

# **The social and legal situation of people with homosexual tendencies or experiencing gender identity disorders in Poland**

ed Rafał Dorosiński



**REPORTS OF THE ORDO IURIS INSTITUTE**

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# I. Introduction

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This report is an overview of the legal protection enjoyed in Poland by people with homosexual tendencies or experiencing gender identity disorders who often refer to themselves as lesbian, gay, bisexual, or transgender (LGBT). With misinformation spread through the efforts taken by lobbying groups that usurp the right to represent LGBT people, it has become necessary to show the real degree of legal protection for such individuals.

Recently published first edition of this report has received a vigorous response. We appreciate all the feedback and comments we have received, in particular those that refer to cases of violence. Without a doubt, acts of aggression against LGBT activists, people with homosexual tendencies or experiencing gender identity disorders, or against any other person, deserve absolute condemnation. There is no room for profanity and violence in a civilized debate. Fortunately, violations of bodily integrity are of more incidental character than systemic one. The conviction that it is necessary to ruthlessly prosecute such acts should unite (and it does unite) all actors of public life in Poland.

Equally common is the confidence that it is necessary to protect fundamental human rights and freedoms and to respect the equality of citizens before the law. Certainly, support for a marriage which is a union of a woman and a man does not undermine any of these rights. So is the belief that gender is a reality rooted in biology. In this context, however, there are attempts to unfairly present the situation of people with homosexual tendencies or experiencing gender identity disorders in Poland.

For example, the ranking developed and published by the International Lesbian and Gay Association (ILGA) suggests that Poland is far behind other European nations in terms of the “degree of respect for human rights” of people with homosexual tendencies or experiencing gender identity disorders. Meanwhile, most of the criteria used in the ranking do not refer to human rights at all, and their fulfilment is not required by any binding international documents. Rather than that, they form part of a detailed agenda of politically minded LGBT activists, and the ranking serves as the means for them to achieve their arbitrary expectations.

Furthermore, Polish LGBT activists have been slandering Poland on the international scene, insinuating that local governments established “LGBT-free zones,” and painting a surreal picture of Poland.

Since these efforts are so detrimental to the fairness of public debate, it is difficult to keep the discussion calm. However, this report is precisely an attempt at that. It touches upon social and legal issues experienced by people with homosexual tendencies and experiencing gender identity disorders, in Chapter III and IV, respectively.

The former presents how public opinion changed following numerous violations that LGBT activists have committed over the course of many months. It also shows the real situation of people with homosexual tendencies or experiencing gender identity disorders in Poland, as evidenced by the EU Fundamental Rights Agency survey. Further on, the text focuses on the ranking developed by the International Lesbian and Gay Association. Finally, it lists the grounds for the objections raised in the wake of the LGBT+ Declaration that was passed in Warsaw, and explains the misunderstandings that have resulted from the adoption of the Local Government Charter of Family Rights and other resolutions against the LGBT ideology.

Chapter IV presents a wide range of domestic and international binding legal regulations which govern the situation of people with homosexual tendencies or experiencing gender identity disorders in Poland. The chapter is divided into several sections, each discussing one key area, such as non-discrimination, protection against violence, freedom of association, and freedom of speech.

The comparison between the social and legal reality, and the fiction propounded by many Polish LGBT activists, turns out to expose various myths on the enjoyment of fundamental rights and freedoms in Poland.

## II. Key points

---

01 Fundamental Rights Agency surveys show an evident discrepancy between the convictions held by people with homosexual tendencies or experiencing gender identity disorders with respect to their social situation, and their personal and empirical experiences.

02 Polish respondents recorded one of the lowest numbers of displays of intolerance towards LGBT behaviours in Europe. Incidents involving insults and threats, and difficulties in access to healthcare or employment alike, are among the rarest in Europe.

03 The principle of equality is not synonymous with uniformity. Both domestic and international case-law emphasises that “[t]he general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless such treatment is objectively justified.”

04 Though each case of discrimination constitutes unequal treatment, not all cases of unjustified unequal treatment are tantamount to discrimination. This is all the more reason why justified unequal (different) treatment of dissimilar interpersonal relationships does not constitute discrimination.

05 Poland has implemented all its binding international non-discrimination obligations.

06 People with homosexual tendencies or experiencing gender identity disorders may benefit from a range of measures available in the Polish legal system, whether arising from criminal law or not, which are applicable with respect to offences against their lives, health, and freedoms, as well as violations of their honour or physical integrity.

07 Both locally, and on a nationwide scale, Polish LGBT organisations not only operate without any systemic restrictions on the freedom of association, but also are generously financed from public funds.

08 LGBT activists not only enjoy freedom of speech, but seem to be a group treated in a privileged way – censorship practices that are often applied to conservative content and profiles on the Internet do not concern the profiles of LGBT organisations or presenting content that popularizes LGBT groups.

09 LGBT organisations aim to penalise hate speech, which they define as statements or actions that conflict with their social and political propositions. This constitutes a real threat to freedom of speech.

10 Participants of LGBT demonstrations in Poland enjoy the constitutional freedom of assembly in its full scope. Recently, this freedom has been exploited to insult and profane symbols of religious worship.

11 As at the end of 2020, none of the Pride parades organised across Poland have been banned. Each time, either the authorities of the respective towns or cities, or the Regional Administrative Courts have allowed the participants to organise and follow through with said events. “The Equality March” in Białystok was disturbed by acts of aggression committed by some of the counter-demonstrators. This and any other violence deserves categorical condemnation and ruthless prosecution.

12 Article 18 of the Constitution renders the institutionalisation of same-sex relationships impossible. The Polish Constitutional Court, Supreme Court, and Supreme Administrative Court have all expressed a consistent position on this matter.

13 At the same time, this does not constitute a ban on establishing rational and just legal solutions which would help people living in some sort of a union to coordinate their private interests and avail themselves of the state’s assistance in this matter. However, non-marital unions do not have to be institutionalised for this purpose.

14

The personal and intimate nature of cohabitation and other informal relationships is respected as part of the individuals' private lives, but not family lives.

15

Those who live in such relationships, including same-sex unions, have at their disposal several extant legal institutions that are indifferent to the question of sex or sexual orientation. Their scope of application is universal. These include powers of attorney, the institution of joint ownership, nominate and innominate contracts, unjust enrichment claims, and testaments. People in informal relationships are also able to obtain information on their sick partner's health, and take out a bank loan together.

16

The Treaty on the Functioning of the European Union enumerates the exclusive and shared powers of the EU. Family law belongs to neither. Furthermore, the Treaty on the European Union clearly states that any powers not conferred on the Union under the Treaties belong to the Member States.

17

Individuals who were refused transcription of their birth certificates have not been deprived of their potential rights that would arise from their status as a national of Poland, especially with respect to applying for a PESEL number or a Polish identity document.

18

Difficulties regarding gender identification for what is actually a small group of citizens are not valid reasons which would necessitate the redefinition of the concept of gender. Rather than that, the individuals in question should have access to adequate and publicly funded therapies.

19

The elementary freedom of self-determination and autonomy in directing the course of one's affairs is one that everyone may enjoy, even when decisions are made that are not in favour of one lobbying group or another. The integral element of this freedom is the opportunity to seek assistance in subduing unwanted homosexual desires.



## III. Social situation

### 1. Fundamental concepts

Among the terms used in the ongoing public debate in Poland, concerning the demands put forward by groups that identify themselves through atypical sexual preferences, the phrases “LGBT movement” and “LGBT ideology” require some clarification.

‘LGBT movement’ is a term of sociological nature which integrates a social movement theory perspective. It is defined as “various collective actions taken by homosexual, bisexual, transsexual, and transgender individuals, as well as by heterosexual individuals who support the demands of these social categories which aim at initiating and maintaining social change.”<sup>1</sup> In essence, their efforts involve an in-depth and revolutionary transformation of society with respect to its understanding of gender, sexuality, marriage, and family (a departure from a “heteronormative society.”)<sup>2</sup>

People actively engaged in the LGBT movement are referred to as LGBT activists. Not all people with homosexual tendencies or experiencing gender identity disorders are LGBT activists. *Vice versa*, not all LGBT activists have homosexual tendencies or experiencing gender identity disorders. At the same time, some people who identify as gay or lesbian do not see themselves as part of the LGBT movement. One example is Get the L out of LGBT, a British social movement which brings together lesbians who object to the LGBT movement’s usurpation of the right to represent their interests.

