual barbarity in Kraków’.⁸⁵ Furthermore, in 2008 the opponents of the March also launched an Internet campaign against the initiative, entitled ‘The Campaign of Intolerance’. On their website many vulgar, hateful and insulting to homosexuals contents were to be found. The fact was notified to the Police.⁸⁶ During the forth March, which gathered according to the Police records, around 600 participants, acts of physical and verbal aggression from the part of far right organisation Narodowe Odrodzenie Polski [National Rebirth of Poland] members took place. The most aggressive individuals from the counter-demonstration who attempted to pass through the police cordon and attacked the policemen, were stopped.⁸⁷

In March 2008, next ‘Manifa’ - a demonstration of feminists, was organised in Warsaw, in cooperation with *Porozumienie Lesbijek* [the Association of Lesbians].

⁸³ Press information of 18.05.2008, <http://katowice.gazeta.pl/katowice/1.35063.5224056.html>

⁸⁴ Press information of 07.06.2008, http://wiadomosci.gazeta.pl/Wiadomosci/1.80708.5288705.Parada_Rownosci_na_ulicach_W_arszawy.html

⁸⁵ Press information of 18.04.2008, <http://www.mmkrakow.pl/297/2008/4/18/kontrowersyjne-plakaty-przeciw-marszowi?category=news>

⁸⁶ Press information of 24.04.2008, <http://www.mmkrakow.pl/341/2008/4/24/dotarlistmy-do-autorow-kampanii-nietolerancji>

⁸⁷ Media information of 26.04.2008, <http://www.tvn24.pl/0.1547574.0.1.polecialy-jajka-i-wyzwiska-na-marszu-tolerancji-w-krakowie.wiadomosc.html>

E.6. Equality Marches in 2009

According to the participants and media observers, the 2009 Equality March in Poznań was the most peaceful march since the beginning of this initiative in Poznań five years ago. The March, which took place on 14.11.2009, gathered around 300 participants and was secured by the Police. However, no intervention was needed as there was actually no counter-demonstration, except of single representatives of far right organisations. What is more, the March took the longer route than in previous years.⁸⁸

The fifth March of Tolerance organised on 16.05.2009 in Kraków proceeded in almost the same way as all previous Marches in Kraków. The March was accompanied by the counter-demonstrations, trying to disturb the event, by throwing eggs and plastic bottles, shouting homophobic, hateful slogans or by attempting to block the route of the March. The Police had to intervene and stopped the most aggressive counter-demonstrators.⁸⁹

On 13.06.2009 Equality Parade marched in Warsaw. The slogans of 2009 Parade were i. a. : ‘We demand the law on same-sex couples’, ‘My sex is my business’, ‘Love speech instead of hate speech’, ‘There is no freedom without equality’, ‘Democracy, freedom, equality’. Although also this year members of far right organisations tried to disturb the Parade, Police successfully blocked such attempts and no confrontation took place.⁹⁰

As in previous years, in March 2009 a demonstration of feminists, ‘Manifa’ was organised in Warsaw, in cooperation with *Porozumienie Lesbijek* [the Association of Lesbians]. During this peaceful demonstration, the issues of equal rights for LGBT persons were also present.

Additionally, it is to be noted that in July 2010, Warsaw will host an annual Europride Parade - the premier gay and lesbian event in Europe, where thousands of LGBT representatives from many European countries will be present.

It has already been stated by the representative of the City Hall that the President of Warsaw, Hanna Gronkiewicz – Waltz, will not officially open the Europride. Moreover, Capital’s authorities have no plans to support the initiative with financial resources of the city. However, he did not exclude the possibility of participation of the City Hall representatives in public debates

⁸⁸ Press information of 15.11.2009, http://poznan.gazeta.pl/poznan/1,36037,7255648,To_byl_najspokojniejszy_Marsz_Rownosci_w_Poznaniu.html

⁸⁹ Press information of 16.05.2009, <http://www.rp.pl/artykul/17,306445.html>

⁹⁰ Press information of 13.06.2009, <http://www.wprost.pl/ar/163878/Parada-Rownosci-w-Warszawie/>

accompanying the whole event and underlined that the authorities will provide all necessary logistic help to the organisers of the parade.⁹¹

Information about organisation of Europride 2010 in Warsaw caused the opposition of some organisations, i. a. Komitet Obrony Wiary i Tradycji 'Pro Polonia' [Defence Committee of Faith and Tradition 'Pro Polonia'], which issued a protest letter to the President of Warsaw, demanding the ban of the parade. The Spokesman of the City Hall stated however that there are currently no basis for issuing such a ban.⁹²

E.7. Other issues

Another issue is the protection of sites of national remembrance. In 2007 the Equality March was to start in the Pl. Mickiewicza square. According to right-wing politicians, this is a site of national remembrance and demonstrations concerning LGBT issues should not take place there. Ultimately, the march was organised according to the originally planned route. This event relates to a larger problem, which may pose certain risks from the point of view of freedom of assembly. In May 2007 the Ministry of Culture and National Heritage discussed a new law on sites of national remembrance.⁹³ Under the draft law, a site of national remembrance was supposed to include cemeteries and war graves, monuments, buildings, chapels and other places of special importance to the Polish Nation or State, or recalling important persons in its history and heritage. The draft law provided that one of the methods of protecting these sites is a special rule as regards the exercise of the freedom of assembly in such places or in their direct vicinity. In particular, the organisation of an assembly in such a place or in its direct surroundings would require the consent of various administrative organs (depending upon the importance of a given site) and the assembly might be banned if its purpose endangers the solemnity or the symbolic meaning of the given site of national remembrance.

Due to the fact that sites of national remembrance, as they were defined by the draft law, are numerous in Poland, the law, if passed, could create a substantial opportunity for the state or municipal authorities to make freedom of assembly subject to prior authorisation.⁹⁴ Following public discussion on this draft law and raising the above concerns, the new government seems not to support this law any longer. However, the possibility of the issue re-emerging cannot be

⁹¹ Press information of 09.01.2010,

http://wyborcza.pl/1,75478,7435104,Europride_test_dla_warszawiakow.html

⁹² Press information of 29.09.2009, <http://www.newsweek.pl/artykuly/sekcje/polska/parada-homoseksualistow--w-centrum-warszawy,46563,1>

⁹³ The information provided in this study regarding the draft law on sites of national remembrance is based on the general rules of the law, as prepared by the Press Office of the Ministry of Culture and National Heritage.

⁹⁴ Cf E. Siedlecka, 'Cenzura zgromadzeń' ['Censorship of assemblies'], in: *Gazeta Wyborcza*, 31.05.2007.

ruled out, in particular following a change of attitude by the government. At present, there are no information concerning the future plans to implement such law.

F. Criminal law

F.1. Protection against hate speech

F.1.1. Is there a need for special protection for homosexuals against hate speech?

In Poland there are no separate criminal rules that would protect members of sexual minorities, although special protection is granted to members of other minorities.

Hate crimes law is regulated in Poland in the Penal Code of 6 June 1997 (Dz.U. [Journal of Laws] of 1997, No 88, item 553, as amended) in Chapter XXVII "Offences against honour and personal inviolability", but the protection offered concerns only those being victims of hatred based on national, ethnic, racial or religious differences or for reason of the absence of any religious belief. However, some effects may be achieved through litigation and reliance on general provisions protecting the individual's reputation and honour (e.g. criminal defamation or protection of personal rights under the Civil Code of 23 April 1964 (Dz.U. [Journal of Laws] of 1964, No 16, item 93, as amended). According to Article 256 of *Kodeks Karny* [Criminal Code], 'Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, racial or religious differences or for reason of the absence of any religious belief, shall be subject to a fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to two years'.⁹⁵

According to Article 257 of the Criminal Code, 'Whoever publicly insults a group within the population or a particular person because of his/her national, ethnic, racial or religious affiliation or because of the absence of any religious belief, or for these reasons breaches the personal inviolability of another individual, shall be subject to the penalty of deprivation of liberty for up to three years'.

The above-mentioned regulations protect only national, ethnic and religious minorities (possibly also individuals who do not belong to any religion). Sexual minorities are not protected, although they too are victims of hate speech

⁹⁵ In accordance with the Supreme Court resolution dated 28.03.2002 (I KZP 5/02), OSNKW 2002/5-6/32, 'promoting, as mentioned in Article 256 of the Criminal Code, designates each misdemeanor that is a public presentation of a fascist or other totalitarian political system with the intention of converting people to it'.

crimes. They are protected against hate speech only by general rules of the Criminal Code and the Civil Code.

In particular, Article 212 of the Criminal Code is often applied, according to which: ‘§1. Whoever imputes to another person, a group of persons, institution, legal person, or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of trust necessary for a given position, occupation or type of activity, shall be subject to a fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to one year. [...]’.

The rules which protect ethnic, national or religious minorities (that is Article 256 and 257 of the Criminal Code) constitute *sui generis* aggravated rules in comparison to Article 212 of the Criminal Code. While the sanctions under both sets of rules are comparable, the crimes mentioned in Article 256 and 257 of the Criminal Code are prosecuted *ex officio*, whereas defamation (Article 212 of the Criminal Code) is prosecuted only upon a private charge. It means that the indictment must be written and then supported in court by the injured person. This can discourage such person from claiming his rights. In contrast, in the case of offences prosecuted on the basis of Article 256 and 257 of the Criminal Code, it is enough for the injured person to inform the prosecutor of the offence and then the prosecutor takes the role of prosecuting attorney.

Irrespective of procedural matters, there are no reasons for the legislator to treat different minorities differently, by guaranteeing some of them stronger criminal protection. The only explanation for such a state of Polish law is the post-war period. At that time, similar regulations to those contained in Articles 256 and 257 of the Criminal Code were introduced into Polish law and since then they have been maintained in Polish law after the introduction of only slight changes. Since then, no efforts have been made to widen the list of minorities which would be granted a stronger degree of protection.

It is open to question whether the extension of the list of protected minorities under Article 256 and 257 of the Criminal Code would improve the social situation of sexual minorities today. There is no statistical information available showing social reality of the criminal law for LGBT people – one reason being unwillingness of the respondents to participate in the polls or disclosing their sexual orientation to others.

Strengthened protection of minorities by criminal law may be considered desirable because:

- Article 212 of the Criminal Code was intended to serve a different purpose from Articles 256 and 257 of the Criminal Code. Above all the aim of this provision is to protect reputation, not safety and public order;
- There are doubts concerning the compatibility of Article 212 of the Criminal Code with the Constitution. This article which aims only for the protection

of reputation might be recognised as being contrary to the Constitution, more particularly as existing norms in civil law constitute sufficient protection of the good name of the injured person. Therefore, there is no need to introduce an additional restriction of the freedom of speech by criminal law. However, if it remains unchanged, annulment of Article 212 of the Criminal Code would completely deprive sexual minorities of the protection granted by the criminal law against the hate speech. The compatibility of Article 212 of the Criminal Code with the Constitution is now being considered by the Constitutional Court.

Against the extension of criminal law protection to other minority groups, especially sexual minorities, the following arguments may be raised:

- The extension of criminal responsibility for the abuse of the freedom of speech may be considered contrary to the freedom of speech (Article 132a of the Criminal Code concerning public defamation of the Polish Nation has been already referred for review by the Ombudsman to the Constitutional Court);
- The restriction of freedom of religion – the special prohibition of homophobic speech may be in conflict with expression of religious beliefs. For example, there are cases in which one may use homophobic language by relying on the text of the Bible. The example of this problem is the case of Pastor Ake Green, decided by the Supreme Court of Sweden;
- Protection against hate speech merely guarantees some groups special protection of their rights, but does not promote equality;
- There is no need to change rules of law since not many people would use them – Articles 256 and 257 of the Criminal Code are hardly ever used.

Statistics show that Articles 256 and 257 are the ones that are most seldom used among all Polish criminal law provisions. In 2005 (the last year for which full data are available on the websites of the Minister of Justice) there were 470,763 convictions in total, but not a single conviction under Article 256 of the Criminal Code (in previous years around five or six people were convicted of such a violation). Concerning Article 257 of the Criminal Code, 16 people were convicted. However, for the violation of the Article 212 of the Criminal Code 156 persons were convicted in 2005.

As can be seen, Articles 256 and 257 of the Criminal Code are not used in practice. However, it does not mean that offences to which these Articles could be applied do not happen. Analysis of the reports written by the organisations that supervise compliance with the rights of LGBT people lead to the conclusion that they are often subject to verbal or physical aggression, but in most cases they do not report it.

Please note that we were not provided with any governmental statistics concerning number of criminal cases in Poland in which sexual orientation was a motive for hate speech. Please note that as long as there is no special

provision dealing with homophobic hate speech, such cases will be incidental and will be based on use of general law provisions in individually selected cases (see below).

In September 2008 a group of LGBTQ NGOs introduced their project of amendments to the Polish Criminal Code, which would expand the scope of protection against hate speech and hate crimes, because at present, the regulations in force protect only national, ethnic and religious minorities and individuals who do not belong to any religion, omitting any references to sex, gender identity, age, disability or sexual orientation. As a result, following amendments have been proposed:

- Article 119 Section 1 of the Criminal Code should read: ‘Whoever uses violence or makes unlawful threat towards a group of persons or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, **as well as because of his/her sex, gender identity, age, disability or sexual orientation**, shall be subject to the penalty of the deprivation of liberty for a term of between three months and five years’
- Article 256 of Criminal Code should read: ‘Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, racial or religious differences or for reason of the absence of any religious belief **as well as because of sex, gender identity, age, disability or sexual orientation**, shall be subject to a fine, a penalty of restriction of liberty or a penalty of deprivation of liberty for up to two years’
- Article 257 of the Criminal Code should read: ‘Whoever publicly insults a group within the population or a particular person because of his/her national, ethnic, racial or religious affiliation or because of the absence of any religious belief, **as well as because of his/her sex, gender identity, age, disability or sexual orientation**, or for these reasons breaches the personal inviolability of another individual, shall be subject to the penalty of deprivation of liberty for up to three years’.

The proposed amendments were presented in the publication of the Campaign Against Homophobia ‘Report on the homophobic hate speech in Poland’ in 2009.⁹⁶ It was completed by the legal opinion on the proposed changes mentioned above. The opinion stipulates, i. a. that:

- the terms “gender identity” and “sexual orientation” should be clearly defined in the written reasoning attached to the Project;
- there is a need of re-edition of the amendments in a way which would allow to include also a prohibition of discrimination by association (e. g. when hateful words are directed to the LGBT NGO’s activist who is not himself/herself a homosexual), namely by omitting the words “his/her” in the changes proposed.