The Ordo Iuris Institute for Legal Culture has pointed out this crucial distinction on numerous occasions. It has stated that “the LGBT ideology is not merely an expression of certain sexual preferences; its demands strive towards disseminating a certain set of views, ideas, as well as social and political attitudes that are not inextricably linked to so-called ‘non-heteronormative sexual preferences’.

That is why said views, ideas, and attitudes are also supported by those who do not display such kind of tendencies.”<sup>3</sup> The

1 J. Kochanowski, *Poza horyzont heteronormatywności. Ruchy społeczne lesbijek i gejów*, “Societas/Communitas,” no. 4, <http://www.ekologiasztuka.pl/think.tank.feministyczny/kurs/kochanowski2007.pdf> (date of access: 01 Feb 2021), p. 3.

2 Ibidem.

3 The Ordo Iuris Institute, Statement by party to case no. VIII SA/Wa 42/20, brought before the Regional Administrative Court in Warszawa, [https://ordoiuris.pl/sites/default/files/inline-files/Stanowisko\\_Ordo\\_Iuris\\_ws\\_gminy\\_Klwow\\_2.pdf](https://ordoiuris.pl/sites/default/files/inline-files/Stanowisko_Ordo_Iuris_ws_gminy_Klwow_2.pdf) (date of access: 01 Feb 2021).

fact that some individuals who do not have homosexual tendencies or experiencing gender identity disorders still belong to the LGBT movement has also been confirmed, for example, by Slavoj Žižek, one of the most influential modern-day proponents of Marxist philosophy. In his widely commented article, “The Sexual is Political”, he points out that the formula LGBT+ is nowadays being expanded to LGBTQIAAP, where one of the As stands for **Allies**. Though, as Žižek states, they are non-LGBT individuals themselves, (i.e. have no have homosexual tendencies or experiencing gender identity disorders), they still belong to the LGBT movement by the token of their participation in its activities.<sup>4</sup> This has also been confirmed by the Polish Ombudsman Adam Bodnar, who described the LGBT acronym as an **umbrella term**,<sup>5</sup> one which protects those who identify with that movement, even though they are non-LGBT individuals.

### What do participants of debates taking place in Poland understand by the term “LGBT ideology”?

An important element of the debate around the demands of the LGBT movement was the phrase „LGBT ideology” used by one side of the dispute and rejected by the other, emphasizing that „LGBT are people, not an ideology”. At this point, it seems essential to define the meaning of this term in Poland and to what extent it can be considered that its use discriminates against people identifying themselves with groups defined by the acronym „LGBT”. It is beyond the scope of these considerations to assess whether the term reconstructed here on the basis of its use in public debate is the most adequate term to describe a set of postulates present in the public debate.

The term „LGBT ideology” rarely appears in Western political discourse, although it has been used many times by, for example, the Marxist thinker Slavoj Žižek<sup>6</sup>. In Poland, in addition to critical approaches, one can also find the affirmative use of this term - in this sense it is used by the left-wing thinker Jan Hartman, who defines in a positive sense „8 postulates of LGBT ideology”<sup>7</sup>.

It is not revealing to say that the LGBT movement has its strategies, ideals and postulates, viewed by many as radical, touching fundamental aspects of human existence such as sex, sexuality, and the family. The consequences of the implementation of these postulates are not limited to the statistically marginal group of people with homosexual tendencies or experiencing gender identity disorders, but affect the entire society.

Thus as used in public debate, the term ‘LGBT ideology’ is understood to mean a body of objectives and proposals propounded by LGBT organisations, and, more generally, the LGBT movement. Drawing on various perspectives, such as postmodernism, queer theory, and radical feminism, these demands pertain to the notions of gender, sexuality, marriage, and family, and entail “attempts to press for their realisation in culture, education, and social life”.<sup>8</sup>

4 S. Žižek, *The Sexual is Political*, 01 Aug 2016, <https://thephilosophicalsalon.com/the-sexual-is-political/> (date of access: 01 Feb 2021).

5 Appeal by Polish Ombudsman against Resolution No. VI/51/2019 of the Klwów Municipality Council of 17 June 2019 on the adoption of the “Klwów Municipality as free from LGBT ideology” declaration, 10 Dec 2019, <https://www.rpo.gov.pl/sites/default/files/Skarga%20RPO%20na%20uchwa%C5%82%C4%99%20Rady%20Gminy%20Klw%C3%B3w%20%28WSA%20Warszawa%29%209.12.2019.pdf> (date of access: 01 Feb 2021).

6 He used the term “LGBT ideology”, for example, in a high-profile debate with Jordan Peterson. He provides an extensive analysis of the doctrinal assumptions of the LGBT political movement in his essay *Sexual is Political*, available on the website “The Philosophical Salon”: <https://thephilosophicalsalon.com/the-sexual-is-political/> (date of access: 01 March 2021).

7 J. Hartman, *Czym jest ideologia gender i LGBT?*, essay available on the weekly website „Polityka”, <https://hartman.blog.polityka.pl/2019/06/10/czym-jest-ideologia-gender-oraz-lgbt/> (date of access: 01 March 2021).

8 Resolution No. XIX/192/2020 of the Tuchów Town Council of 18 March 2020, <https://bip.malopolska.pl/umtuchow,a,1743507,stanowisko-w-sprawie-udzielenia-odpowiedzi-na-skarge-adw-pana-przemyslaw-a-lisa-markiewicz-a-z-dnia-18.html> (date of access: 01 Feb 2021).



## a) gender

As regards gender, LGBT ideology assumes that any and all differences between genders observable on a daily basis are artificial and unreasonable. Gender is a social construct, while commitment to motherhood, marriage, and fidelity is considered a “stereotype.”

LGBT ideology theoreticians state that:

- their strategic objective is “the deconstruction and destabilisation of categories of gender and sexuality, and the ensuing destruction of the social stratification system based thereupon”;<sup>9</sup>
- “a happy society has to be one where both men and women define themselves fluidly and dynamically as regards their sexual preferences”;<sup>10</sup>
- “stable gender or stable sexuality are non-existent”.<sup>11</sup>

Their Western precursors point out that “[t]he differentiation between sex and gender allows one to notice various interpretations of sex in gender, and in itself allows one to question the integrity of an individual,”<sup>12</sup> an action which prof. Lew-Starowicz has called “dislocating one’s identity” in one of his critical remarks.<sup>13</sup>

At the same time, LGBT ideology theoreticians promote the fundamental gender-related belief that “it is gender identity, i.e. the internal and subjective sense of one’s own gender, that is key in defining one’s own gender”.<sup>14</sup> This way, objective gender identity (simply speaking, sex) should be modified in line with an individual’s feelings. This ideology substitutes the objective reality encoded in people’s DNA with a radical theory that a human being is what they believe to be, irrespective of evidence to the contrary.

The LGBT ideology suffers from a series of internal contradictions, one of which, for example, is the claim that gender is a social construct, but that at the same time one’s own gender identity is innate and immutable.

**Disseminating this ideological concept of gender leads to severe identity disorientation, especially in children.** There has been a rapid increase in the number of children with gender dysphoria where said concept is integrated in the education system. The United Kingdom, for example, saw that number grow from 97 in 2009-2010 to 2,590 in 2018-2019.<sup>15</sup> The process of promoting the ideological concept of gender also has a detrimental impact on adults.

## b) sexuality

<sup>9</sup> M. Abramowicz, R. Biedroń, J. Kochanowski (ed.), *Queer studies. Podręcznik kursu*, Warszawa 2010, [https://kph.org.pl/publikacje/queerstudies\\_podrecznik.pdf](https://kph.org.pl/publikacje/queerstudies_podrecznik.pdf), (date of access: 01 Feb 2021), p. 9.