⁹⁶ The Report is available at: http://monitoring.kampania.org.pl/images/mowa_nienawisci.pdf

The latest amendments to the Polish Criminal Code which were approved by *Sejm* in September 2009 and which include changes in Article 256 of the Criminal Code, do not, however, make any references to the criteria listed in the LGBTQ organisations' project. The amendments concern only the addition to Article 256 of Section 2 (penalization of i. a. producing, presenting, sending, buying and storage of written, pictorial or other material containing manifestations covered by Article 256) and Section 3, excluding legal responsibility, if the unlawful acts were committed within the framework of artistic, educational, collector or scientific activities.⁹⁷

F.1.2. Case law

Of great importance for inclusion in the jurisdiction of the Polish courts on the protection of LGBT people's rights are cases lodged by private individuals. One such case was the comparison of homosexuality with paedophilia, necrophilia and zoophilia, which took place on 07.11.2004 by councillors, members of *Prawo i Sprawiedliwość* [the Law and Justice Party], during the public debate concerning the Equality Parade. The councillors, Przemysław Aleksandrowicz and Jacek Tomczak, used the following expressions: 'It may be about promoting such inclinations as paedophilia, necrophilia and zoophilia; promotion of promiscuity, even independently of so-called sexual orientation, is a glaring violation of the rules of society; we do not know whether paedophilia, necrophilia and zoophilia may at any moment simply just be considered as sexual orientations'. Such statements were considered to be offensive to homosexual people and resulted in the above-mentioned councillors being accused of defamation as defined in Article 212 of the Criminal Code.

A private bill of indictment was lodged by a group of four lesbian women. On 04.09.2006 the parties entered into settlement in the course of the trial before the District Court in Poznań. According to the settlement, the accused (who after the elections in 2005 became members of the Polish Parliament) expressed their sorrow that homosexual persons might have been offended by their statements during a conference on 11.09.2006. They claimed they did not mean to compare homosexuality with paedophilia, necrophilia and zoophilia.

As far as we are aware it is the first criminal case concerning hate speech against gays or lesbians which ended in victory, compelling the people expressing the offending statements to apologies.

Another interesting case concerns the abuse of the personal data of LGBT people by one of the main anti-gay politicians. One of the leaders of the right-wing party, *Liga Polskich Rodzin* [League of Polish Families], Wojciech

⁹⁷ The text of the amendments is available at <http://www.senat.gov.pl/k7/dok/opinia/2009/042/o/668.pdf>

Wierzejski, organised a protest in 2004 against equality marches. At that time he was Vice Marshall of the Mazowieckie Voivodship.

In response to this, a number of gays and lesbians sent him letters of protest. Wojciech Wierzejski prepared a list of these people and placed the names of 24 people on a website (together with their email addresses). These people claimed that it was a violation of their privacy and that Wojciech Wierzejski was breaching *Ustawa o ochronie danych osobowych* [Law on the Protection of Personal Data] and submitted official notification to Generalny Inspektor Danych Osobowych [the General Inspector for the Protection of Personal Data] (GIODO). Following the intervention of GIODO, the prosecutor's office started criminal proceedings against Wojciech Wierzejski, claiming that he used personal data illegally. In the period 2005-2007 the criminal investigation was suspended because Wojciech Wierzejski was a parliamentary deputy and was protected by immunity.

In August 2009 a landmark judgement was issued by the Regional Court in Szczecin⁹⁸. It proved that apart from criminal proceedings, a civil action may be also used as a tool of protection against homophobic hate speech. Ryszard Giersz, young homosexual living in Wolin, small town (5000 inhabitants) in Western Poland, brought a lawsuit against his neighbour. The defendant, a woman who was in long-lasting conflict with plaintiff's family, was notoriously calling him publicly and in the presence of other people *pedał* [a faggot] and was using other offensive words concerning his sexual orientation. Her comments provoked also plaintiff's harassment by other inhabitants, specially by the group of youth. The Court found the infringement of the plaintiff's personal goods [*dobro osobiste*] protected by article 24 § 1 of the Civil Code. According to the Court, using the word "faggot" aimed to offend the plaintiff and this expression cannot be considered as a commonly accepted. In Court's opinion "*humiliation of a person while criticizing his/her sexual distinctness threatens one of the most sensitive aspects of human life*". Therefore the Court forbade the defendant to infringe plaintiff's personal goods, i.e. his liberty, dignity, honour, intimate life and good name and particularly to use the word "faggot" and other abusive words as well as to comment publicly plaintiff's intimate life and his sexual orientation. The defendant was to pay satisfaction in the amount of 15 000 PLN (around 3700 EUR). The judgment is final since in February 2010 the Appeal Court in Szczecin dismissed an appeal lodged by the defendant. The Appeal Court confirmed that '*using vulgar words to describe someone's sexuality always infringes personal goods*', it only decided to decrease satisfaction to 5000 PLN⁹⁹. According to *Kampania Przeciw Homofobii* [Campaign Against Homophobia] this is the first case where a

⁹⁸ Judgement of the Regional Court in Szczecin of 4 August 2009.

⁹⁹ Press information of 5 February 2010,
http://wyborcza.pl/1,75478,7529907,Slowo_pedał_obraza.html

homosexual decided to defend his rights so openly at the Court¹⁰⁰. In November 2009 lesbian and homosexual, members of association *Otwarte Forum*, brought a civil lawsuit against two journalists, the editor-in-chief and the publisher of *Rzeczpospolita*, one of the leading Polish newspapers. In June 2009 *Rzeczpospolita* published an article concerning homosexual partnerships and a satirical picture. The picture was presenting a homosexual couple during a marriage ceremony. A man standing next to them was saying to a goat held on a string 'It's our turn as soon as these misters get married'. In the opinion of plaintiffs which reflects feelings of many homosexuals, this publication compares homosexuals to zoophiles and therefore infringe their dignity protected by article 24 § 1 of the Civil Code¹⁰¹.

Case of Krystian Legierski, a LGBT activist, demonstrates another aspect of counteracting homophobic hate speech. In 2009 Legierski was a candidate in elections to the European Parliament. During the election campaign, three candidates of a right-wing party made statements that homosexuality is an illness caused probably by "brain damage" and that homosexuals are perverts who enrich thanks to international support. In Legierski's opinion these statements were offensive to him since he was a homosexual and that they had a negative impact on his electoral campaign. He lodged suits to the Regional Court in Warsaw under article 74 of *Ordynacja Wyborcza do Parlamentu Europejskiego* (Electoral law of the European Parliament). Despite the reference to the international standards and experts' opinions submitted by Legierski, The Court dismissed the suits arguing that the plaintiff did not prove that recently there is no dispute among medical professionals concerning homosexuality. The Court also indicated that the procedure of *tryb wyborczy* [electoral suit] requires the case to be examined in 24 hours and therefore does not permit to verify medical issues e.g. by ordering expert's opinion. In one case the Court refused to examine the suit since the electoral suit serves to straighten out untrue information and not to counteract controversial or offensive speech. Legierski's appeals to the Appeal Court were also dismissed. Despite of extensive opinion of *Polskie Towarzystwo Seksuologiczne* [Polish Sexologists' Association] stating clearly that any sexual orientation, including homosexuality, cannot be recognized as a disorder, the court of second instance stated that the dispute among medicals concerning the nature of homosexuality is a commonly known fact. It also stated, that the questioned statement was a view free from any assessments or offensive elements that referred to the electoral campaign. Legierski, supported by *Helsinki Fundacja Praw Człowieka* [Helsinki Foundation for Human Rights] lodged a complaint to the European Court of Human Rights. He claims violation of art. 6 § 1 of the European Convention of Human Rights (right to fair trial), art. 8 of the Convention (right to privacy), art. 13 of the Convention (right to an effective

¹⁰⁰ Press information of 4 August 2009, http://policyjni.gazeta.pl/Policyjni/1.103617.6892821.Precedensowy_wyrok_15_tysiecy_zl_za_pedala.html

¹⁰¹ Plaintiffs report the case regularly on their blog <http://www.naszasprawa2.pl/> (accessed on 28 January 2010).

remedy), art. 14 of the Convention (prohibition of discrimination) and art. 3 of Protocol No 1 to the Convention (right to free elections). His application was registered by the Court on 21 January 2010¹⁰².

F.2. Physical violence against LGBT people

The HFHR has not been provided with any governmental statistics regarding physical violence on the grounds of sexual orientation. The only data available in this regard are those collected by LGBT organisations.

The report by Lambda, one of Poland's leading NGOs, concerning discrimination of sexual minorities¹⁰³, indicates that homosexual, bisexual and transsexual people unfortunately do not trust the institutions that should guarantee their safety. Thirty-five per cent of those surveyed (that is 148 people) experienced verbal or physical violence or both. 12.2 per cent of those questioned (52 people) experienced physical violence and 31.5 per cent (134 people) psychological violence. Only a small number of the injured persons reported their experiences to the police. In the case of physical violence, 25 per cent of injured people reported this fact to the police, in the case of psychological violence it was only 13.5 per cent. Among cases of psychological violence reported to the police, in 66.7 per cent of cases police did not intervene and in 5.6 per cent the reaction to the report was hostile. This shows that people who are victims of crimes because of their sexual orientation do not report them to the police because they do not believe that any effective measures would be taken or because of fears about the reaction of the police to a person with different sexual orientation.

According to the report of the Campaign Against Homophobia for years 2005-2006, 14.6 per cent of people surveyed had recently been subject to physical violence. Most of them did not inform the police.

Reports by LGBT organisations¹⁰⁴ show examples of numerous aggressive misdemeanours against homosexuals. However, most of the incidents or offences against homosexuals which lead to a complaint begin written to one of the NGOs are not followed by legal action. Victims usually do not want to undertake any legal action. The Campaign Against Homophobia was informed about a significant incident in a club in Toruń in 2007, where two people were beaten due to their sexual orientation. The beating took place almost immediately after two friends kissed each other. Offenders also called the victims 'faggots'. However, the victims decided not to submit official

¹⁰² Application No 341/10, <http://www.hfhrpol.waw.pl/precedens/aktualnosci/tryb-wyborczy-skarga-do-etpcz.html> (access on 29 January 2009).

¹⁰³ Report of 2002, available at www.lambda.org.pl

¹⁰⁴ E.g. report by the Campaign Against Homophobia, *Social situation of bisexual and homosexual people in Poland – report for years 2005 and 2006*. (www.bezupzedzen.org/doc/report_dyskryminacja_orientacja_2005_2006.pdf).

notification to the police, fearing for their security and being unwilling to involve friends as witnesses in criminal proceedings.

On 17.04.2007, during a meeting with the Ombudsman, Polish LGBT organisations complained that physical violence due to the sexual orientation of the victim often occurs in the neighbourhood of clubs or other public places. The Ombudsman promised to undertake action if any individual notifies him of such an incident.¹⁰⁵

The authors are also familiar with one case concerning violence against transsexuals. In December 2004, the Regional Court in Łódź issued a judgment in which it found that two men were guilty of beating a transvestite to death. They did not explain the motives for their brutal conduct. While they were drinking alcohol in a public park, they noticed a person searching through litter bins. When they realised it was a man dressed in women's clothes, they pushed him on to the ground, undressed him and started kicking him. The man died as a result of injuries caused by the men. Their only explanation was that they acted under the influence of alcohol. 27-year-old A.F. was sentenced to six years' imprisonment and 23-year-old D.R. was sentenced to six years and two months of imprisonment. In the opinion of the Regional Court in Łódź there was no doubt that the act of violence was motivated by stereotypical prejudice against transvestites.

In 2008 and 2009 the Campaign Against Homophobia still reported about numerous examples of aggressive behaviour towards LGBT people.¹⁰⁶ However, as in previous years, most of the incidents or offences against LGBT people are not being followed by any legal action, in most cases they are not even officially notified to the Police. In 2008 the Campaign Against Homophobia was also informed about incidents of physical violence against LGBT pupils at schools. Analysis of the situation in that regard clearly shows, according to the Campaign Against Homophobia, that Polish schools are not prepared to deal with the problem of homophobic aggression among pupils.

In September 2009 the Campaign Against Homophobia intervened in the case of verbal insulting and physical assaulting of a homosexual person by the City Guards in Warsaw, while his identity was being proved. In the letter to the *Komendant Warszawskiej Straży Miejskiej* [Chief Commissioner of the City Guard in Warsaw], it has been underlined that the Campaign Against Homophobia has been previously informed about examples of similar,

¹⁰⁵ Note from the meeting on 17.04.2007 and the preparatory note for the meeting with the Ombudsman, available at www.brpo.gov.pl

¹⁰⁶ The reports are available at <http://monitoring.kampania.org.pl>

unacceptable behaviour of the City Guards. The Commissioner was called to examine all such cases in detail.¹⁰⁷

Another disturbing issue noted by the Campaign Against Homophobia refers to the newly observed method of identifying homosexual persons by the way of dating and social web portals.¹⁰⁸ After coming to the previously agreed in Internet place of a meeting/date, homosexual persons are being assaulted and beaten. The prosecution of perpetrators of such attacks is even more difficult, as the victims are unwilling to refer to the Police about the purpose of the meeting.

One case concerning aggression against LGBT persons gained special attention in Polish media. The victim of an assault was Rafalala - transvestite, poet and theatre performer, who became well known after Polish parliamentary elections in October 2007, when she was denied the right to vote. Rafalala was insulted, attacked with tear gas and almost beaten in the centre of Warsaw in October 2009.¹⁰⁹ She asked for help *Straż Miejska* [City Guard], but they refused to take any action. However, no legal action has been initiated.

F.3. Issue of the website www.redwatch.info

Another issue of a criminal nature which relates to homophobia concerns the website www.redwatch.info. It is a website which has been operating since January 2006 and which presents materials of a fascist and racist nature. In particular, the website lists a number of people who, in the opinion of the authors of the website, represent a threat to Polish society. Information on the website includes photos, addresses and even mobile phone numbers of a number of people, including leaders of the LGBT movement in Poland. The descriptions of people also contain information on political beliefs, social activities, and sometimes describe people using vulgar language. Furthermore, the website contains photos from gay pride marches and counter-demonstrations which have taken place in Poland. It seems that the people managing the website have connections with neo-fascist organisations from the United Kingdom, such as Blood&Honour.

Since the establishment of the website a few proceedings have been undertaken with the aim of identifying the website managers. All the cases pending before the prosecutor's office concern violation of the laws on the protection of

¹⁰⁷ The text of the letter is available at http://monitoring.kph.org.pl/index.php?option=com_content&view=article&id=93:list-do-stray-miejskiej-o-przemocy&catid=1:news

¹⁰⁸ 'Report on the homophobic hate speech in Poland', Campaign Against Homophobia, Warsaw 2009, p.67-68.