<sup>10</sup> *Ibidem*, p. 50.

<sup>11</sup> *Ibidem*, p. 24.

<sup>12</sup> J. Butler, *Uwikłani w płęć*, Warszawa 2008 (EN: *Gender trouble. Feminism and the Subversion of Identity*). Olga Tokarczuk, who wrote the foreword for Butler’s work, notes that this book “begs us to go further, where the practical application of intentions laid out therein would become a true moral, social, and civilisational revolution.”

<sup>13</sup> “For example, certain people could be interested in raising children as agender. This suggestion also comes up sometimes. The children themselves should decide who they are. As a scientist who knows a bit about people’s physical and mental development, I can declare with one-hundred percent certainty, that masculine and feminine characteristics arise at very early stages of children’s development. Therefore, raising children this way can simply lead to dislocating one’s identity. Destroying one’s life. Negating genetic factors never leads to anything good,” M. Cieślak, *Gender podoba się tylko elitom*, “Rzeczpospolita”, 29 Nov 2013, <https://www.rp.pl/artykul/1068923-Gender--podoba-sie-tylko--elitom.html> (date of access: 01 Feb 2021).

<sup>14</sup> K. Dułak, *Transpłciowość to wyraz ludzkiej różnorodności*, [in:] M. Rawłuszko (ed.), *Szkoła równości. Dziennik praktyk. Wywiady z praktykami i praktyczkami edukacji antydyskryminacyjnej*, Warszawa 2016, [https://tea.org.pl/userfiles/szkola\\_rownosci\\_dziennik\\_praktyk.pdf](https://tea.org.pl/userfiles/szkola_rownosci_dziennik_praktyk.pdf) (date of access: 01 Feb 2021), p. 124.

<sup>15</sup> S. Marsh, *NHS to hold review into gender identity services for children and young people*, 22 Sep 2020, <https://www.theguardian.com/society/2020/sep/22/nhs-to-hold-review-into-gender-identity-services-for-children-and-young-people> (date of access: 01 Feb 2021).

With respect to sexuality, the LGBT ideology moves away from the perspective that inscribes sexuality in the social, emotional, spiritual, and intellectual domains of an individual, and in the context of love, family, and self-development. It treats this notion as a category that is *de facto* devoid of moral dimensions. Any choice of sexuality is possible, provided that it is voluntary. In this perspective, sex is “an almost infinite repertoire of behaviours” between “two or more individuals in innumerable configurations” which “may be an expression of a deep emotional relationship, a way of enriching friendships, or simply a pleasurable way to spend time with acquaintances and strangers alike.”<sup>16</sup>

In line with WHO recommendations that have been drafted in this vein,<sup>17</sup> children up to the age of four should be familiarised with such topics as masturbation, different family relationships, and the exploration of gender identities. Between the age of nine and twelve, children should learn how to “use condoms and contraceptives effectively in future.” They should also “take responsibility in relation to safe and pleasant sexual experiences for oneself and others,” and “communicate to have enjoyable sex.”<sup>18</sup>

### c) family and marriage

The notion of marriage that the LGBT movement promotes is that “marriage is *love, mutual trust, and support*.”<sup>19</sup> This would mean that the specific (unique) nature of marriage is decided by *experiences and emotional relationships*. Such a definition allows one to denote an almost unlimited number of interpersonal configurations, thereby depriving it of its real meaning.

### d) political activism

An important part of the LGBT movement and ideology is the aspect of social and political activism, which involves “generating political will”<sup>20</sup> and “increasing social support” for the demands concerning family life and other areas which are discussed in greater detail in Chapter IV hereof.

Prof. Jacek Bartyzel defines LGBT ideology as “a legal, moral, and social equalisation of all forms of sexual activities, based on acknowledging the fact that so-called sexual orientations are equal in rights and status. Its ‘originality’ arises from the fact that it is the first ideology ever to put acceptance towards all (or almost all) ways of obtaining sexual gratification at its centre of interest, and to grant such practices a public and legal status.”<sup>21</sup>

## 4) people with homosexual tendencies or experiencing gender identity disorders

The term ‘people with homosexual tendencies or experiencing gender identity disorders’ refers to such people in general, including those who despite such tendencies or disorders do not identify themselves with the LGBT movement, and do not share the demands reflective of the LGBT ideology.

16 J. Kochanowski, *Socjologia seksualności*. Marginesy, Warszawa 2013, p. 2.

17 WHO Regional Office for Europe and BZgA, *Standardy edukacji seksualnej w Europie. Podstawowe zalecenia dla decydentów oraz specjalistów zajmujących się edukacją i zdrowiem*, 2012, [https://www.bzga-whocc.de/fileadmin/user\\_upload/Dokumente/WHO\\_BzGA\\_Standards\\_polnisch.pdf](https://www.bzga-whocc.de/fileadmin/user_upload/Dokumente/WHO_BzGA_Standards_polnisch.pdf) (date of access: 01 Feb 2021).

18 The coursebook “ABC mojego ciała. Leksykon dla dziewcząt i chłopców” recommended by WHO states, for example, that: “[j]ust like you can crave chocolate, men and women can crave sex. Being a lesbian is totally normal. You can experience orgasms also on your own, by touching your clitoris, breasts, penis, and testicles.”

19 Ed. A. Boczowska, A. Urbanik, *Równość małżeńska. Przewodnik dla początkujących*, Warszawa 2016, [https://mnw.org.pl/app/uploads/2017/08/MNW\\_rownosc\\_malzenska\\_przewodnik.pdf](https://mnw.org.pl/app/uploads/2017/08/MNW_rownosc_malzenska_przewodnik.pdf) (date of access: 01 Feb 2021), p. 24.

20 Stowarzyszenie Miłość Nie Wyklucza, *Strategia wprowadzenia równości małżeńskiej w Polsce na lata 2016-2025*, Warszawa 2016, <https://mnw.org.pl/app/uploads/2017/08/Strategia-rownosc-malzenskiej.pdf> (date of access: 01 Feb 2021), p. 10.

21 J. Bartyzel, *Czy LGBT jest ideologią?*, 17 Dec 2020, <https://www.pch24.pl/prof-jacek-bartyzel-czy-lgbt-jest-ideologia-80687,i.html> (date of access: 01 Feb 2021).

## 2. Public opinion

Studies conducted by the Centre for Public Opinion Research (CBOS) show that between 2005 and 2017 there was a gradual increase in the number of Poles who affirmatively responded to the following question: “Do you think that gay and lesbian couples, i.e. same-sex couples in an intimate relationship, should have the right to publicly express their way of life?” In 2005, 16% of respondents were in favour of that. In 2008 – 25%, in 2010 – 29%, in 2013 – 30%, and in 2017 – 32%. In turn, 78%, 69%, 64%, 63%, and 62% of respondents respectively objected to same-sex couples expressing their way of life publicly.

2018 and 2019 saw a reversal of this trend. Fieldwork conducted by CBOS between April 4<sup>th</sup> and 11<sup>th</sup> 2019 shows that aversion towards public manifestations of the homosexual way of life rose to 67%, whereas approval for it fell to 29%. Undecided respondents made up 5%, the lowest percentage ever recorded for this question.<sup>22</sup>

A similar trend can be observed with respect to the following question: “Should two people of the same sex living together be able to enter into a civil partnership?” In 2011, 2013, and 2017, those in favour of introducing this possibility amounted to 25%, 33%, and 36% respectively, whereas those who were against it made up respectively 65%, 60%, and 56%. In April 2019, the percentage of those supporting the institutionalisation of same-sex civil partnerships dropped to 35%, while the percentage of those opposing the idea rose to 60%. This question also saw the lowest recorded percentage of undecided respondents – 5%.<sup>23</sup>

There has also been a marginal decline in how many people support equalising same-sex relationships with opposite-sex marriages (from 30% in 2017 to 29% in 2019, where disapproval grew from 64% to 66%), and allowing same-sex couples to adopt children (from 11% to 9%, with 84% of respondents opposing the idea in both surveys). However, for these questions, there has been no radical change in what so far had been a continuous upward trend.