¹⁰⁹ Press information of 09.11.2009, http://www.wysokieobcasy.pl/wysokie-obcasy/1.66725.7224415.Zaklinanie_rzeczywistosci.html

personal data (placing names and pictures of people without their consent) or violation of their dignity.

As a result of the investigation three people, Andrzej P., Bartosz B. and Mariusz T., were detained. There is a suspicion that they were editors of the website. Thus they are accused of committing a crime of incitement to racial hatred and of other offences. On 17.05.2007, the prosecutor directed a bill of indictment to the court. Subsequently, the bill of indictment was remanded by the court to make additional clarifications. All three individuals were released from pre-trial detention, but pending trial they are prohibited from leaving the country.

Despite the arrest of three people connected with Redwatch, this website is still operating. The Polish government tried to intervene in this respect with the US authorities (where the servers are located). However, assistance has been refused. In consequence, the website is still operating and there is no real and effective measure which can change this situation. There are also new servers where the website also operates. It should be noted, however, that Polish internet users have recently started to use special programs which automatically load the content of the redwatch.info website on to hard disks. If such efforts are multiplied by a number of internet users, it may cause an effective blocking of this internet site.

In June 2009 HFHR submitted an official letter to *Prokurator Generalny* [General Prosecutor], expressing concern about the way the proceeding is being continued, as all persons listed on the website were supposed to be interrogated.¹¹⁰ It causes a real danger of exceeding the limitation period of punishability of crimes the three individuals were accused of. HFHR suggested that all persons listed on the website and described as 'enemies of the race' should be recognized as the victims of the crime. The idea was supported by the Ombudsman.

Finally, on 14.12.2009 the Regional Prosecutor's Office in Warsaw directed a bill of indictment to the Regional Court in Szczecin.¹¹¹ The accusation concerns committing a crime of incitement to hatred and violence against a group of people on the ground of their national origin and political beliefs, whose pictures, information about their political or philosophical beliefs and sexual orientation, as well as their personal data were listed on the website www.redwatch.info, edited by the accused individuals.

Since 2008 the website is still operating, although it is sometimes temporarily unavailable due to the effective blocking methods of Polish Internet users.

¹¹⁰ The text of the letter is available at <http://www.hfhrpol.waw.pl/interwencja/interwencje/interwencja-hfpc-w-sprawie-popelnienia-przestepstwa-przez-autorow-strony-internetowej-red-watch.html>

¹¹¹ News release of the Regional Prosecutor's Office in Warsaw, http://www.warszawa.po.gov.pl/pl/main/komunikat/id/79/alias/akt_oskarzenia_przeciwko_os_obom_redagujacym_polskojezyczna_strone_internetowa_organizacji_blood_honour.html

However, the website also operates on new servers. In January 2008 personal data of Daniel Michalski from Szczecin, leader of a local branch of the Campaign Against Homophobia, were presented on the website. He was described as another person who should be „eliminated” because of his sexual orientation.¹¹² Michalski informed the Prosecutor’s Office. However, no further legal action has been undertaken, as Mr. Michalski withdraw his complaint, discouraged by the lack of interest and ineffective reaction of the Police and the Prosecutor’s Office.¹¹³

In June 2009 a very important court judgment became final, after the decision of the Supreme Court, dismissing the appeal of Marek B., who was sentenced to ten years’ imprisonment for an attempt of homicide of a person – a left-wing activists, listed on the Redwatch website and described as a ‘traitor of the white race’. The case and court proceedings were monitored by the HFHR.¹¹⁴

However, it has to be noted that apart from Redwatch, there are many other Polish websites with homophobic contents, which are often extremely vulgar, hateful and incite to violence against LGBT persons. These are mostly websites presenting also materials of a xenophobic, fascist and racist nature: *Krew i Honor Polska* [Blood&Honour Poland], *Obóz Narodowo-Radykalny* [National – Radical Camp].

¹¹² Media information of 08.01.2008, <http://www.tvn24.pl/0,1534690,wiadomosc.html>

¹¹³ Information received from Mr. Michalski.

¹¹⁴ See the information of HFHR at <http://www.prawaczlowieka.edu.pl/pliki/138825ed8f4199d67f9ca400b795b65fec1158ac-p22.pdf>

G. Transgender issues

Article 32 Section 2 of the Polish Constitution prohibits discrimination in political, social or economic life. Besides Article 11³ of the Labour Code, which proscribes direct or indirect discrimination in relation to employment on the ground of sex and sexual orientation, there are only a few explicit provisions banning discrimination against homosexual or transgender people¹¹⁵. The LGBT organisations in Poland are striving to amend the Criminal Code in order to make discrimination on the grounds of sex, sexual minority, age or disability a punishable offence. For the time being, the Code specifies a few acts aimed against members of national, ethnic, racial, political, religious or non-religious group as crimes (see Chapter F. above for detailed description).

In Poland discrimination of transgender people is dealt with as discrimination on the grounds of sex.

The main difference of treatment between transgender people and other LGBT people is not reflected in the legislation, but in the jurisprudence of the Supreme Court and legal writing. Namely, transsexualism is seen as a disease, gender dysphoria or gender identity disorder, which requires medical treatment, while homosexuality is not a disease. However, the medical costs associated with sex reassignment are not covered by the National Health Fund and are thus available only to the few. Nevertheless, a considerable part of society thinks of homosexuality as a curable deviation. Transsexualism (transgenderism) is widely considered as a taboo, there are no organisations dealing exclusively with transgender issues and no official or private statistics presenting the situation of transsexual people¹¹⁶. Moreover, the homosexual community often does not want to be associated with transsexuals, though media coverage often shows transgender people as representatives of the whole LGBT movement.

In Poland sexual identification is protected as a personal right. The concept of a personal right to self-determination about an individual's belonging to a particular sex was developed in the judgment of the Supreme Court in 1978¹¹⁷. It accepted that it is not only external physical features and organs which define an individual's sex, but also emotional association with the gender opposite to that assigned at birth. The Court found that no-one could be forced to be a man (or woman) if s/he internally denies it. Moreover, the Court stated that in

¹¹⁵ Moreover, in Polish law there is no provision banning discrimination in other areas, in particular in civil and administrative relations, beyond employment (such as access to goods and services, accommodation, private contracts, social insurance, health and education). Such legislation is not in place even if required by the Racial Equality Directive (2000/43/EC).

¹¹⁶ I.e. the civil society organisation *Kampania przeciwko Homofobii (KPH)* [Campaign Against Homophobia] produced a report, 'The social situation of homosexual and bisexual people in Poland. Report for the year 2005 and 2006', which did not refer to the social situation of transsexual people because there were only six such people who agreed to participate in the poll.

¹¹⁷ Judgment of the Supreme Court of 02.02.1978, CZP 100/77.

exceptional circumstances courts can rectify acts of civil status before sex reassignment surgery takes place if the features of the new sex are predominant and changes are irreversible. In this regard it extended the scope of personal rights. Until 1989 the procedure of changing sex required:

- A positive opinion from *Centralny Zakład Seksuologii i Patologii Węzi Ludzkich* [Central Institution of Sexology and Pathologies of Human Relations] in Warsaw;
- Two years of hormone therapy;
- Rectification of birth certificate and
- Sex reassignment surgery.

The Supreme Court in a later judgment withdrew from its earlier position and rejected the position that transsexualism justifies rectification of birth certificates in regard to sex as defined at birth¹¹⁸. The new approach made it impossible to rectify acts of civil status. In order to modify this data included in the acts of civil status, Article 21 of *Ustawa o aktach stanu cywilnego* [Law on Acts of Civil Status] foresees the institution of additional inscription (note). Only on this basis can a transsexual person apply for a change of first name and, in most cases, the ending of the last name.

Subsequently, the Supreme Court recognised that determination of gender identity belongs to personal rights so that the interested person can file an action for a declaratory judgment (in accordance with Article 189 of the Civil Procedure Code)¹¹⁹. In this procedure the court determines the legal sex of the transsexual. It is worth noting that the parents of the concerned person are the defendant party (or, in their absence, the director of the civil status office). Such a solution can cause serious inconvenience for the person concerned whose parents may not receive her/his sexual identity problem with understanding. However, parents' objections do not count as a veto power because the court declares the current – meaning different from the one stated in the birth certificate – legal sex of the person concerned on the basis of an opinion of a medical doctor attached to the writ of summons and in some cases a testimony of a medical expert. Moreover, the parties in these proceedings can agree that the jurisdiction of the court will be in the place of residence of the plaintiff, not of the defendants.

It is noteworthy that the court declaration of legal sex is considered to create a new status and grants new rights, which follow from the fact of being a man or a woman. This is in line with the Supreme Court decision ruling that the declaration of a legal right (status or relation) can take place only when it

¹¹⁸ Decision of the Supreme Court of 22.06.1989, No. III CZP 37/89. The Court stated that acts of civil status only have a declaratory character and describe the legal status of a person resulting from acts of law and transsexualism could not be described as a change by acts of law, since it is a psychological transformation.

¹¹⁹ Judgment of the Supreme Court of 22.03.1991, No. III CRN 28/91.

actually exists¹²⁰. Thus a declaratory judgment is available only when there have already been irrevocable changes towards the formation of the opposite sex or when a surgical intervention (mastectomy¹²¹) has taken place. A declaratory judgment cannot be based solely on the subjective feeling of the person concerned that s/he belongs to a particular sex¹²². Such an approach is supported in the legal literature in particular with regard to married transsexuals for the reason that the Polish Constitution proclaims marriage only as a union of a man and a woman (Article 18 of the Constitution). Following this provision, a transsexual person who is married must divorce and if s/he is the sole guardian of minor children, s/he must wait until they come of age. If there is another parent, the court will give him/her custody.

Sex reassignment surgery (SRS) is in practice possible only after a declaratory judgment has been delivered. There have been situations where surgeons denied reassignment fearing that criminal charges would be brought against them¹²³ in spite of the consent of the transsexual person¹²⁴. For those reasons the SRS (involving removal of female or male genital organs, which results in depriving transsexual people of their reproductive capacity) is carried out on the basis of the declaratory judgment.

Currently, the procedure for changing sex is based on the jurisdiction of the Supreme Court. It is very long and costly¹²⁵. Moreover, there may be substantial differences in its course depending on the health care institution¹²⁶. The procedure includes obtaining basic medical blood and urine tests, electroencephalogram (EEG), tomography of the skull, karyotype, psychiatric, psychological and sexology opinions, hormone treatment, a declaratory judgment stating that a person is of the opposite sex to that declared in the birth certificate, change of name and personal documents and sex reassignment surgery. There is still a prevailing belief that hormone therapy should last two years in order to test the formation of the new sex, however, in practice the declaratory judgment may be obtained after three months of therapy.

It is important to underline that the most part of costs of medical therapy of transsexuals is not covered by *Narodowy Fundusz Zdrowia* (National Health Fund, a body that manages health premiums). It means that a person who

¹²⁰ Judgment of the Supreme Court of 22.09.1995, No. III CZP 118/95.

¹²¹ Mastectomy is the surgical removal of the breasts leading to the main sex reassignment surgery such as *feminising genitoplasty* and *masculinising genitoplasty*.

¹²² Judgment of the Appeal Court in Katowice of 30.04.2004, No. U I ACa 276/04.

¹²³ Sex reassignment surgery may fall under the scope of Article 156 of the Penal Code that prohibits causing serious damage to health, as it results in total infertility.

¹²⁴ Consent from the person concerned does not exclude the illegality of the act. In the legal doctrine there are voices arguing that sex reassignment surgery can be excused by the state by necessity, which constitutes circumstances excluding the illegality of the criminal act.

¹²⁵ Over 20,000 PLN (approx. 5,700 Euro) and takes on average two years. The medical costs are not covered by the National Health Fund, although statistically there are only 1:30,000 men and 1:100,000 women requiring SRS. At present there are approximately 2,000 transsexual people who have undergone SRS.

¹²⁶ In some hospitals hormonal therapy is not required for a declaratory judgment.

requires to undergo the therapy of sex reassignment is forced to bear majority of costs on her/his own what significantly restricts access to such a treatment and enable many people to live in harmony with their own sex. The sex reassignment therapy was explicitly excluded by the Law on Health Services Financed from the Public Resources of 27 August 2004 (*Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*)¹²⁷ from being financed from the public resources. This provision was abolished by the amendment of 29 June 2009¹²⁸. Sex reassignment therapy as such is not currently listed by the law as a treatment that is not financed from public resources. It does not mean however that this type of therapy is to be financed by the State. Only a very few specific medical services which are performed as elements of sex reassignment therapy (e.g. creation or amputation of penis) are classified on the list of hospital services that are financed from public resources¹²⁹. Most of procedures of sex reassignment therapy is not on the list. Moreover, the law stipulates that plastic surgery procedures or cosmetic procedures are financed from the public resources only if they are used in a treatment of a congenital defect, an injury or an illness¹³⁰. This provision excludes in case of transsexuals the plastic surgery procedures to be reimbursed by the State. It is worth to mention that the Law on Health Services Financed from the Public Resources contains a new provision which lists conditions that should be taken into account while qualifying if a treatment should be financed from public resources. One of them is an assessment if a treatment prevents from “chronic suffering” and from “reduction of quality of life”. As it is indicated by transgender activists, transsexuality is an illness that causes chronic suffering and leads to reduction of quality of life what means that these factors should be taken into account by the State while qualifying a treatment to be financed from public resources¹³¹. Future shows how the abovementioned provisions are interpreted by the relevant authorities and if there is any progress in this regard. Summing up, in Poland gender recognition is conditional on hormonal therapy. Due to the many inconveniences of the procedure, there is a considerable need for comprehensive legislation balancing the rights of transsexuals and doctors, as well as regulating the procedure of changing the name and acts of civil status.

Upon a request from, the authors, the Ministry of Internal Affairs provided the statistical information based on data about personal identification numbers of Polish citizens (PESEL), which show that in 2000-2007 152 people changed their names as a result of sex reassignment.

¹²⁷ *Dziennik Ustaw* [Journal of Laws] of 2004, No. 210, item 2135.

¹²⁸ *Dziennik Ustaw* [Journal of Laws] of 2009, No. 118, item 989.

¹²⁹ Ordinance of the Ministry of Health of 29 August 2009, *Dziennik Ustaw* [Journal of Laws] of 2009, No. 140, item 1143 (*Rozporządzenie Ministra Zdrowia w sprawie świadczeń gwarantowanych z zakresu leczenia szpitalnego*).