Nonetheless, it is worth noting **these surveys alone confirm the fact that this sharp decrease in support for institutionalising same-sex relations and pushing homosexual propaganda in public space is unrelated to prejudices towards the concept of homosexual tendencies.** Compared to the 2017 survey, the percentage of people who believe “homosexuality is not normal and must not be tolerated” is still 24%, and has thus been **at a relatively low level for ten years** (at 23% in 2010, at 26% in 2013, and at 24% in 2017).<sup>24</sup>

22 Centre for Public Opinion Research, *Stosunek Polaków do związków homoseksualnych*, no. 90/2019, July 2019, [https://www.cbos.pl/SPISKOM.POL/2019/K\\_090\\_19.PDF](https://www.cbos.pl/SPISKOM.POL/2019/K_090_19.PDF) (date of access: 01 Feb 2021), pp. 4-5.

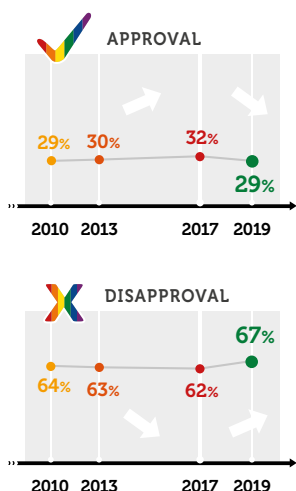
23 *Ibidem*, p. 7.

24 *Ibidem*, pp. 2-3.

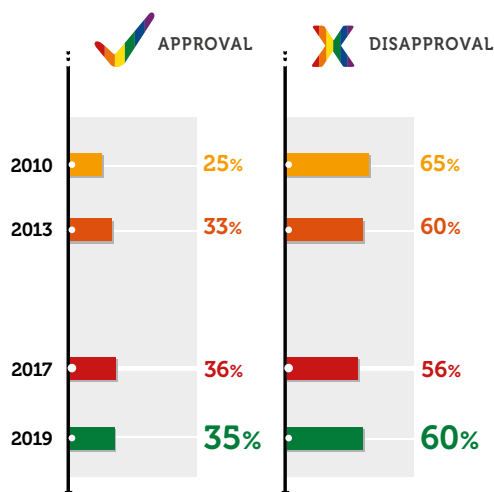
# THE SURVEY CARRIED OUT BY CBOS BETWEEN APRIL 4th AND 11th 2019 HAS SHOWN A DECISIVE DECREASE IN POLES' APPROVAL FOR THE LGBT MOVEMENT'S POLITICAL DEMANDS.

However, this decrease does not go hand-in-hand with greater prejudice towards homosexual tendencies themselves!

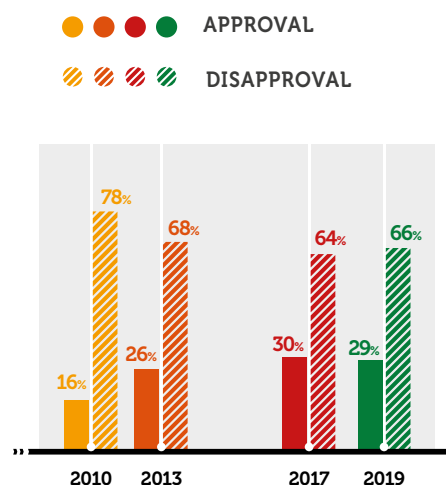
**a.** approval for gay and lesbian couples to exhibit their way of life in public



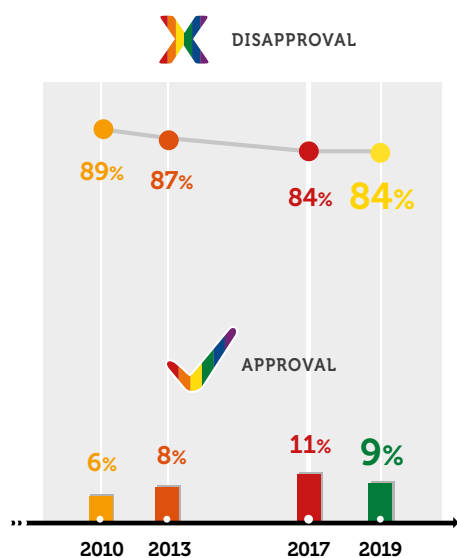
**b.** approval for two people of the same sex living together to be able to enter into a civil partnership



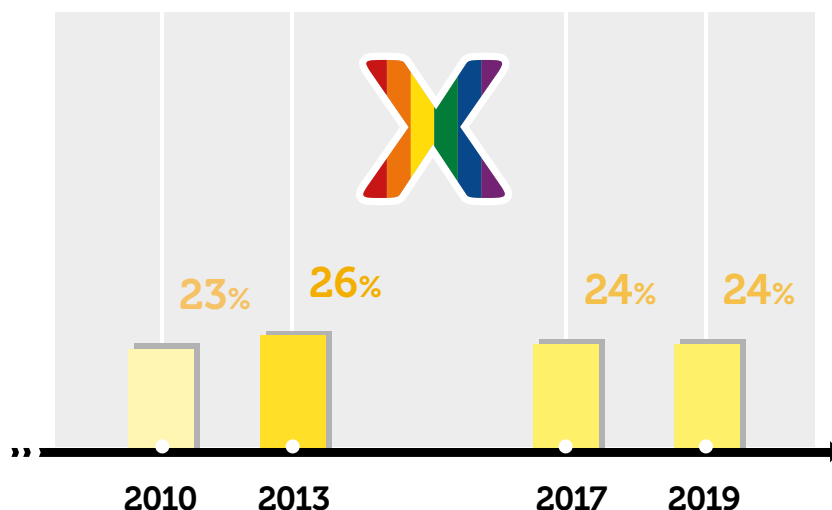
**c.** approval for gay and lesbian couples to marry



**d.** approval for gay and lesbian couples to adopt children



Percentage of people who think that "homosexuality is not normal and must not be tolerated"



Therefore, what events and circumstances in 2018 and 2019 could have significantly affected this trend, leading to a stricter stance on the part of Poles with respect to the demands of the LGBT movement? CBOS conducted its survey in April 2019, i.e. before local governments across Poland started declaring themselves “free from LGBT ideology,” or adopting the Local Government Charter of Family Rights – passing resolutions that were untruthfully alleged to have established “LGBT (people)-free zones”. This means that the real reason for this change should lie in the events that took place before that.

July 9<sup>th</sup>, 2018 saw a pride parade organised in Częstochowa by LGBT activists, during which an incident took place that shocked Polish public opinion. The many materials that the demonstrators used in their parade included the Polish, red and white flag remade into rainbow and white, and bearing the national emblem of Poland refashioned into a white eagle on a rainbow-coloured background.<sup>25</sup> Many reports were filed with the authorities, claiming that this was a criminal offence under Article 137 § 1 of the Act of June 6<sup>th</sup>, 1997 – the Criminal Code (uniform text: Polish Journal of Laws of 2020, item 1444): “Whoever publicly profanes, destroys, damages, or removes an emblem, standard, ensign, banner, flag or any other state symbol, is subject to a fine, restriction of liberty or imprisonment for up to one year.” Ultimately, the prosecutor’s office did not find this incident to be a violation of the law. However, many Poles saw this as an expression of ostentatious hostility towards Polish symbols and traditions on the part of LGBT activists. The decision taken by the prosecutor’s office only reinforced the public opinion in its belief that these activists are granted special and privileged treatment for unclear reasons.