¹³⁰ *Ibidem*, § 3 Section 2.

¹³¹ A statement on the provisions on financing treatment of transsexuality made by Foundation Trans-Fuzja, http://fundacja.transfuzja.org/pl/artykuly/oswiadczenia_i_komentarze/komentarz_do_zmiany_prawa_o_finansowaniu_leczenia_transseksualizmu.htm (access on 10 February 2010).

Except that, there is no statistics available showing social reality of the law, or rather the judicial practice concerning transgender people. The above paragraphs were written mainly on the basis of information provided by the medical institutions dealing with SRS or private websites containing instructions for people who want to change their sex.

During the last parliamentary elections in October 2007, there was an incident which illustrates that the legislation does not respond fully to the rights of transsexuals.

Rafalala is the artistic pseudonym of a transvestite, poet and theatre performer. She appeared at the polling station dressed in a black dress and wearing a blond wig. Having shown her identity card with her picture as an 18-year-old man, she was dismissed because the electoral commission could not identify her with the person in the picture. It was suggested that she could vote if she put on trousers and removed her make-up. The electoral commission called the police who were also unable to take a decision as to whether Rafalala was the person in the picture, speculating that the man could have been her twin brother. She argued that many people have old pictures in their ID cards and lack of similarity is not a ground to deny them the right to vote. Nevertheless, she was not allowed to vote. The representative of *Państwowa Komisja Wyborcza* [National Electoral Office] stated that there had been no violation of the law in this case, as a voter should submit an identity card which allows for actual identification. Rafalala refused to do this and for this reason she was unable to exercise her right to vote. Nevertheless, this situation may be regarded as a sign that the legal provisions do not correspond with changing social attitudes and customs, including changes in the external appearance of transsexual people.

The case of Rafalala inspired the idea to introduce identity cards with two photos for transgender persons what could considerably improve quality of their everyday life. This proposal was made by *Fundacja Trans-Fuzja* (Foundation *Trans-Fuzja*). The Foundation was established in 2008 in order to support rights of transvestites, transsexual and transgender people and to counteract transphobia. The aim of the identity cards for transgender people was not to replace official IDs but to create some sort of a voluntary membership card which may be used together with official ID. This initiative was supported by the Ombudsman who issued a letter to the Ministry of Interior and Administration asking to consider this postulate¹³². Answering the letter, a representative of the Ministry stated that such documents would be contrary to the law and would permit to create arbitrary and unlawfully double personality of certain group of persons¹³³. In letter addressed to the Foundation *Trans-Fuzja*, the Ombudsman stated that the argumentation presented by the Ministry

¹³² Letter by Janusz Kochanowski, *Rzecznik Praw Obywatelskich* [the Ombudsman] of 19 June 2009, No. RPO-615323-I/09/MK.

¹³³ Letter by Witold Drożdż, *Podsekretarz Stanu w Ministerstwie Spraw Wewnętrznych i Administracji* [Undersecretary of State in Ministry of Internal Affairs and Administration] of 10 July 2009, No. BMP-079-5384/09/AK.

was reasonable and therefore he would not undertake any other steps in this case¹³⁴. It is worth to mention that this initiative reached significant media attention and is one of rare examples of public debate on situation of transgender people in Poland.

An incident that demonstrates hostility towards transgender persons took place in December 2009. The group of 20 young people disturbed the meeting concerning rights of transsexual persons organized by the periodical *Krytyka Polityczna* in a cafe in Warsaw. The group, consisted probably of members of *Młodzież Wszechpolska* [All-Poland Youth] entered the meeting and interrupted the discussion by shouting offensive slogans and addressing hate speech towards LGBT persons. Although the physical violence was not used and the organizers decided not to call the Police, the incident was recorded and commented in media¹³⁵.

Rafalala, who was mentioned above, reported about an incident of attacking her with a gas and using against her the threats of physical violence by the group of men who assaulted her in a fast-food in the centre of Warsaw. The guard of the restaurant, as well as the city guard refused to help her¹³⁶.

In 2003 an application against Poland was lodged to the European Court of Human Rights by a person who had applied the civil court for recognition of her new gender identity, since she was a male-to-female transsexual¹³⁷. Proceedings before the Regional Court in Warsaw lasted almost two years, mainly because of difficulties in obtaining the expert opinion. The applicant submitted that in the view of the delay which had occurred, the Polish authorities had failed to show respect for her private life. She had been registered at birth as a male, she had undergone partial gender reassignment surgery and she lived in society as a female. Nonetheless, for a period of almost two years the applicant had remained, in the eyes of the law, a male. She had not been able to continue her medical treatment (a court decision was necessary) or change her personal data in the civil status register and on her official identity documents. The judgment was not finally issued by the European Court of Human Rights since the applicant decided to settle with the Government which paid her the amount of PLN 15,000. This case could be potentially the first one, precedent judgment concerning rights of transsexual people. It dealt not only with the right to fair

¹³⁴ Letter by Mirosław Wróblewski, Director of the Unit of the Constitutional and International Law in the Office of the Ombudsman of 10 August 2009 published on http://fundacja.transfuzja.org/pl/artykuly/oswiadczenia_i_komentarze/rzecznik_praw_obywatelskich_do_fundacji_transfuzja_w_sprawie_legitymacji_dla.htm

¹³⁵ Press information of 8 December 2009, http://warszawa.gazeta.pl/warszawa/1,34889,7340792,Pracownicy_zaklocili_debate_o_transseksualistach.html

¹³⁶ Letter of Rafalala to magazine *Wysokie Obcasy* published on 9 November 2009, http://www.wysokieobcasy.pl/wysokie-obcasy/1,66725,7224415,Zaklinanie_rzeczywistosci.html

¹³⁷ Application No. 37850/03, decision to strike the application out of the list of cases of 4 January 2008.

trial without undue delay but also with the right to respect for private life during the time when a person, who triggered legal proceedings to change her/his sex is waiting for their final outcome.

H. Miscellaneous

H.1. Educating about homosexuality in schools

At the beginning of 2006 the Polish version of *Compass*, the guide for teachers on methods of educating young people about human rights, published by the Council of Europe, was withdrawn from circulation by the Ministry of Education. On 08.06.2006 the Minister of National Education dismissed the director of the National In-Service Teacher Training Centre (NTTC), Mirosław Sielatycki, for publishing the guide. The grounds for dismissal were the content of the chapter on homosexuality contrary to the general programme of education, as well as the charge that the publication promoted homosexuality in schools.¹³⁸ During a visit by the Commissioner for Human Rights of the Council of Europe to Poland, the Secretary of State at the Ministry of National Education, Mirosław Orzechowski, explained that, although the *Compass* guide contains many positive chapters, the chapter on homosexuality is not acceptable by the Polish government due to a lack of Polish values. According to the Minister, homosexuality is not a problem in Polish society and should not be discussed in schools. The officially accepted manual entitled *Wygrajmy Młodość* [*Let's win youth*] defined homosexuality as an unnatural tendency and homosexual people as people who require special care and help to fight this shameful deviation. The authors associate homosexuality with fear of responsibility, improper hierarchy of values, lack of an appropriate ideal of love and a hedonistic attitude, as well as prostitution.

The Commissioner for Human Rights of the Council of Europe found this depiction simply wrong, insulting and contrary to the principle of equality, diversity and respect for rights of every human being. The Polish authorities have full discretion in determining the content of school subjects and books, but the principles regarding human rights and non-discrimination are not optional. He also expressed his concern about the planned law prohibiting the promotion of homosexuality in schools.¹⁴⁰

In May 2007 the former Minister of National Education, Roman Giertych, also prepared amendments to *Ustawa o systemie oświaty* [Law on the Education

¹³⁸ For considerations on the litigation initiated by Mirosław Sielatycki against the Minister of National Education, see Chapter A.

¹⁴⁰ Memorandum to the Polish Government, Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, 20.06.2007, CommDH(2007) 13.

System]¹⁴¹. The draft envisioned that any school or educational unit would be obliged to protect pupils from content threatening to their proper psychological and moral development, in particular content ‘promoting brutality, violence, hatred and discrimination; pornography; promoting conduct contrary to moral standards; and incompatibility with the principle of the protection of marriage and family, including the promotion of homosexuality’¹⁴². In its justification the draft explained that does not aim to discriminate against homosexuals and does not prohibit describing this phenomenon in school (i.e. in biology classes)¹⁴³.

However, presenting homosexuality as an alternative way of life and a social role is contrary to the constitutional protection of marriage understood only in terms of a union between a man and a woman. The draft law became a source of international criticism and controversy within the country¹⁴⁴. The atmosphere in which the draft law was presented was full of rhetoric hostile to homosexual people (in particular in the public speeches of Minister of National Education Roman Giertych and the Secretary of State at this Ministry, Mirosław Orzechowski¹⁴⁵). Finally, the amendments to the Law on the Education System were never passed due to the collapse of the former government.

Nevertheless, *Compass* never reached school libraries. The published edition has been deposited in an unknown place and only a few people involved in the preparation of the Polish version of the manual have it. There is also a group of teachers who underwent a special training course organised by NTTC who use *Compass* in their work with students in schools, though they keep secret the source of the ready-made templates for class scenarios. To date, the new Minister of Education, Katarzyna Hall, has not yet taken a decision as to whether the manual may be obtained and used by schools. Many school directors ordered not to include it in the educational programmes as they still fear the charge of promoting homosexuality in schools. The bottom line is that the spirit of intolerance has survived in the rules of the previous Minister and his cabinet who officially disapproved of homosexuality as ‘a disgusting topic’.

¹⁴¹ Poland/*Ustawa z dnia 7 września 1991 r. o systemie oświaty*, unified text – *Dziennik Ustaw* [Journal of Laws] of 2004, No. 256, item 2572, as amended.

¹⁴² The initial draft foresaw that school directors who allow such content would be subject to disciplinary dismissal and anyone who promotes homosexuality would be subject to sanctions (restriction of liberty and a fine). Moreover, on one occasion (on the Radio Tok FM, on 15.03.2007) the Secretary of State at the Ministry of Education announced that all teachers who reveal their homosexuality would be dismissed as well. On the next day he withdrew from this position.

¹⁴³ The main counter argument against the rationale of the draft law was that homosexuality is innate and immutable, so it could not be acquired as a result of ‘homosexual propaganda’.

¹⁴⁴ Teachers’ trade union (ZNP); Ombudsman, the organisations Lambda and KPH, the political party SLD, Amnesty International, Human Rights Watch, the European Parliament, the Council of Europe Commissioner for Human Rights, etc. It was expected that the law would become a tool to discriminate against homosexual teachers and pupils.

¹⁴⁵ Homosexuality has been referred to as ‘deviation’, ‘devil’s work’, ‘pathology’ and compared to fascism and communism. Allegedly the draft law was to stop LGBT organisations from invading schools with their campaigns.

A positive signal in this regard is a statement made by the current Minister of National Education, Katarzyna Hall. On 14.02.2008 at the meeting of ministers of education of the EU Member States, she stressed that education in Poland should be based on the principle of tolerance. As she stated, ‘Tolerance for any minorities and the respect for the world of values of other people are obvious things for me’. This statement is a signal that there will be no continuation of the policies of the former Minister in the field of education. However, *Compass* still in 2009 has not been officially used in Polish schools. At the same time, in 2009, the National In-Service Teacher Training Centre together with Stowarzyszenie dla Dzieci i Młodzieży Szansa [Association for Children and Youth “the Chance”], published the first European translation of the Council of Europe book *Compasito* [Kompasik], the equivalent of *Compass*, dedicated to teachers of younger children from elementary schools.¹⁴⁶ For the reason of the age of children the book is designed for, it presumably does not include direct references to sexual orientation and sexual minorities rights.

In October 2009, the local division of the Campaign Against Homophobia in Gdańsk, organized the first Polish promotion of a book for children entitled ‘*Z Tango jest nas troje*’ [‘And Tango Makes Three’], written by Peter Parnell and Justin Richardson to help parents teach children about same-sex parents families. The meeting took place in the Centre of Creative Play. As a result, local politicians of the Law and Justice party organized a ‘Campaign against demoralization’, expressing their protest against ‘promotion’ of demoralization and deviation.¹⁴⁷ They were joined by the activists of *Młodzież Wszechpolska* [All-Poland Youth].

In February 2010 it has been reported about the forthcoming publication of the next children’s book concerning the issue of homosexual couples, translated into Polish. The fairy tale written by Linda de Haan and Stern Nijland tells the story of two Princes who fall in love and became the King and the King.¹⁴⁸

H.2. The draft law on same-sex couples (registered partnerships)

In August 2003 Senator Maria Szyszowska presented a draft law that would give same-sex couples legal partnership rights. The draft law, except for the right to register in the civil status office, provided for mostly economic rights of the partners – establishing contractual community of goods, the right to inherit and the right to social security after one partner dies, the right to maintenance

¹⁴⁶ Information available at <http://www.bezuprzedzen.org/warsztaty/art.php?art=323>

¹⁴⁷ The statement of Law and Justice party is available at <http://www.pis.org.pl/article.php?id=15919>

¹⁴⁸ Press information of 26.01.2010, http://pl.wikinews.org/wiki/Kr%C3%B3l_i_kr%C3%B3l: bajka_dla_dzieci_ucz%C4%85ca_tolerancji_b%C4%99dzie_wydana_w_Polsce

payments after one of the partners becomes impoverished, pecuniary rights following from the labour relationship, the right to visit the partner in closed institutions, to take decisions instead of her/him in case of her/his incompetence, to receive correspondence or medical information about the partner's health, and to refuse attestation as a witness (due to recognition of partners as the nearest persons for the purpose of civil, criminal and administrative law).

Although the original version of the draft law foresaw common taxation, statutory community of goods and the right to represent the child of another partner, these entitlements were eventually abandoned. Joint adoption by same-sex couples was rejected as well. Partnerships could be dissolved within six months after a consistent declaration of will by the partners. The fact that a person remained in a registered partnership would constitute an impediment to marriage.

The draft law was approved by the Senate on 03.12.2004 and reached the *Sejm* (lower house of Parliament) on 23.12.2004. However, the act never took its course during the fourth term of the Sejm and, due to the principle of discontinuation, it was never reintroduced.