This feeling was furthermore compounded in September 2018, when the prosecutor’s office in Poznań refused to instigate proceedings against a plenipotentiary of the city’s mayor who shared her Facebook profile picture with a frame featuring the “rainbow eagle” in order to prevent exclusion.<sup>26</sup>

On July 23<sup>rd</sup>, 2018 a group of LGBT activists derided and offended Catholics’ religious feelings by engaging in a provocation at St. Anne’s Church in Warsaw. The activists took photographs of themselves standing before the figure of the Crucifix, holding, i.a., a black umbrella (symbolising the pro-abortion stance which is contrary to the Church-affirmed principle of protection of life from the moment of conception), and a rainbow-like six-coloured flag.<sup>27</sup>

On October 13<sup>th</sup>, 2018, the “rainbow eagle” returned during a Pride Parade in Lublin,<sup>28</sup> and on March 10<sup>th</sup>, 2019 in Bydgoszcz, during the Manifa, an annual feminist demonstration.<sup>29</sup>

The culmination of those events occurred on February 18<sup>th</sup>, 2019 (i.e. just a few weeks before the CBOS survey). It was on that day that Rafał Trzaskowski, Mayor of Warsaw, signed the Warsaw Municipal Policy for the LGBT+ community (hereinafter referred to as the “LGBT+ Declaration”). This document was issued unilaterally, not as a legally stipulated order or bill, and no wide-scale social consultations preceded its issuance. This was met with radical criticism, not only from the communities that are traditionally

25 *Biały orzeł na tęczowym tle. Minister Brudziński zarzuca „profanację” symboli narodowych*, 09 Jul 2018, <https://tvn24.pl/polska/czestochowa-bialy-orzel-na-teczowym-tle-brudziński-profancja-godla-ra852342-2404188> (date of access: 01 Feb 2021).

26 K. Kurkiewicz, *Prokuratura w Poznaniu nie będzie ścigać za tęczowego orła*, 04 Sep 2018, <https://poznan.wyborcza.pl/poznan/7,36001,23857005,prokuratura-w-poznaniu-nie-bedzie-szigac-za-teczowego-orla.html> (date of access: 01 Feb 2021).

27 *Profanacja w kościele św. Anny. Grupa LGBT zakpiła z religijnych symboli*, 23 Jul 2018, <https://dorzeczy.pl/kraj/71447/Profanacja-w-kościele-sw-Anny-Grupa-LGBT-zakpiła-z-religijnych-symboli.html> (date of access: 01 Feb 2021).

28 S. Skomra, *Marsz Równości. Prokuratura i policja na tropie orła na tęczowym tle*, 19 Nov 2018, <https://kurierlubelski.pl/marsz-rownosci-prokuratura-i-policja-na-tropie-orla-na-teczowym-tle/ar/13676686> (date of access: 01 Feb 2021).

29 R. Jaskot, *Bydgoska Manifa. Policja „aresztowała” tęczową flagę z orłem*, 10 Mar 2019, <https://bydgoszcz.wyborcza.pl/bydgoszcz/7,48722,24535226,bydgoska-manifa-policja-aresztowala-teczowa-flage-z-orlem.html> (date of access: 01 Feb 2021).

associated with protecting family and marriage. Just a week later, on February 25<sup>th</sup>, 2019, the Warsaw Industry Social Dialogue Committee for Equal Treatment issued a letter, in which it stated that:

” *a situation where one of the minorities is protected to a greater degree than others gives rise to doubts whether indeed the residents of Warsaw are treated equally, and are not discriminated against by the local government authorities. Therefore, it perpetuates the very same doubts that experts and the Polish Ombudsman have with respect to the Act from December 3<sup>rd</sup>, 2010 on the implementation of certain European Union provisions regarding equal treatment. Instead of protecting and guaranteeing equal treatment, the document in question creates division, since it distinguishes between those who suffer from discrimination in terms of the degree of their protection. It introduces a scale for the sense of grievance and injustice, depending on the reason behind discriminatory behaviours. Thus, the document itself is actually of discriminatory nature.*<sup>30</sup>

The Polish public opinion noticed that **instead of striving towards true equal treatment, Polish LGBT activists had incited a political fight with a view to forcefully promote demands that are radically inconsistent with the beliefs held by the majority of Poles.** These concerns were confirmed by Paweł Rabej, Deputy Mayor of Warsaw, who stated on March 4<sup>th</sup>, 2019 that the **promotion of certain elements of the LGBT ideology among minors “should begin in the kindergarten”**.<sup>31</sup> On March 15<sup>th</sup>, he laid out the stages for this process, also known as the Rabej Plan:

” *Let us first get people used to the fact that civil partnerships are not pure evil, that they do not destroy the fabric of society or the Polish family. Then, it is going to be easier to take further steps, to reach marriage equality and adoption [...] I am in favour of doing it step by step: first introduce civil partnerships, then marriage equality; in the end, time will also come for adoption of children.*<sup>32</sup>

The radical propositions laid out in the LGBT+ Declaration were also criticised by Hanna Gronkiewicz-Waltz, Mayor of Warsaw between 2006-2018, and Deputy Head of the centre-liberal Platforma Obywatelska (Civic Platform) party between 2006-2017. She said, **“I believed that nothing should be signed with any specific group, as you should equally take care of the elderly, [members of] the LGBT community, or the refugees. [...] Not all parents are going to consent to that. Especially when it comes to standards of upbringing. The issue here is that you are deciding for the parents. [...] You should take specific upbringing activities in specific timeframes. As a mother and grandmother, I would shift those standards around.”**<sup>33</sup>

Therefore, the LGBT+ Declaration caused much concern among parents. Only as a response, a few weeks later, the bishops of Warsaw reminded us of the “respect with which we should treat homosexuals.” Nonetheless, they also stated that the document has nothing to do with such respect, saying:

” *the bishops of Warsaw express their full solidarity with and support for parents who are concerned by the provisions of the ‘LGBT+ Declaration’. [...] The fact that the document in question makes no mention of the role of parents (with respect to whom schools, with all their educational elements, are in a position*

30 Letter to the Head of the Centre for Social Communication dated 25 February 2019, case file no. CKS-5/510/19.

31 Paweł Rabej o kibicach Legii: To nie powinno mieć miejsca, 04 Mar 2019, <https://www.youtube.com/watch?v=hnPZJ0cqVf8> (date of access: 01 Feb 2021).

32 Paweł Rabej: Najpierw wprowadźmy związki partnerskie, a na koniec adopcję dzieci, 14 Mar 2019, <https://wiadomosci.dziennik.pl/opinie/artykuly/593557,pawel-rabej-homoseksualizm-gej-malzenstwo-polityka-adopcja-dzieci.html> (date of access: 01 Feb 2021).

33 Gronkiewicz-Waltz o karcie LGBT+: mam wątpliwości, miałam inną koncepcję, 08 Mar 2019, <https://tvn24.pl/tvnwarszawa/najnowsze/gronkiewicz-waltz-o-karcie-lgbt-mam-watpliwosci-mialam-inna-koncepcje-900692> (date of access: 01 Feb 2021).

of servitude), means that the 'Declaration' might violate both the constitutional right of parents to raise their children in line with their beliefs as well as the existing provisions of law concerning education.<sup>34</sup>

Leaders of Protestant communities have also reacted to Trzaskowski's declaration, stating that it is :

” an assault executed on parents' rights and children's wellbeing in many ways [...]. It hurts children, attacks parents, and is a total interference of the state in peaceful, domestic affairs. **We do not deny the adults' right to choose their own, homosexual way of life. Respect for all people, irrespective of their lifestyles, is inscribed in Christian ethics. Nonetheless, we believe that it is not the task of schools or local governments to instil in children certain values and attitudes that are unfamiliar to those shared within their households. We say this as representatives of religious minorities in Poland who know the meaning of contempt and intolerance.**<sup>35</sup>

It is worth mentioning that CBOS conducted its survey in the first two weeks of April 2019, i.e. before the most severe provocations on the part of LGBT activists. In the night between April 26<sup>th</sup> to 27<sup>th</sup> 2019, LGBT activists profaned the Christian image of Mary by posting posters and stickers on rubbish bins and portable toilets around a church in Płock. Said materials featured the Black Madonna of Częstochowa with six-coloured rainbow halos around Mary and the Child.<sup>36</sup> During another event, the Pride Parade in Gdańsk that took place on May 25<sup>th</sup>, 2019, participants parodied the Most Blessed Sacrament, substituting it with a drawing of a vagina. This scandalous incident was even condemned by the liberal left-wing Mayor of Gdańsk, Aleksandra Dulkiewicz.<sup>37</sup>

The Equality Parade in Warsaw on July 8<sup>th</sup>, 2019 featured a parody of the Holy Mass, an “ecumenical service” celebrated by Szymon Niemiec (an LGBT activist) who declared himself to be a validly ordained priest. The Head of the Polish Ecumenical Council, an organisation representing non-Catholic Christian denominations, has decisively distanced himself from the figure of Niemiec, stating that:

” none of the churches in the Polish Ecumenical Council have any relations or contacts with Mr Niemiec. [...] Not everyone who calls themselves ecumenical has something to do with the Polish Ecumenical Council and the churches it brings together. [...] There is no relationship between reformed churches in Poland (both the Evangelical Reformed Church and the Evangelical Church of the Augsburg Confession) and Mr. Niemiec.<sup>38</sup>

The ridiculing nature of the “service” that took place during the parade was evidenced by the fact that Mr. Niemiec was assisted by a man who wore a colander on his head, representing Pastafarianism, an anti-clerical and anti-religious movement that mocks faith regardless of one's denomination.

On July 26<sup>th</sup>, 2019 Dominika Kulczyńska, a Wrocław-based artist, began promoting her rainbow-coloured vagina-shaped sculptures of Theotokos. Profits generated from sales were to go to Campaign Against Homophobia, a leading association of the LGBT movement. It is also with respect to this issue

34 Statement by the bishops of Warsaw on the LGBT+ Declaration, 08 Mar 2019, <https://ekai.pl/stanowisko-biskupow-warszawskich-w-sprawie-deklaracji-lgbt/> (date of access: 01 Feb 2021).

35 *W obronie suwerenności rodziny. List otwarty ewangelicznych przywódców chrześcijańskich do władz samorządowych naszej ziemskiej Ojczyzny*, 11 Mar 2019, <https://baptysty.pl/aktualnosci/list-otwarty-w-obronie-suwerenności-rodziny> (date of access: 01 Feb 2021).

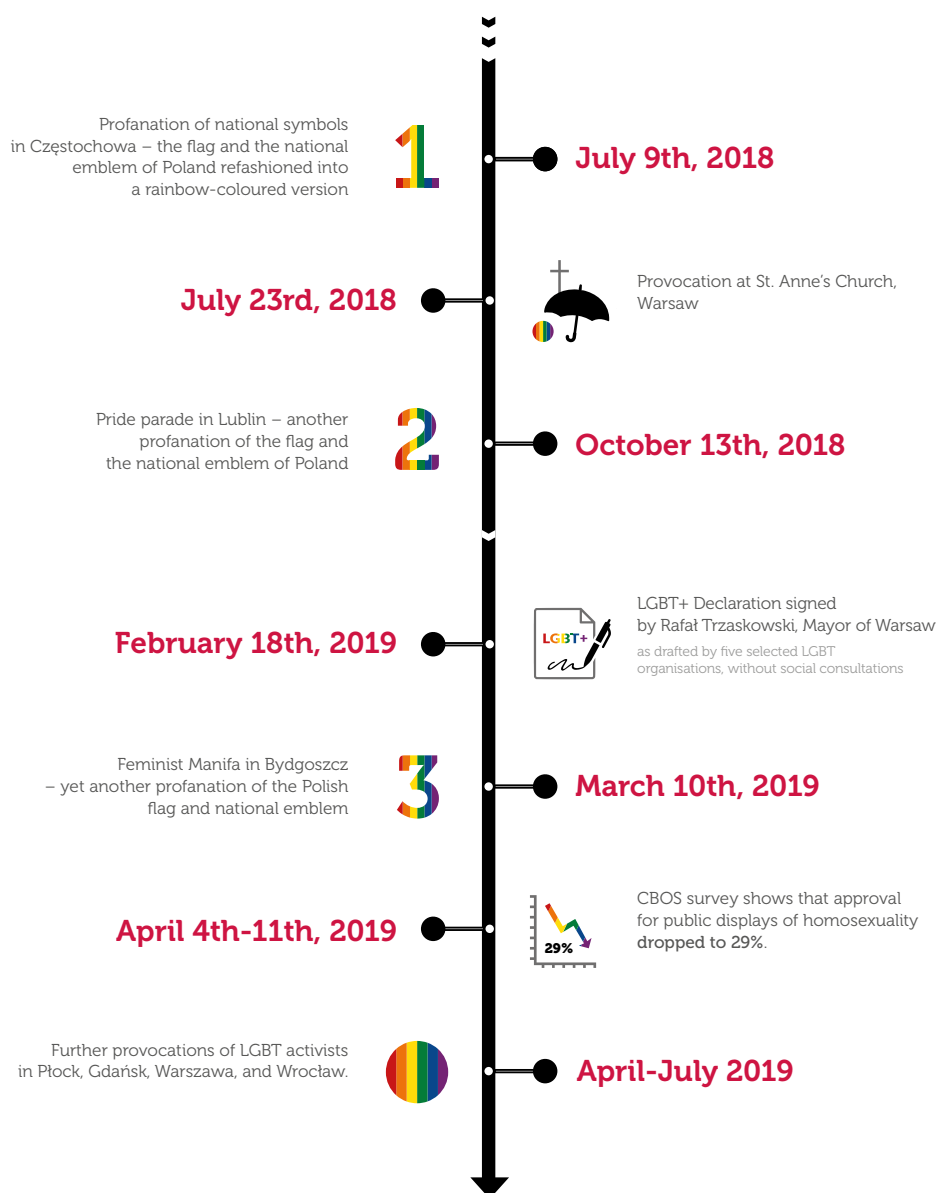
36 *Zarzut za Matkę Boską w tęczowej aureoli. Reaguje Helsińska Fundacja Praw Człowieka*, 07 May 2019, <https://tvn24.pl/polska/matka-boska-z-teczowa-aureola-elzbieta-podlesna-uslyszala-zarzut-ra933312> (date of access: 01 Feb 2021).

37 *Dulkiewicz o profanacji na marszu LGBT: Skąd tyle agresji wobec chrześcijańskich symboli?*, 28 May 2019, <https://www.tvp.info/42830161/dulkiewicz-o-profanacji-na-marszu-lgbt-skad-tyle-agresji-wobec-chrzcijanskich-symboli> (date of access: 01 Feb 2021).

38 *Bp Jerzy Samiec: Polska Rada Ekumeniczna nie ma nic wspólnego z Szymonem Niemcem*, 09 Jun 2019, <https://www.polskieradio24.pl/5/1222/Artykul/2322480-Bp-Jerzy-Samiec-Polska-Rada-Ekumeniczna-nie-ma-nic-wspolnego-z-Szymonem-Niemcem> (date of access: 01 Feb 2021).

that a crime report has been filed with the authorities.<sup>39</sup> Finally, on the night of July 28<sup>th</sup>, 2020, a group of activists desecrated the statue of Christ in front of the Church of the Holy Cross at Krakowskie Przedmieście, Warsaw, by draping it in a rainbow-like LGBT-movement flag.<sup>40</sup>

## Provocations of LGBT activists between 2018-2019 have led to increasing disapproval for the LGBT movement's political demands.



<sup>39</sup> *Chciała sprzedawać tęczową Maryję w kształcie waginy. Będzie zawiadomienie do prokuratury*, 26 Jul 2019, <https://www.tvp.info/43670598/chciala-sprzedawac-teczowa-maryje-w-ksztalcie-waginy-będzie-zawiadomienie-do-prokuratury> (date of access: 01 Feb 2021).

<sup>40</sup> *Tęczowa flaga na figurze Chrystusa na Krakowskim Przedmieściu*, 29 Jul 2020, <https://archwva.pl/wiadomosci/teczowa-flaga-na-figurze-chrystusa/> (date of access: 01 Feb 2021).