In December 2007 NGOs representing the LGBT community in Poland submitted a draft law on same-sex partnerships to the Prime Minister, asking for the adoption of the law. However, the government opposed such a law. The government declared that it has not dealt and will not deal with this issue.¹⁴⁹

In the end of March 2008, Sojusz Lewicy Demokratycznej [Alliance of Democratic Left], major left-wing party, decided to make a significant shift in its policies. Among other new ideas, leader of this party, Mr. Wojciech Olejniczak, has announced that his party will prepare a new law on same-sex partnerships. He declared that partners in same-sex couples are restricted in exercise of certain rights, e.g. they cannot be automatically heirs to each other. Even if the Alliance of Democratic Left prepares such draft law, there are no significant chances of passing it, due to opposition in this area of two major political parties – *Platforma Obywatelska* [Civic Platform] and *Prawo i Sprawiedliwość* [Law and Justice].¹⁵⁰

The representatives of LGBT community have been continuing their campaign for introduction of the law on same-sex partnerships. In June 2009 they issued a petition to *Marszałek Sejmu* [Marshall of the Sejm] Bronisław Komorowski requesting for the law to be passed. About 200 persons demonstrated their

¹⁴⁹ Statement by Agnieszka Liszka, Press Officer of the Government of Poland, Wirtualna Polska, <http://wiadomosci.wp.pl/kat.1329.wid.9659925.wiadomosc.html> (access on 15 February 2008).

¹⁵⁰ Press information of 31 March 2008, <http://wiadomosci.gazeta.pl/Wiadomosci/1.80708.5072279.html>

support for the petition during the picket organized in Warsaw in July 2009¹⁵¹. The petition has been published in Internet and till the end of January 2010 gained 6500 signatures¹⁵². In recent months, the public debates on same-sex partnerships took place in numerous Polish cities¹⁵³.

The request for support and cooperation was addressed also to Polish Prime Minister, Donald Tusk¹⁵⁴. Elżbieta Radziszewska, a Governmental Plenipotentiary for Equal Status maintained however previous position of the Government and stated that there was no need to pass such a law¹⁵⁵. Interviewed on this issue in November 2009, she seemed not to see any difference between “same-sex partnerships” and “same-sex marriages”¹⁵⁶.

The Ombudsman, Janusz Kochanowski, expressed opinion that the registered partnerships, including same-sex partnerships, should be introduced into Polish legal order¹⁵⁷ but opposed to child adoption by such couples¹⁵⁸. Similarly Jerzy Buzek admitted in an interview preceding his election for the President of the European Parliament that the same-sex partnerships should be recognized by Polish law first and foremost in order to secure inheritance interests of the same-sex partners but definitely without opportunity to adopt children¹⁵⁹.

In January 2010 *Sojusz Lewicy Demokratycznej* declared once more its willingness to prepare new draft of the law. It is to be based on the draft presented by Senator Maria Szyszkowska in 2004. The party invited to cooperation leading NGOs dealing with LGBT rights¹⁶⁰.

Practice illustrates a need to secure rights of the same-sex couples. A case communicated to the Polish Government in 2007 by the European Court of Human Rights is one of the examples. The applicant, Mr. Piotr Kozak,

¹⁵¹ Press information of 14 July 2009, http://warszawa.gazeta.pl/warszawa/1,34889,6820231,Pikieta_zalegalizujcie_zwiazki_partnerskie.html

¹⁵² <http://www.petycje.pl/petycjePodglad.php?petycjeid=4117> (access on 25 January 2010).

¹⁵³ Press information of 9 January 2010, http://wiadomosci.gazeta.pl/Wiadomosci/1,81048,7436526,Srodowiska_antyhomofobiczne_debatuja_nad_ustawa_o.html

¹⁵⁴ <http://zwiazkipartnerskie.blogspot.com/2009/12/list-do-donalda-tuska-premiera.html> (access on 25 January 2010).

¹⁵⁵ Press information of 15 July, <http://www.rp.pl/artukul/334265.html>

¹⁵⁶ Interview for RMF radio station, 21 November 2009, available at http://fakty.interia.pl/fakty_dnia/news/radziszewska-nie-dla-legalizacji-zwiazkow-partnerskich,1400267

¹⁵⁷ Interview for Radio Zet radio station, 17 July 2009, <http://www.radiozet.pl/Programy/Gosc-Radia-ZET/Dr-Janusz-Kochanowski>

¹⁵⁸ Interview for Tok Fm radio station, 12 November 2009, <http://www.tok.fm/TOKFM/0,89513.html>

¹⁵⁹ Interview for TVN24 TV station, 15 June 2009, http://www.tvn24.pl/6725,1,kropka_nad_i.html

¹⁶⁰ Press information of 5 January 2010, http://wiadomosci.gazeta.pl/Wiadomosci/1,81048,7421967,Lewica_bedzie_pracowac_nad_projektem_ustawy_o_zwiazkach.html

complained that he was discriminated against on the ground of his homosexual orientation in that he was denied the right to succeed to a tenancy after the death of his partner¹⁶¹. Mr. Kozak and his partner (T.B.) had been living together in a council flat since 1989. The flat was formally rented by Mr. T.B. and Mr. Kozak was registered as a permanent resident of the flat in the residents' register kept by the Szczecin Municipality. After death of T.B. in 1998 he applied to the Mayor of Szczecin in order to enter a new contract on his own. He was refused because in the opinion of authorities he moved in the apartment just a couple months before his partner's death. Consequently in 2000 Mr. Kozak sued the Szczecin Municipality before the Szczecin District Court (*Sąd Rejonowy*), seeking a declaration that he had succeeded to the tenancy after T.B.'s death. The applicant stated that the claim was based on section 8(1) of the Lease of Dwellings and Housing Allowances Act of 2 July 1994 (*ustawa o najmie lokali mieszkalnych i dodatkach mieszkaniowych*) ("the 1994 Act") and that on this basis he had a right to succeed to the tenancy as T.B.'s life-partner (*konkubent*), with whom he had cohabited for many years and with whom he had run a common household. The court dismissed the claim reasoning that there was no *de facto* marital relationship (*konkubinat*) between T.B. and Mr. Kozak since pursuant to Family and Custody Code, a marriage can be contracted only between a woman and a man. Consequently, [the law] recognises only *de facto* relationships of different-sex persons. The applicant appealed to the Szczecin Regional Court (*Sąd Okręgowy*). In his appeal he asked the Court to refer to the Supreme Court or the Constitutional Court in order to clarify the interpretation of the notion of "*de facto* marital cohabitation". In 2001 the Court dismissed the appeal. It stated *inter alia* that "*the District Court properly interpreted the above-mentioned term. This court shares the opinion stated in the reasoning of the impugned judgment that the legal regulation in section 8(1) of the 1994 Act concerns persons remaining in a de facto marital relationship, i.e. an actual relationship of different sex persons with stable physical, emotional and economic ties, imitating a marriage. The appellant is not right in saying that the scope of the above-mentioned provision encompasses also homosexual relationships. According to an opinion commonly accepted in our legal writing and case-law [...], de facto marital cohabitation takes place only if a woman and a man cohabit together*". Since a cassation appeal to the Supreme Court was not available in this case, Mr. Kozak decided to apply to the European Court of Human Rights. He claims violation of article 8 of the Convention (right to respect private and family life) and article 14 of the Convention (prohibition of discrimination) as well as article 6 (right to fair trial). The case was communicated to the Polish Government in 2007. The proceedings before the Court are still pending.

¹⁶¹ Kozak v. Poland, application No. 13102/02 lodged on 23 August 2001.

H.3. Limited access to advertising agencies

Homophobic attitudes in Polish society are also visible in the approach of advertising and outdoor advertising campaigns prepared by the leading LGBT non-governmental organisation in Poland, the Campaign Against Homophobia. At the end of 2007, the Campaign Against Homophobia prepared a campaign entitled 'You are not alone'. The main idea of the campaign was to put up posters in different public places presenting homosexual 'everymen', thus indicating the general problem of discrimination. Every poster included a slogan indicating a profession and the fact that somebody exercising this profession is a homosexual (e.g. 'I am a dentist. I am a lesbian'). This slogan was followed by a name (e.g. Anna) and the place of residence. In the middle of the poster there was a picture of the given person exercising this profession, where the face was not recognisable. At the bottom of the poster, there was another slogan e.g. 'We are more than 6,000 in Toruń' (different numbers in different cities).

However, the organisers were unable to implement this campaign with full effectiveness. In Toruń, the public transport company informally let them know that it would not work with the campaign. Furthermore, one of the outdoor advertising firms also refused to place posters on their pillars and billboards. This situation was reported in media with great criticism of such refusal. Following this, the outdoor advertising company tried to change its position, but by that time the advocacy campaign had already ended.

It should also be noted that Robert Biedroń, leader of the Campaign Against Homophobia, was refused the right to promote his book *Tęczowy elementarz* [*Rainbow Elementary*], describing basic issues on homosexuality in Poland, in Empik, one of the largest chains of bookstores in Poland. He was not able to have meetings with readers as an author. In the official reply, the PR manager of the network claimed that 'the strategy of communication of the firm includes supporting only such titles which do not violate somebody's reputation or religious beliefs', and that 'such meetings may also result in objections by customers who are in the bookstore at that time, and the topic of discussion may shock or offend somebody's feelings'.

In 2008 and 2009 another cases of limiting the access to goods and services for LGBT organisations were reported. The Campaign Against Homophobia was unable to implement the action of promoting their activities as an NGO because of the refusal of the private company in Wrocław to print their posters. Furthermore, the organisers of the Festival 'Culture for Tolerance' in Kraków were informed by the employee of a private printing house, that the pictures for the exhibition devoted to the Argentinian lesbians, will not be printed as they violate his religious beliefs and his worldview. The owner of the printing house stated that he respects the refusal of his employee although he personally would accept such order. Finally the owner refunded the organisers the costs of the order. It is worth to note, that the pictures did not contain any shocking or

controversial symbols or contents, they only presented graffiti found by the author on the walls in Argentinian cities, with the slogans such as ‘Heterosexuality is not obligatory’.¹⁶²

Another example of denying the access to advertisement took place in Rzeszów, where the public transport company refused to place the posters of Radio ‘Eska Rock’, as they showed two male popular TV and Radio presenters laying together in bed. The company stated that the content of the advertisement may promote homosexuality. The Director of the public transport company in Rzeszów stated that he has no prejudice towards homosexuals but a public company is not allowed to promote them as it may harm public morals and company’s reputation. Finally the posters were placed on the public buses in a censored version.¹⁶³

As to the legal possibilities of enforcing the prohibition of discrimination in access to goods and services, especially in regard to private companies and enterprisers in Poland, experts indicate, i. a. Article 32 Section 2 of the Polish Constitution, prohibiting discrimination in political, social or economic life and the regulations of *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym* [Countering the Unfair Market Practices Act], adopted in 2007. The Act stipulates that the ‘unfair market practices’ are to be understood as ‘practices contradictory to good customs’. This definition seems thus sufficiently general to cover also the prohibition of discrimination.¹⁶⁴

H.4. Collection of personal data by the police

The Law on the collection, processing and transmission of criminal information of 06.07.2001¹⁶⁵ grants the police power to gather sensitive personal data about suspects, minors committing indictable criminal offences, people without a confirmed identity or who try to conceal their identity, and fugitives, including without their knowledge and consent. Article 20 Section 18 of the Law on the Police¹⁶⁶ provides that all data concerning racial or ethnic origin, political opinions, religious or philosophical convictions, religious, party or trade union membership, data about the state of health, addictions or sexual life of persons under suspicion of indictable criminal acts who are acquitted are subject to

¹⁶² Press information of 04.04.2009, http://cjpgazeta.pl/cjg_krakow/1,91645,6465568,Lesbijki_Tego_wam_nie_wydrukujemy.html

¹⁶³ Press information of 12.06.2008, http://miasta.gazeta.pl/rzeszow/1,34962,5307554,Cenzura_wedlug_MPK.html?skad

¹⁶⁴ E. Siedlecka, ‘Homofobia zakazana w usługach’ [‘Homophobia banned in services’], an interview with dr Adam Bodnar, in: *Gazeta Wyborcza*, available at http://wyborcza.pl/1,75478,6279705,Homofobia_zakazana_w_uslugach.html

¹⁶⁵ Poland/*Ustawa z dnia 6 lipca 2001 r. o gromadzeniu, przetwarzaniu i przekazywaniu informacji kryminalnych*, *Dziennik Ustaw* [Journal of Laws] of 2001, No. 110, item 1189.

¹⁶⁶ Poland/*Ustawa z dnia 6 kwietnia 1990 r. o Policji*, unified text – *Dziennik Ustaw* [Journal of Laws] of 2007, No. 57, item 390.

immediate destruction by the commission after the judgment becomes final. However, there is no parallel provision protecting sensitive data of witnesses or victims as parties in such proceedings.

Thus, the regulation regarding the processing of personal data by the police is inadequate, since it leaves these categories of persons unprotected, even if all of them individually have the right to have their personal data removed from the police registers. The clear consequence of this shortcoming is that homosexual people are unwilling to report any criminal acts against them, fearing that their sensitive data will be collected by the investigative bodies or might be used by unauthorised third parties.

It is also worth noting that the *Instytut Pamięci Narodowej (IPN)* [Institute for National Remembrance], Commission for the Prosecution of Crimes against the Polish Nation, decided not to investigate a case concerning activities undertaken by *Milicja Obywatelska* [Citizens' Militia] against homosexuals in 1985-1987¹⁶⁷. This case was brought by Szymon Niemiec and Jacek Adler on 25.09.2007. The Institute found that the so-called Action Hyacinth did not fulfil the criteria of a communist crime as it was within the statutory duties of the Citizens' Militia (regarding crime prevention and the fight against crime).

In December 2009 a group of 29 deputies of *Prawo i Sprawiedliwość* [Law and Justice] addressed to the Ministry of Interior and Administration an interpellation calling to “set up within the Ministry of Internal Affairs a unit dealing with counteraction against sexual crimes committed against children by paedophiles including paedophiles-homosexuals”¹⁶⁸. As Stanisław Pięta, the initiator of the interpellation, stated on his website, they requested *inter alia* for increased monitoring of Internet, including “websites with homosexual pornography, blogs of homosexuals, websites of homosexual activists and websites of propagators of homoideology” as well as for “identification and monitoring of nightspots, clubs and dens visited by the homosexuals” and for “trainings for the police indicating how to disclose paedophiles among homosexual individuals”¹⁶⁹.

H.5. Use of same-sex marriage celebration in the official address of the President

- The President of Poland used in an official address transmitted on national television on 17 March 2008, seen by approximately 8 million viewers, the video capture of a same-sex couple celebrating their marriage in Canada.

¹⁶⁷ These activities are known under the cryptonym of *Akcja Hiacynt* (Action Hyacinth). They were intended to collect sensitive data about the LGBT community, however, they could also be used for blackmail and the recruitment of new secret agents or informants.

¹⁶⁸ Interpellation No. 13696 lodged on 21 December 2009, <http://orka2.sejm.gov.pl/IZ6.nsf>

¹⁶⁹ <http://www.spieta.com.pl/> (access on 26 January 2010).

This video was shown to underline the President's concerns on the full applicability of the EU Charter of Fundamental Rights in Poland. In his opinion, applicability of the Charter would mean that one day same-sex marriages would be „imposed on Poland”.

- The gay couple in the official presidential address were Brendan Fay and Timothy Moulton from New York, known for their involvement in the field of LGBT rights. The Chancellery of the President of Poland [*Kancelaria Prezydenta RP*] did not obtain the couple's consent for using the video capture. Representatives of the Chancellery claimed that there was no need for this, since the video has been available on a website open to the public and Fay and Moulton invited journalists and wanted this video to be publicly available.
- Having heard about the President's address, Fay and Moulton submitted an official letter to the President of Poland through the Polish Consul General in New York. Fay and Moulton felt defamed with such a use of their marriage celebration video. They expressed concern that the video was used in order to create a fear against same-sex couples. Their letter stated: “We are frustrated to hear that images from such a joyous day are used to spread intolerance”.
- The Polish Consul General apologized to the couple. He stated specifically that he would like to „express [his] gratitude for your conciliatory approach and the empathy you have demonstrated from the first moment this pitiful incident surfaced.”¹⁷⁰
- In another letter to the President Fay and Moulton asked for a private meeting during which they wanted to explain him different issues connected with life of same-sex couples and discrimination of LGBT people. On 30, 31 March and 1 April 2008 they visited Poland and meet different persons active in the field of anti-discrimination, including Mr. Ryszard Kalisz, head of the Parliamentary Commission on Justice and Human Rights, representatives of LGBT organizations and the Helsinki Foundation for Human Rights. They were also interviewed by one of the major TV stations in Poland – TVN – on a very popular talk show „Teraz My”.
- The President did not accept the proposal of a meeting. Among Polish politicians there were different opinions whether President should apologize to Fay and Moulton for the use of the video capture in his official address. According to E. Radziszewska, a new Governmental Plenipotentiary for Equal Status, the President should apologize to them. However, in the opinion of Stefan Niesiołowski, parliamentary deputy from *Platforma Obywatelska* [Civic Platform] and *Wicemarszałek Sejmu* [Vice-Marshall of the Sejm], the President does not have such an obligation. He said that their marriage was not a real marriage but a parody of marriage. In his opinion by requesting a meeting they only tried to advertise for themselves.¹⁷¹

¹⁷⁰ Sewell Chan, A New York Activist, a Wedding Photo and the Future of Poland, New York Times, 19 March 2008, available at <http://cityroom.blogs.nytimes.com/2008/03/19/a-queens-activist-a-wedding-photo-and-the-future-of-poland/#more-2342>

¹⁷¹ Dziennik, Niesiołowski: Niech geje się nie pieklą, 26. March 2008, available at http://www.dziennik.pl/polityka/article142722/Niesiolowski_Niech_geje_sie_nie_piekla.html

- Fay and Moulton are now considering to start legal proceedings for reasons of violation of their personal rights due to the official address of the President. Their visit – apart from the question whether the President should apologize or not - once again ignited the discussion on the introduction of same-sex marriages or partnerships in Poland.
- In December 2008 Fay and Moulton sent another letter to President Lech Kaczyński, requesting again a meeting. The letter contained Christmas wishes for President and his family. The Chancellery of the President of Poland replied to the letter, encouraging the couple to visit Poland during their trip to Europe in 2009 and to attend the Music Festival of Ludwig van Beethoven. The response was described by the Chancellery as a “courtesy reply”, including no official invitation for Fay and Moulton.¹⁷²

H.6. Public statements by politicians

In 2008 and 2009 two significant cases of homophobic attitude, presented publicly by the members of the Polish biggest political parties, were recorded. First case concerns *Wicemarszałek Sejmu* [Vice-Marshall of the Sejm] Stefan Niesiołowski, member of the ruling party *Platforma Obywatelska* [Civic Platform]. Vice-Marshall Niesiołowski stated that he supports the idea of establishing in law obligatory separation of children from a homosexual parent if such parent ‘brings home’ another homosexual. This statement was followed by the strong reaction of LGBT organisations.¹⁷³

Another member of the Polish Parliament, Deputy Artur Górski from *Prawo i Sprawiedliwość* [Law and Justice], stated during a parliamentary debate, that ‘homosexuality should not be regarded as ordinary inclination to sin, because it exceeds all such inclinations in its vileness’. Again, the Campaigned Against Homophobia protested against this homophobic attitude of the member of the Polish Parliament. The statement was also strongly criticised by Ms. Elżbieta Radziszewska, the Plenipotentiary for the Equal Treatment.¹⁷⁴

In January 2010 Janusz Palikot, a prominent politician of the ruling party *Platforma Obywatelska* [Civic Platform] and a deputy of *Sejm*, stated in the press interview, that he was ‘searching for’ the evidences of the homosexuality of Zbigniew Ziobro, former Minister of Justice in the Government of *Prawo i Sprawiedliwość* party [Law and Justice] and his political opponent. Palikot

¹⁷² Media information of 17.03.2009, <http://www.tvn24.pl/12690,1591178,0,1,jak-kancelaria-prezydenta-koresponduje-znbspejami,wiadomosc.html>

¹⁷³ The text of the official statement of LGBT organisations available at http://monitoring.kph.org.pl/index.php?option=com_content&view=article&id=34:kph-interweniuje-w-sprawie-homofobicznych-wypowiedzi-wicemarszaka-niesioowskiego&catid=1:news

¹⁷⁴ Press information of 05.02.2009, http://wiadomosci.gazeta.pl/Wiadomosci/1,80708,6241108.Radziszewska_będzie_interweniowac_ws_wypowiedzi_Gorskiego.html

claimed that he did so in order to expose the hypocrisy of Law and Justice which he considers to be a homophobic organisation.¹⁷⁵ In fact the statement of Janusz Palikot was commonly perceived as an example of a homophobic prejudice.

In February 2010 Polish media reported about another example of homophobic statements of the member of Civic Platform – one of the town councillors of Tomaszów Mazowiecki. In the dispute with a local media representatives Tadeusz Adamus stated i. a. that the journalist Agnieszka Łuczak, who officially admitted that she is a lesbian, has no chances ever to become a town councillor as she is a ‘member of the sexual minority’. He added that it is necessary to ‘think with the head, not with the ovaries’.¹⁷⁶ That statements of Mr. Adamus were strongly criticised by other town councillors, representatives of town’s authorities and the Plenipotentiary Elżbieta Radziszewska. The case is going to be further discussed during the meeting of the town council.

H.7. Eurobarometer Survey ‘Discrimination in the EU 2009’ – Poland

The overall estimation of the situation in Poland in regard to homophobia and discrimination on grounds of sexual orientation should also include the results of the Eurobarometer’s survey, entitled ‘Discrimination in the EU 2009’.¹⁷⁷ The results show that a half of Polish respondents consider sexual orientation to be a source of discrimination in their country. Answering the question: ‘.. when a company wants to hire someone and has the choice between two candidates with equal skills and qualifications, which of the following criteria may, in your opinion, put one candidate at a disadvantage?’, 25 per cent of respondents answered that in Poland this criteria would be sexual orientation. At the same time Polish respondents would be less satisfied than respondents from other EU Member States generally, with the appointment of a homosexual person to a senior political post in Poland.

¹⁷⁵ The full text of the interview is available at http://www.polskatimes.pl/stronaglowna/206990.palikot-tusk-wychowuje-teraz-schetyne-a-nowak-dostal-w-zeby.id.t.html#material_2

¹⁷⁶ Press information of 02.02.2010, http://www.tokfm.pl/Tokfm/1,103454,7518494,Radny_PO_dyskryminuje_dziennikarke_z_podu_orientacji.html

¹⁷⁷ The results of the whole survey available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_317_fact_pl_en.pdf

H.8. The promotion of ‘Yogyakarta Principles’ and knowledge on the legal issues in regard to LGBT rights.

In 2008 and 2009, as a result of the efforts undertaken jointly by the Poznań Human Rights Centre Institute of Legal Studies of the Polish Academy of Sciences, Human Rights Institute, Faculty of Law and Administration of the Warsaw University and HFHR, significant initiatives were to be noted. Their aim was to introduce different issues in regard to LGBT persons’ rights to the representatives of academia, NGOs and public authorities. On 27.10.2008 a nationwide Conference ‘Sexual Orientation and Sex Identity - Legal and Social Issues’ took place in Poznań, gathering the most prominent legal experts, LGBT activists and many other representatives of academic world and civil society. The part of the Conference was devoted to the promotion of the ‘Yogyakarta Principles’, a document concerning the application of international human rights law in relation to LGBT persons. This unique Conference, held under the chair of Prof. Roman Wieruszewski, Director of the Poznań Human Rights Centre and one of the co-signatories of the ‘Yogyakarta Principles’, touched upon the crucial and most interesting issues of the LGBT human rights protection and was accompanied by a vivid and fruitful discussion.

The most important outcome of the Conference was a book containing the presented papers, discussion record and Polish translation of the ‘Yogyakarta Principles’ (prepared by the Poznań Human Rights Centre, Human Rights Institute - Faculty of Law and Administration of the Warsaw University and HFHR), published in 2009. The publication is undoubtedly the next significant step on the way to strengthen and promote legal standards regarding the rights of LGBT individuals in Poland.

H.9. Parliamentary debate on the governmental draft amendments to Ustawa o organizacjach pożytku publicznego i o wolontariacie [Public Benefit Organisations and Voluntary Services Act]

During the parliamentary debate which took place on 17.12.2009 in Polish *Sejm*, Deputy Sylwester Pawłowski, member of *Klub Poselski Lewica* [Parliamentary Club of the Left], proposed an amendment to the governmental

draft, which would add countering sexual orientation to the catalogue of ‘public tasks’.¹⁷⁸ Previously, the government issued a negative opinion in that regard. Deputy Pawłowski asked representative of the Ministry of Labour and Social Policy why in a democratic state with a long tradition of tolerance, organisations active in the field of, i. a. discrimination of sexual minorities, are being deprived of the possibility to benefit from the regulations of the Public Benefit Organisations and Voluntary Services Act. The representative of the Ministry answered that the areas of discrimination mentioned by Deputy Pawłowski are covered by different fields of different regulations, giving actually no answer to the question stated. During the vote on the amendment 32 deputies were for its adoption, while a vast majority (380 deputies) voted against it.

During the same debate another amendment was proposed. It concerned inclusion of the activities undertaken to the advantage of the maternity and parenthood in the catalogue of ‘public tasks’ mentioned above. This amendment was supported and adopted by 400 deputies (7 deputies were against it, 1 abstained).

H.10. Reactions on the Lithuanian law on the protection of minors against the detrimental effects of public information

Polish NGOs were strongly alarmed by the draft of the Lithuanian law. The Campaign Against Homophobia addressed the President of Lithuania asking him to place a veto on the law¹⁷⁹. Association Lambda and Amnesty International called the public to sign a letter addressed to the Speaker of the Lithuanian Parliament¹⁸⁰. When the law was passed, the numerous protests were organized including picket in front of the Lithuanian Embassy in Warsaw¹⁸¹. The Lithuanian regulation was also condemned by the group of 31 Polish deputies, mainly from the left-wing parties, who issued a letter to the Speaker of the Lithuanian Parliament stating that this law “excludes Lithuania from the community of democratic and modern European countries”¹⁸². In turn, the deputies from *Prawo i Sprawiedliwość* declared intention to prepare a draft of law that would be inspired by Lithuanian regulation. In this regard, in August

¹⁷⁸ The text of the record from the debate available at <http://orka2.sejm.gov.pl/Debata6.nsf/main/2D226ACA#168>

¹⁷⁹ <http://www.kph.org.pl/pl/allnews/15-kph/177-kph-przeciwko-dyskryminujcej-ustawie> (access on 26 January 2010).

¹⁸⁰ <http://www.lambdawarszawa.org/content/view/352/1/> (access on 26 January 2010).

¹⁸¹ <http://www.kph.org.pl/pl/allnews/15-kph/194-protesty-pod-ambasadami-litewskimi-w-europie-sprzeciw-kph-wobec-dyskryminujcego-prawa-na-litwie-> (access on 26 January 2010).

¹⁸² Press information of 21 July 2009, http://dziennik.pl/wydarzenia/article418688/Polscy_poslowie_bronia_gejow_i_lesbijek.html

2009 the head of the parliamentary club of this party ordered the translation of the Lithuanian law¹⁸³. It is important to mention that this is not a first initiative of this kind in Poland since in 2007 a draft of the law banning “homosexual propaganda” in schools was presented by Roman Giertych from *Liga Polskich Rodzin* [League of Polish Families], the Ministry of Education at that time¹⁸⁴.

H.11. Blood donation

The controversy concerning honorary blood donation by homosexuals has been existing since the eighties of the last century when the homosexuals had been treated as an AIDS risk group what eliminated them as donors. Since 2005 the questionnaire filled by the donors has not inquired anymore about homosexual contacts but about risk-taking sexual behaviors, regardless personal sexual orientation. The problem revived in 2008 when media informed that *Narodowe Centrum Krwi* [National Blood Centre] which acts under supervision of Ministry of Health, intended to change the questionnaire and introduce question on homosexual contacts¹⁸⁵. This change was not introduced and *Narodowe Centrum Krwi* stated that it aimed to specify which sexual behaviors can exclude potential donors. In the same time the statement underlined that there was no intention to prevent homosexuals from drawing blood¹⁸⁶. Even though it is evident from legal perspective that homosexuals can be blood donors, the prejudices and stereotypes still exist. For instance in 2008 the Campaign Against Homophobia reported that *Niezależne Zrzeszenie Studentów na UMK w Toruniu* [Independent Students’ Association of Toruń University] who organized the action of blood donation informed on its website that homosexuality, which was listed together with alcoholism and drug addiction, was one of the direct contraindications for blood donation¹⁸⁷. In February 2010 a daily *Dziennik* informed that blood donation by homosexuals is still questionable. By instance some local blood donation points still inform on their websites that homosexual orientation is a serious obstacle to be blood donor¹⁸⁸.

¹⁸³ <http://www.pis.org.pl/article.php?id=15686> (access on 26 January 2010).

¹⁸⁴ <http://www.monitor.edu.pl/newsy/projekt-projektu-juz.html> (access on 26 January 2010).