To summarise, the public opinion's attitudes which reflect increasing disapproval of the political demands put forward by the LGBT movement do not entail that discrimination or homophobia have become more popular. In fact, this change has been brought about by months of provocations and actions taken by the LGBT activists themselves. In their course, they attacked, Polish patriotic symbols, religion, and the notion of the family, simultaneously usurping the right to represent all people with homosexual tendencies or experiencing gender identity disorders. **Polish public opinion is not against lesbians, gays, bisexuals, and transsexuals. However, it disagrees with the ideological claims pursued by the LGBT activists that are in glaring conflict with the Constitution of Poland, and the values held by the majority of Poles.**

### 3. Discrimination experienced in Poland in the light of findings reached by the European Union Agency for Fundamental Rights.

One of the things that gave rise to criticism of Poland as a country that allegedly discriminates against people with homosexual tendencies or experiencing gender identity disorders were surveys carried out by the Fundamental Rights Agency, as cited by some observers. In her memorandum, the Council of Europe Commissioner for Human Rights has stated that:

” a 2019 survey by the EU's Fundamental Rights Agency found that 68% of LGBTI respondents from Poland – the highest ratio by a long way of all EU countries – believed that prejudice and intolerance against LGBTI people had increased in Poland over the previous five years.<sup>41</sup>

In reference to this claim, it would be worth analysing the survey cited by the Commissioner in greater detail. The European Union Agency for Fundamental Rights (FRA) made the survey dataset available on December 15<sup>th</sup>, 2020. The survey itself was conducted between May 27<sup>th</sup> and July 22<sup>nd</sup>, 2019, using the [lgbtsurvey.eu](https://lgbtsurvey.eu) platform on a sample of 139,799 residents of EU Member States, Northern Macedonia, and Serbia<sup>42</sup> who identified as belonging to the LGBTI group (i.e. lesbians, gays, bisexuals, and those with trans or intersex experiencing gender identity disorders). FRA used the Internet and social media to reach its target group, cooperating with statistical methodology and tool vendors (Agilis SA), as well as companies that deal in marketing and consulting profiled for the self-identified LGBTI community (Homoevolution).

FRA cooperated with social organisations comprising the LGBT movement in all countries where the survey was carried out. The actual findings of the survey, conducted by an entity that is commonly seen as favouring the LGBT movement, give a drastically different picture from the one painted by ideological prejudices and preconceptions concerning Poland, as presented by this movement to the public opinion, and perpetuated i.a. by the CoE Commissioner for Human Rights in the Memorandum in question.

The FRA survey itself demonstrates that there is an evident **discrepancy between the convictions held by the respondents concerning their social situation (as cited by the Commissioner), and their personal, empirical experiences.**

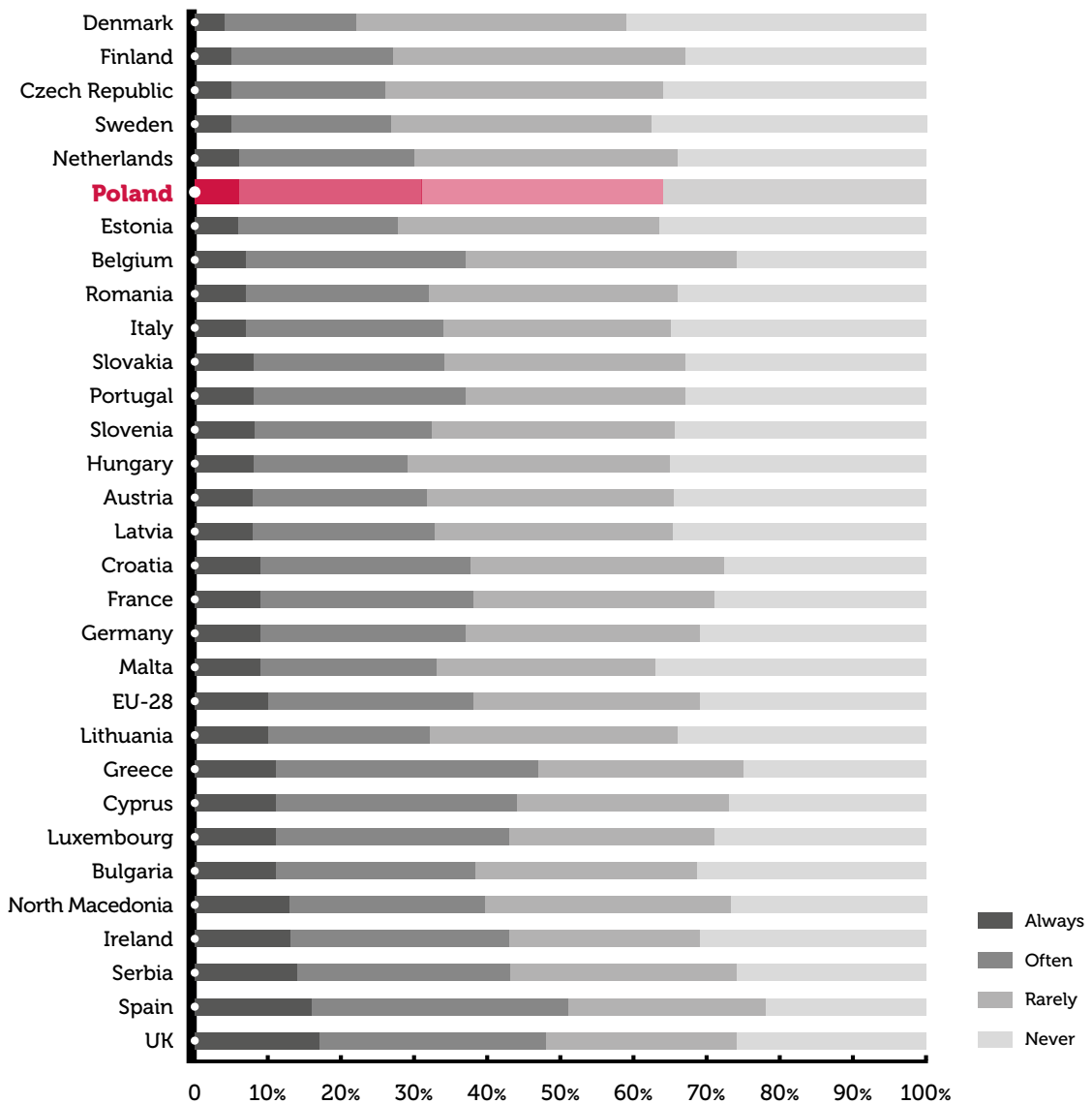
41 *Memorandum na temat stygmatyzacji osób LGBTI w Polsce*, 03 Dec 2020, <https://rm.coe.int/memorandum-na-temat-stygmatyzacji-osob-lgbti-w-polsce/1680a08bb4> (date of access: 01 Feb 2021), p. 2.

42 FRA's LGBTI survey dataset now available, 15 Dec 2020, <https://fra.europa.eu/en/news/2020/fras-lgbti-survey-dataset-now-available> (date of access: 01 Feb 2021).

When asked whether they experienced negative comments or conduct at school because of their belonging to one of the LGBTI groups, 6% of the Polish respondents gave 'Always' as the answer, and 25% gave 'Often,' whereas the EU average in this respect was 10% and 28%. A comparison with findings in other countries also shows that Polish respondents recorded one of the lowest numbers of displays of intolerance towards their behaviours in Europe.