¹⁸⁵ *Nie pobiorą krwi od geja* [They won’t draw blood from gay], in: *Dziennik Polska-Europa-Świat*, 9 May 2008.

¹⁸⁶ <http://www.nck.gov.pl/index.php?page=komentarz-do-artykulu-z-09-05-2008> (Access on 26 January 2010).

¹⁸⁷

http://monitoring.kampania.org.pl/index.php?option=com_content&view=article&id=25:dyskryminacja-na-umk-w-toruniu-kph-interweniuje&catid=1:news (access on 26 January 2010).

¹⁸⁸ Press information of 5 February 2010,

http://www.dziennik.pl/wydarzenia/article542627/Nie_chca_krwi_od_gejow.html?service=print

H.12. Access to culture

In 2009 there were several alarming incidents concerning participation of LGBT persons in cultural life.

In October 2009 deputy Stanisław Pięta, member of *Prawo i Sprawiedliwość* [Law and Justice Party], interpellated to the Minister of Culture and National Heritage on the issue of the National Museum's plans to organize an exhibition of objects connected to homosexuality. The interpellation included extremely offensive statements in regard to homosexual persons, equating homosexuality with zoophilia, pedophilia and necrophilia and accusing the Director of the National Museum of promoting deviation and demoralization.

Deputy S. Pięta asked the Minister of Culture and National Heritage if he intends to stop this discredit of the National Museum, one of Poland's most important cultural institutions¹⁸⁹. Answering the interpellation, the Ministry explained that the exhibition is 'the element of the discussion on the contemporary meaning of symbols existing in the art since ages' and that the task of the Museum is to stimulate the process of social development and to form democracy¹⁹⁰.

In November 2009 the Vice-President of Opole refused the project of *Żywa biblioteka* (Living library) to be organized in *Miejski Ośrodek Kultury* (City Cultural Centre). *Żywa biblioteka* is an undertaking aimed to break stereotypes and prejudices concerning different social groups. It permits to meet with representatives of these groups and share their experiences. The organizers of *Żywa biblioteka* in Opole made a paid lease contract with *Miejski Ośrodek Kultury* managed by City Hall in order to place the event in its premises. Arkadiusz Karbowski, the Vice-President of the city ordered to break a contract when he got to know that a homosexual was to be one of the "living books"¹⁹¹. Interviewed, he stated that homosexuality is a deviation and "a dissidence that cannot be tolerated in the public sphere"¹⁹². The event finally took place in premises of Opole University¹⁹³. A few days later also in Rzeszów, another city where the event was to be hosted, the Regional Cultural Centre withdrew its consent to let its premises¹⁹⁴.

In November 2009 the festival *Bez Tabu* [No Taboo] took place in the City Cultural Centre in Olsztyn. The festival aimed to present problems of different

¹⁸⁹ Interpellation No 12370 lodged on 20 October 2009, <http://orka2.sejm.gov.pl/IZ6.nsf/main/161CCD77>

¹⁹⁰ <http://orka2.sejm.gov.pl/IZ6.nsf> (access on 27 January 2010).

¹⁹¹ Press information of 20 November 2009, <http://opole.gazeta.pl/opole/1,35086,5971960.html>

¹⁹² Interview for *Gazeta Wyborcza* of 20 November 2009; <http://opole.gazeta.pl/opole/1,35086,5971964.html>

¹⁹³ Press information of 21 November 2009; <http://opole.gazeta.pl/opole/1,35086,5976830.html>

¹⁹⁴ Press information of 26 November 2009; <http://rzeszow.gazeta.pl/rzeszow/1,34962,5994629.html>

groups facing social exclusions, including homosexuals. One of the events during the festival was also a concert of the drag queens. A few days after the festival Jerzy Szmit, the Vice-President of the city, announced that “the city space is not a proper place to propagate gay ideology. There is no moral consent for such things”. He argued that the festival indignated inhabitants and was strongly criticized by local catholic association¹⁹⁵.

In this context it is worth to recall an incident from 2005. *Krajowa Rada Radiofonii i Telewizji* (The National Council of Radio Broadcasting and Television) who shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television, issued a rebuke to the Director of the Channel 2 of Public Television who emitted a video clip of the band *Pudelsi*. The video clip portrayed subtly two women dancing together and contained a very short scene of their kiss. The Council decided to intervene after receiving complaint from a private person. The Council did not accept explanations provided by the Director of the Channel 2 and urged to “select carefully and prudently the content of the broadcasts emitted in time when they may be watched also by children”¹⁹⁶.

Another example illustrating attitude to homosexuals in media is linked to the annual contest for the “Most beautiful couple” organized by *Gala*, one of the most popular magazines. In 2008 the readers of *Gala* awarded this prize to a gay couple – T Raczek and M. Szczygielski who are media personalities. The ceremony was broadcasted as usually by Channel 2 of Public Television. After the ceremony *Nasz Dziennik*, a conservative and catholic daily presented vivid reactions towards this event claiming that the Public Television was used to promote “indecent attitudes”. A few days later the Board of Public Television decided that the ceremony of *Gala* awards and other events of this kind will not be transmitted in future by Public Television. Although no clear reason for this decision was presented, it was widely commented in media that the direct cause was the prize for Raczek and Szczygielski¹⁹⁷.

¹⁹⁵ Press information of 4 December 2009,

http://olsztyn.gazeta.pl/olsztyn/1.48726.7333154.Jerzy_Szmit_wiceprezydent_Olsztyna_Nie_dla_gejow.html

¹⁹⁶ Annual Report of *Krajowa Rada Radiofonii i Telewizji*, March 2005, available at www.krrit.gov.pl/bip/Portals/0/sprawozdania/spr2005/spr2005.pdf

¹⁹⁷ E.g. press information of 2 December 2008,

http://wiadomosci.gazeta.pl/Wiadomosci/1.80708.6017789.Raczek_i_Szczygielski_najpiekniejsza_para_TVP.html

I. Good practices

In the overall assessment, the judicial approach towards the exercise of freedom of assembly by LGBT people is an example of good practices. Judgments concerning Equality Marches are meaningful due to protection of basic values in a democratic society. Some of the statements included in these judgments may reverberate in other EU countries, especially new Member States.

Another example of good practices is the positive cooperation between the Polish ordinary courts and administrative courts and NGOs in litigation of precedent cases. Polish courts accept public interest litigation, especially if an organisation is presenting an *amicus curiae* brief or legal opinion, and may take advantage of views expressed therein.¹⁹⁸ It is of great help in advancing the rights of the LGBT community and may have good effects if the legislator or the executive is not responding correctly to the needs and problems of the given minority.

An awareness campaign carried out by the Polish Ministry of Labour and Social Policy within the framework of own activities of 2007 European Union's "European Year of Equal Opportunities for All" brought many positive effects. The realization and coordination of the campaign planned was inducted to the Department for Women, Family and Counteracting Discrimination of the Polish Ministry of Labour and Social Policy. Additionally, for the time of the campaign, the advisory body to the Department – the Advisory Committee – was established. It included group of experts on the issue of discrimination on the grounds of sexual orientation (ex. experts of the Campaign against Homophobia).¹⁹⁹ One of the most important outcomes of the "European Year of Equal Opportunities for All" was the research study *Situation of Sexual Minorities in Poland in the Light of Empirical Studies*, conducted under the supervision of Professor Ireneusz Krzemiński from the Sociology Institute of the Warsaw University, published in March 2008.²⁰⁰ The study delivered many information on the actual situation of the LGBT persons in Poland. Another project fulfilled within the framework of the campaign in Poland was the launching of the internet portal *Multikulti*, devoted to the issue of all grounds for discrimination and realized by the Campaign against Homophobia.²⁰¹ All activities, projects and actions, (along with their results) which took place in Poland within the "European Year of Equal Opportunities for All" are described

¹⁹⁸ Please see e.g. *amicus curiae* brief submitted by Polskie Stowarzyszenie Edukacji Prawnej [Polish Association of Legal Education] in case of accused P. Aleksandrowicz and J. Tomczask on homophobic hate speech. Available at www.psep.pl/pliki/news/obr/uwagi_wstepne.pdf

¹⁹⁹ The full list of the members of the Advisory Committee is to be found at: <http://www.kobieta.gov.pl/?7,12,135>,

²⁰⁰ Report from the Study available at: <http://www.kph.org.pl/images/stories/raporty/PostawyWobecOsobHomoseksualnychKrzeminski.pdf>

²⁰¹ *Multikulti* project web page: <http://www.multikulti.org.pl/>

at the web page of the Department for Women, Family and Counteracting Discrimination of the Polish Ministry of Labour and Social Policy.²⁰² It is also worth to mention that this Department organized in 2006-2008 contests for non-governmental organisations under which funds were provided for activities relating to counteract diverse forms of discrimination including discrimination based on sexual orientation. The abovementioned project *Multikulti* was one of beneficiaries of this program. Unfortunately the Department for Women, Family and Counteracting Discrimination of the Polish Ministry of Labour and Social Policy was dissolved in the beginning of 2010.

The appointment of special bodies dealing with the problem of discrimination of LGBT people can certainly be described as a positive development. In 2009 the Plenipotentiary of the President of Warsaw for the discrimination on grounds of ethnic and national origin, sex, age, sexual orientation and disability and the Plenipotentiary for gays and lesbians of Ogólnopolskie Porozumienie Związków Zawodowych [All Poland Alliance of Trade Unions], were appointed.²⁰³

Another example of good practices concerns the pilot training for the Police in Gdańsk, carried out i. a. by the representatives of the Campaign Against Homophobia.²⁰⁴ The training included the issues of discrimination of sexual minorities and the proper reaction and behaviour during the contact with LGBT persons. Furthermore, special, free of charge courses are offered by the Polish Ministry of Labour and Social Policy to the employees of the public sector (policemen, teachers, administrative officers). The courses are devoted to the problem of countering discrimination, i. a. discrimination of sexual minorities.

Many positive developments are also to be noted in the field of LGBT organisations activities. Among number of examples of such activities, two may be seen as particularly important. 'Queer studies', an initiative of the Campaign Against Homophobia, offers a possibility of the interdisciplinary studies in the research areas of sexual orientation and identity, sexual prejudice and stereotypes, social perception of LGBT people. The studies are directed by the best Polish scholars and experts in the field. Another interesting action, entitled Festival Tęczowych Rodzin [Festival of Rainbow Families], is being organised in order to educate about different types of family models and familiarise Polish society with that issue.

In April 2009, Professor Zbigniew Hołda, a prominent Polish lawyer, Board member and Vice-President of HFHR, received a highly prestigious price of

²⁰² <http://www.kobieta.gov.pl/?7,12,308>.

²⁰³ Information available at http://www.queercafe.pl/index.php?option=com_content&view=article&id=577:pitbull-od-dyskryminacji-w-warszawskim-ratuszu&catid=81:kraj&Itemid=458; <http://opzz.org.pl/aktualnosci/glowna.html/id/668>

²⁰⁴ News release of the Campaign Against Homophobia available at <http://monitoring.kampania.org.pl/images/biuletyn6pl.pdf>

“Pro Bono Lawyer”. Professor Hołda represented before the European Court of Human Rights i. a. the applicants in the famous case of banning in 2005 the Equality Parade by the President of Warsaw. Professor Hołda was also granted the ‘Tolerance Award’, the prize of European LGBT organisations, [in recognition of](#) his great services in the fight for the LGBT rights in Poland. Professor Zbigniew Hołda passed away in May 2009.

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	B. K. versus CZA-TA
Decision date	16 March 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	District Court in Płock (Sąd Rejonowy w Płocku)
Key facts of the case (max. 500 chars)	The plaintiff claimed compensation (30.000 PLZ) for harassment and intimidation on the basis of his sexual orientation at work. Due to this situation, he terminated his employment.
Main reasoning/argumentation (max. 500 chars)	In accordance with Directive 2000/78/EC the burden of proof is on the respondent, while the person who claimed to be wronged has to establish facts, from which the court may presume that direct or indirect discrimination took place.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Direct or indirect discrimination does not occur in a situation when the management and colleagues treat a person less favourably due to objective reasons - non-fulfilment or improper fulfilment of his duties.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	No discriminatory treatment has been found in this case since major proofs could be interpreted in favour of both parties to the proceedings. Due to procedural failures, the appeal has been dismissed.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	Mirosław Sielatycki versus the Minister of National Education [<i>Centralny Ośrodek Doskonalenia Nauczycieli – (National In-Service Teacher Training Centre (NTTC))</i>].
Decision date	5 June 2007 31 March 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	District Court in Warsaw (Sąd Rejonowy w Warszawie) Regional Court in Warsaw (Sąd Apelacyjny w Warszawie)
Key facts of the case (max. 500 chars)	The plaintiff claimed compensation (19.000 PLN) for discrimination in employment and unfair dismissal from office as the director of the National In-Service Teacher Training Centre. The dismissal followed his decision to publish a training manual, which allegedly promoted homosexuality.
Main reasoning/argumentation (max. 500 chars)	The case was decided on the basis of the Labour Code provisions prohibiting discrimination in employment on the ground of political views (not sexual orientation). Sexual orientation was at stake in this case but only to the extent the parties disagreed on this issue within the work context. The court found that the Minister of Education, Roman Giertych, and Mr. Mirosław Sielatycki differed in their view on the role of schools.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Discrimination on the basis of sexual orientation does not take place where neither of the parties is of different sexual orientation, but just of different opinion about the type of education regarding this matter.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The District Court found discrimination and unfair dismissal and awarded almost the exact sum required by the plaintiff – 19.000 PLN compensation (16.000 PLN for discriminatory treatment on the basis of political views and 3.000 for unfair dismissal). In result of the appeal brought by the NTTC, the Regional Court affirmed the judgment of the District Court as to its finding (discriminatory treatment and unfair dismissal), but rejected as to the amount of compensation awarded for discriminatory treatment (reducing it from 16.000 to 5 300 PLN). The amount of compensation awarded for unfair dismissal was upheld.

No more case law data are available.

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

Case title	III SA/Gd 229/08
Decision date	6 August 2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Regional Administrative Court in Gdańsk [<i>Wojewódzki Sąd Administracyjny w Gdańsku</i>]
Key facts of the case (max. 500 chars)	A case was lodged by a female citizen of Poland who wished to register a partnership with a female citizen of Germany under provisions of German law which recognize same-sex partnership. The woman was refused to by <i>Kierownik Urzędu Stanu Cywilnego</i> [the Head of the Civil Status Office] to receive a certificate stating that she is not married to anyone else who claimed that she did not have any legal interest to obtain such a certificate. She made an appeal to the Governor of the Voivodship [<i>Wojewoda</i>] which was also dismissed. Finally she lodged complaint to the Regional Administrative Court.
Main reasoning/argumentation (max. 500 chars)	Law does not allow to examine if, with whom or where an applicant wishes to contract marriage or to test authenticity of her/his intentions. The only task of the body entitled to issue certificates is to examine if a person fulfill conditions stipulated by Polish law which are necessary to be fulfilled in order to get married. A citizen is entitled to receive such certificate without substantiating her/his request and in any case her/his intentions cannot be prerequisite for the refusal.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	This is the first judgement clearly confirming that a homosexuals who wish to enter abroad in the same-sex partnerships cannot meet any obstacles while applying in the Civil Status Office in order to receive the certificate stating that she/he is not married to anyone else.

No case law data on freedom of movement are available.

Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC, case 1

Case title	Application for the refugee status of a Chechen national
Decision date	1 October 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Chief of the Office for Foreigners (Szef Urzędu ds Cudzoziemców)
Key facts of the case (max. 500 chars)	A Chechen woman was not accepted in her locality and family due to her problems with gender self-identification. She feared persecution on this ground and fled to Poland.
Main reasoning/argumentation (max. 500 chars)	The applicant fear of persecution and serious harm or even loss of her life in the country of origin was well-founded.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The applicant feared persecution on the basis of belonging to a particular social group (or rather non-belonging to any sex (female or male) group).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Chief of the Office for Foreigners granted the applicant the refugee status.

Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC, case 2

Case title	Application for the refugee status of a Moldovan national
Decision date	December 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Chief of the Office for Foreigners (Szef Urzędu ds Cudzoziemców) as the first instance Council for Refugees (Rada ds Uchodźców) as the appeal instance
Key facts of the case (max. 500 chars)	A Moldovan man was subject to persecution due to his sexual orientation. He was arrested for taking part in a religious demonstration and raped at the police station. The video tape of this incident was later used to blackmail him. He fled to France, where he applied for the refugee status. Then he returned to Moldova, where he was still subject to persecution. His application for the refugee status in Poland has been denied.
Main reasoning/argumentation (max. 500 chars)	The situation of homosexuals in Moldova is relatively good and there are not subject to intimidation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	For the first time, the Council for Refugees will review a case where the applicant's sexual orientation was raised as the ground for granting him the refugee status.

No more case law data are available

Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

No case law data on family reunification are available

Chapter E, Freedom of assembly, case 1

Case title	No. K 21/05 Road Traffic Act
Decision date	18 January 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Constitutional Court (Trybunał Konstytucyjny) in abstract review of constitutionality of the Road Traffic Act
Key facts of the case (max. 500 chars)	In result of series of instances when the Equality Parades were banned, the Ombudsman referred the Road Traffic Act to the Constitutional Court.
Main reasoning/argumentation (max. 500 chars)	Freedom of assembly may not be limited because of the lack of symmetry between its purposes and the intentions of the organisers and participants attributed to it by media, commentators or public officials. “Moral convictions of the public officials are not a synonym for ‘public morality’ as a limitation of the freedom of assembly”. Assemblies hindering traffic should not be subject to the same administrative burden like commercial events, which are not essential for democracy and as such not within the scope of protected political freedoms
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Freedom of assembly is the constitutional and fundamental right, thus it should not fall in the same regime of administrative concessions like commercial events. Only the system of prior notifications suits the fundamental nature of this right.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Road Traffic Act submitting assemblies to the same administrative procedures as other commercial events was found unconstitutional.

Chapter E, Freedom of assembly, case 2

Case title	IV SA/Po 983/05 I OSK 329/06
Decision date	Judgment of the Regional Administrative Court (<i>Wojewódzki Sąd Administracyjny</i>) in Poznań of 14 December 2005 Judgment of the Supreme Administrative Court (<i>Naczelny Sąd Administracyjny</i>) of 25 May 2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Mayor of Poznań (Prezydent Miasta Poznania) as the administrative organ who banned the assembly Wielkopolskie Voivodship governor as the appeal administrative organ who upheld the ban Regional Administrative Court (Wojewódzki Sąd Administracyjny) as the first instance administrative court which quashed the decision Supreme Administrative Court (Naczelny Sąd Administracyjny) as the appeal administrative court which upheld the ruling of the Regional Administrative Court
Key facts of the case (max. 500 chars)	The Mayor of Poznań banned the Equality March 2005 arguing that because of risk of counter-demonstrators attacking the March (taking into account events from the previous year), there is a danger to public property, health and life of demonstrators. The decision was quashed in the Regional Administrative Court and the cassation appeal against this ruling dismissed by the Supreme Administrative Court.
Main reasoning/argumentation (max. 500 chars)	'It is the role of neither public administration nor administrative courts to analyse slogans, ideas and views shared at the assembly, being not contrary to law, especially by prism of own moral convictions of public officials or judges judging in administrative court, or by prism of convictions of the dominant part of the society. Such analysis would thwart the constitutional freedom of peaceful assembly'.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The risk of clashes between the notified assembly and any expected counter-demonstrations should not justify a ban on the assembly which has a lawful purpose.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The ban has been declared ill-founded on May 25, 2006, whereas the assembly took place in November 2005 under presumption of illegality and was brutally dispersed by the Police. There is lack of prompt procedures that would enable to review the administrative decisions before the planned date of the notified assembly.

No more case law data on freedom of assembly are available

Chapter F, Hate speech, case 1

Case title	Lesbian Women versus Przemysław Aleksandrowicz and Jacek Tomczak
Decision date	4 September 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	District Court in Poznań (Sąd Rejonowy w Poznaniu)
Key facts of the case (max. 500 chars)	The councillors of the Law and Justice Party expressed publicly that Equality Parades “may be about promoting such inclinations as paedophilia, necrophilia and zoophilia; promotion of the promiscuity, even independently from the so called sexual orientation, is glaring violation of the social cohabitation rules; we do not know if in a moment paedophilia, necrophilia and zoophilia won't be just considered as one of the sexual orientations”. Such statements were considered to be offensive for homosexual persons. The group of lesbian women in a private indictment charged the councillors with defamation on the basis of Article 212 of the Criminal Code.
Main reasoning/argumentation (max. 500 chars)	The case ended with a settlement.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It was the first case of this type in Poland. The case showed that it is possible to claim for violation of dignity of homosexuals in case of homophobic hate speech.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The case ended with a settlement between the parties, according to which the councillors had to apologize for this unfortunate comparison (at that time they were already elected as members of the Parliament).

Chapter F, Hate speech, case 2

Case title	Ryszard Giersz versus Anna Sz.
Decision date	4 August 2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	Regional Court in Szczecin (<i>Sąd Okręgowy w Szczecinie</i>)
Key facts of the case (max. 500 chars)	.Ryszard Giersz, young homosexual living in Wolin, small town (5000 inhabitants) in Western Poland, brought a civil lawsuit against his neighbour. The defendant, a woman who was in long-lasting conflict with plaintiff's family, was notoriously calling him publicly and in the presence of other people <i>pedał</i> [a faggot] and was using other offensive words concerning his sexual orientation. Her comments provoked also plaintiff's harassment by other inhabitants, specially by the group of youth.
Main reasoning/argumentation (max. 500 chars)	The Court found the infringement of the plaintiff's personal goods [<i>dobro osobiste</i>] protected by article 24 § 1 of the Civil Code. According to the Court, using the word "faggot" aimed to offend the plaintiff and this expression cannot be considered as a commonly accepted. In Court's opinion " <i>humiliation of a person while criticizing his/her sexual distinctness threatens one of the most sensitive aspects of human life</i> ".
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	It seems to be the first case where a homosexual decided to defend his rights so openly at the Court which reveals that apart from criminal proceedings, a civil action may be also used as a tool of protection against homophobic hate speech.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court forbade the defendant to infringe plaintiff's personal goods, i.e. his liberty, dignity, honour, intimate life and good name and particularly to use the word "faggot" and other abusive words as well as to comment publicly plaintiff's intimate life and his sexual orientation. The defendant was to pay satisfaction in the amount of 15 000 PLN (around 3700 EUR).

Chapter F, Hate crimes, case 2

Case title	Case against Wojciech Wierzejski
Decision date	Criminal investigations suspended for the period of term served in the European Parliament (2005-2007)
Reference details (type and title of court/body; in original language and English [official translation, if available])	General Inspector for Personal Data Protection (Generalny Inspektor Ochrony Danych Osobowych) Criminal Investigators
Key facts of the case (max. 500 chars)	One of the leaders of the League of the Polish Families Party and at the material time the Vice-Marshall of the Mazowieckie Voivodship organised a protest against LGBT demonstrations, in result of which he received letters from the LGBT activists disapproving of his action. The case concerned posting the names and email addresses of 24 signatories of the letter on the website abusing their personal data. They complained to GIODO who referred the case for criminal investigation.
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	There is no official information whether criminal investigations against Wojciech Wierzejski have been resumed.

Chapter F, Hate crimes, case 3

Case title	Case against A.F. and D.A.
Decision date	December 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Regional Court in Łódź (<i>Sąd Rejonowy w Łodzi</i>)
Key facts of the case (max. 500 chars)	Two drunk young men beat a transvestite to death. They met the victim in a public park, realized it was a man dressed in women's clothes; pushed him to the ground, undressed and started kicking. The man died in result of serious injuries.
Main reasoning/argumentation (max. 500 chars)	In the opinion of the court there was no doubt that the act of violence was motivated by stereotypical prejudice against transvestites.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	'In this case a man would have not died, if he had been different. He died only because the accused did not like him. They put the equal sign between a queer, a transvestite and a deviant. He was beaten only because he was different, since he did not do anything to the accused. He died in such a cruel way - kicked to death'.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Both aggressors were found guilty. 27-year-old A.F. was sentenced to six years' imprisonment and 23-year-old D.R. was sentenced to six years and two months of imprisonment.

No more case law data on criminal law are available

Chapter G, Applicability of legislation on trans gender issues, case 1

Case title	I ACa 276/04
Decision date	30 April 2004
Reference details (type and title of court/body; in original language and English [official translation, if available])	Appellate Court in Katowice (Sąd Apelacyjny w Katowicach)
Key facts of the case (max. 500 chars)	The Regional Court (Sąd Okręgowy) dismissed the suit for a declaratory judgment establishing the sex of a transsexual person on the ground that in the Polish law there is no legal basis for such an action. This judgment has been consecutively dismissed by the Appellate Court
Main reasoning/argumentation (max. 500 chars)	Sex of a human being belongs to personal goods protected by law. Determination of sex can take the course through a declaratory judgment. Declaratory judgment regarding sex of a transsexual person cannot be solely based on the state of mind of this person, or her sense of belonging to a particular sex. Self-identification and its importance in the multilevel system of sex identification can be evaluated from the medical perspective as primary for the legal evaluation of sex of a human being.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The court confirmed the possibility of judicial change of sex in case of transsexuals through a declaratory judgment.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court confirmed the earlier position of the jurisprudence that transsexualism can justify insertion of an additional note about the judicial change of sex in the birth certificate.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 1

Case title	ICZP 100/77.
Decision date	02 February 1978
Reference details (type and title of court/body; in original language and English [official translation, if available])	Supreme Court
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	Not only external physical features and organs define an individual's sex, but also emotional association with the gender opposite to that assigned at birth.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Self-determination of one's sex is a personal right.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	In exceptional situations courts can rectify acts of civil status before sex reassignment surgery takes place if the features of the new sex are predominant and changes are irreversible.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 2

Case title	III CZP 37/89
Decision date	22 June 1989

Reference details (type and title of court/body; in original language and English [official translation, if available])	Supreme Court
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	Acts of civil status only have a declaratory character and describe the legal status of a person resulting from acts of law and transsexualism could not be described as a change by acts of law, since it is a psychological transformation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Transsexualism does not justify rectification of birth certificates in regard to sex as defined at birth.

Chapter G, Name change and/or sex change of trans gender people, relevant case law, case 3

Case title	III CRN 28/91
Decision date	22 March 1991
Reference details (type and title of court/body; in original language and English [official translation, if available])	Supreme Court

Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Determination of gender identity belongs to personal rights.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	A transsexual person can file an action for a declaratory judgment (in accordance with Article 189 of the Civil Procedure Code) in order to have one's legal sex judicially recognized.

No case law data are available due to sensitive data protection

Chapter I, Case law relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation, case 1

Case title	
Decision date	
Reference details (type and title of court/body; in original language and English [official translation, if available])	
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

Annex 2 – Statistics

In the course of the preparation of the Report we have contacted the following institutions and agencies requesting disclosure of the public information:

- Ombudsman,
- Ministry of Labour and Social Affairs,
- Ministry of Justice,
- Ministry of Internal Affairs and Administration.
- Chief of the Office for Foreigners,

All relevant information obtained from these institutions is included into the report. With respect to some of the information, the institutions did not provide us with relevant statistics, as it is not collected.

Please note that the Minister of Labour in a letter No. DKR-07800-178-GW/08 has informed us that there is no statistics collected by the public authorities concerning the number of homosexual partners of the EU citizens, who reside in the territory of Poland. Furthermore, the Minister of Labour informed us that the sexual orientation is not taken into account neither in the court statistics nor in the administrative statistics.

In a similar way, the Office for Foreigners in a letter of 7 February 2008 (No. BP-II-25/MP/08 has informed us that the Office collects only such data which is allowed for collection by binding laws. The scope of collected data does not include data concerning sexual preferences (i.e. so called sensitive data) of foreigners coming in the territory of Poland, being the EU citizens or coming from third countries, who are party to concrete administrative proceedings. Accordingly, the Office has no information concerning the number of homosexual or transsexual persons, who are residing in the territory of Poland as well as the number of administrative proceedings with participation of LGBT persons.

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)								

Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)								
Number of LGBT partners who claimed their right to residence but were denied this right								

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.								
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation								

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC								
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner								

Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.								
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification								

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc								
Number of demonstrations against tolerance of LGBT people.								

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)								
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)								
Range of sanctions issued for homophobic hate speech								
Number of non-criminal court cases initiated for homophobic statements								
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)								

Chapter F, Homophobic motivation of crimes as aggravating factor

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing								

Chapter G, Transgender issues Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007
Number of name changes effected due to change of gender	9	17	7	13	14	23	32	37
Number of persons who changed their gender/sex in your country under the applicable legislation								

Please note that we asked the Minister of Interior two above questions, but received an answer only to the first one.²⁰⁵

**Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation
[presentation according to the templates above]**

²⁰⁵ Response to the request for public information by Adam Bodnar, dated 28 February 2008, No. BMK – 0667- 5- 61/2008/JM