### People who experienced negative comments or conduct at school because of their belonging to one of the "LGBTI" groups

(% of respondents from the Member State)

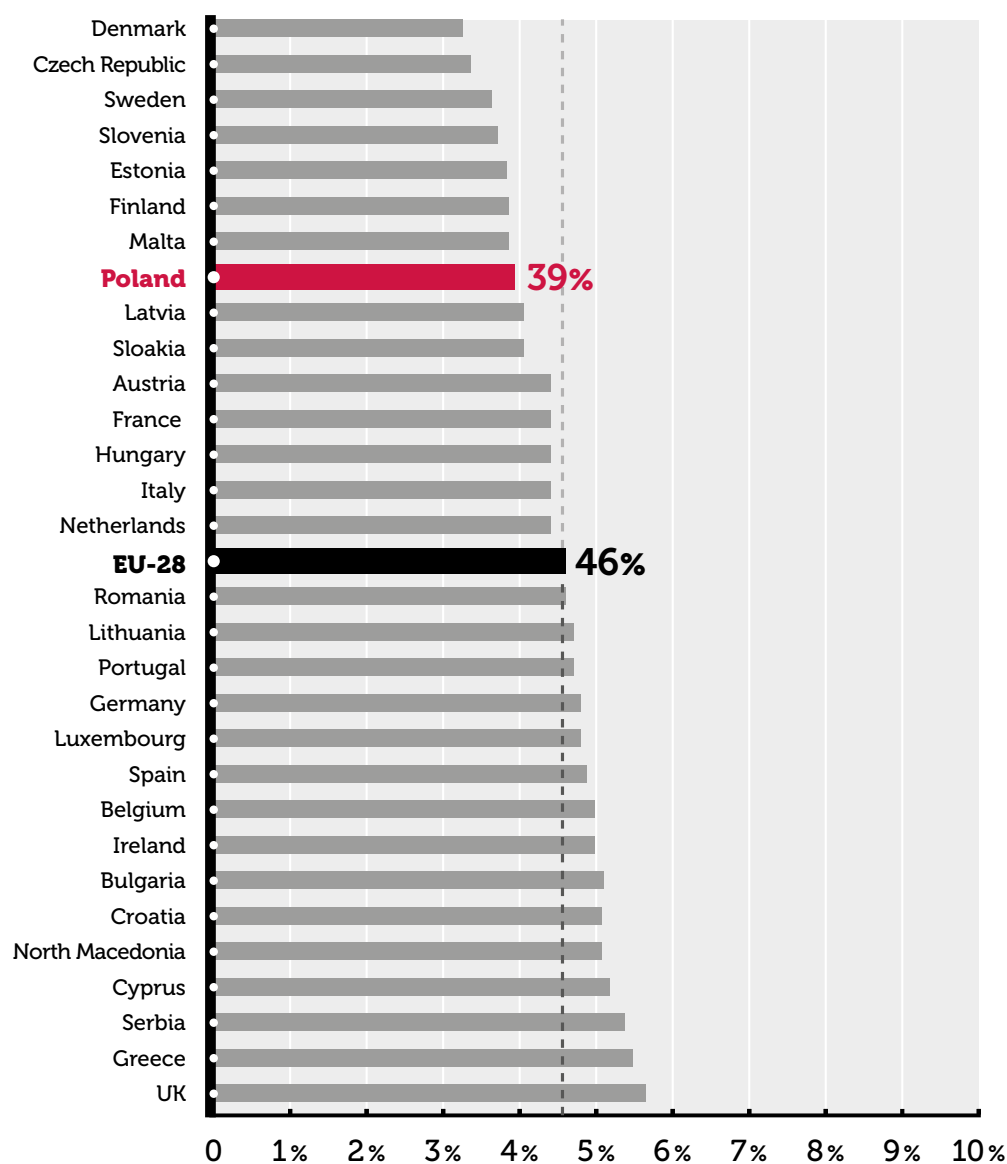


Source: <https://fra.europa.eu/en/news/2020/fras-lgbti-survey-dataset-now-available> (date of access: 01 Feb 2021).

Similarly, Poland is the country where members of LGBTI groups are least often ridiculed, teased, insulted, or threatened due to the fact that they belong to said groups. 39% of Polish respondents experienced any of those behaviours, whereas the EU-28 average was at 46%. For the United Kingdom, the result was 57%, Germany – 48%, Ireland – 50%, and Belgium – also 50%.

### People who experienced being ridiculed, teased, insulted, or threatened because of their belonging to one of the "LGBTI" groups

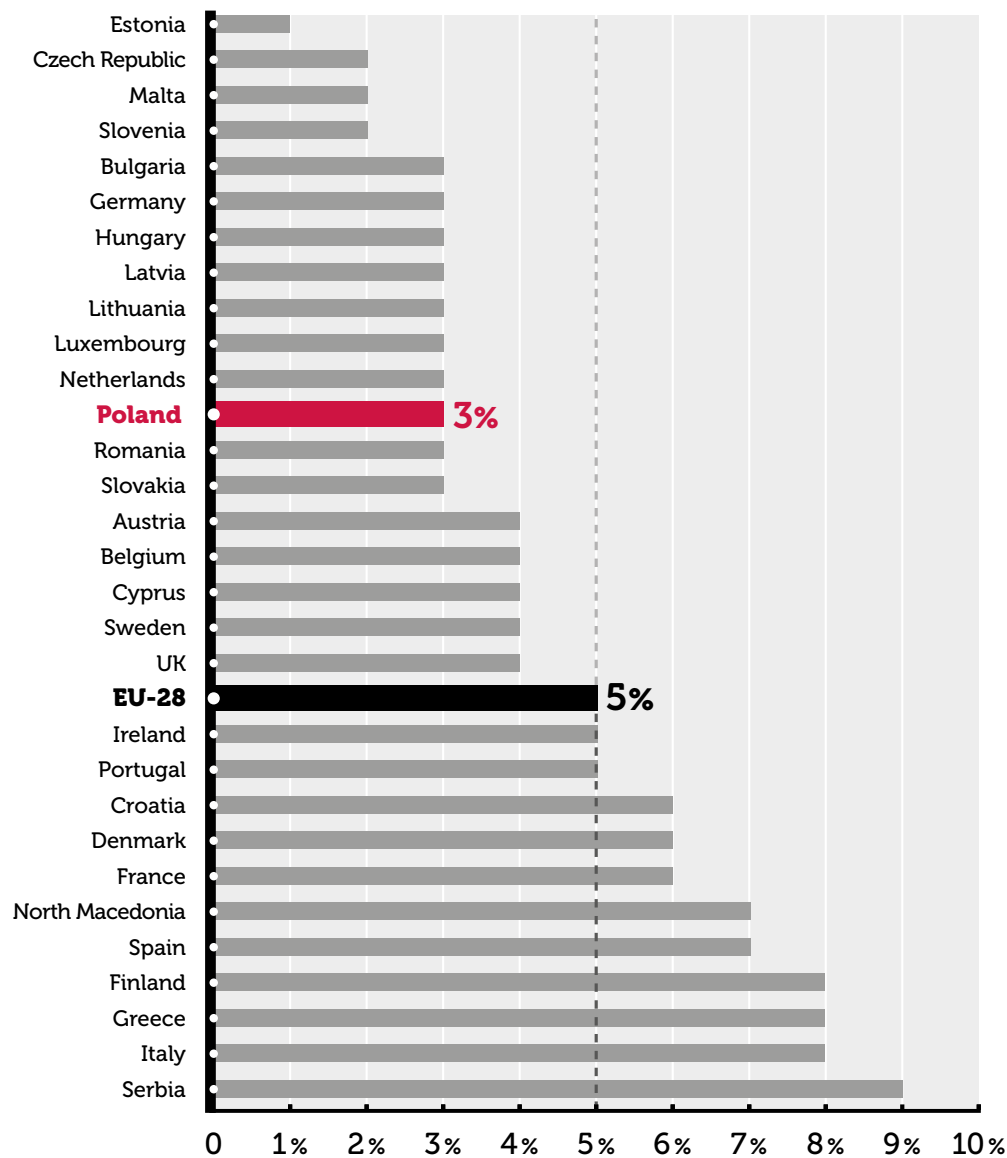
(% of respondents from the Member State)



Poland is also below the EU-28 average with respect to unemployment among people who belong to LGBTI groups. It amounts to 3%, which is comparable with the average unemployment rate for the entirety of the population (3.1% by Labour Force Survey classification), or even much lower than that (5.2% by Statistics Poland classification). The average rate for EU-28 was, in turn, 5%. This means that **neither homosexual tendencies, nor trans or intersex disorders constitute a significant employment barrier in Poland.**

### The level of unemployment among people who belong to "LGBTI" groups

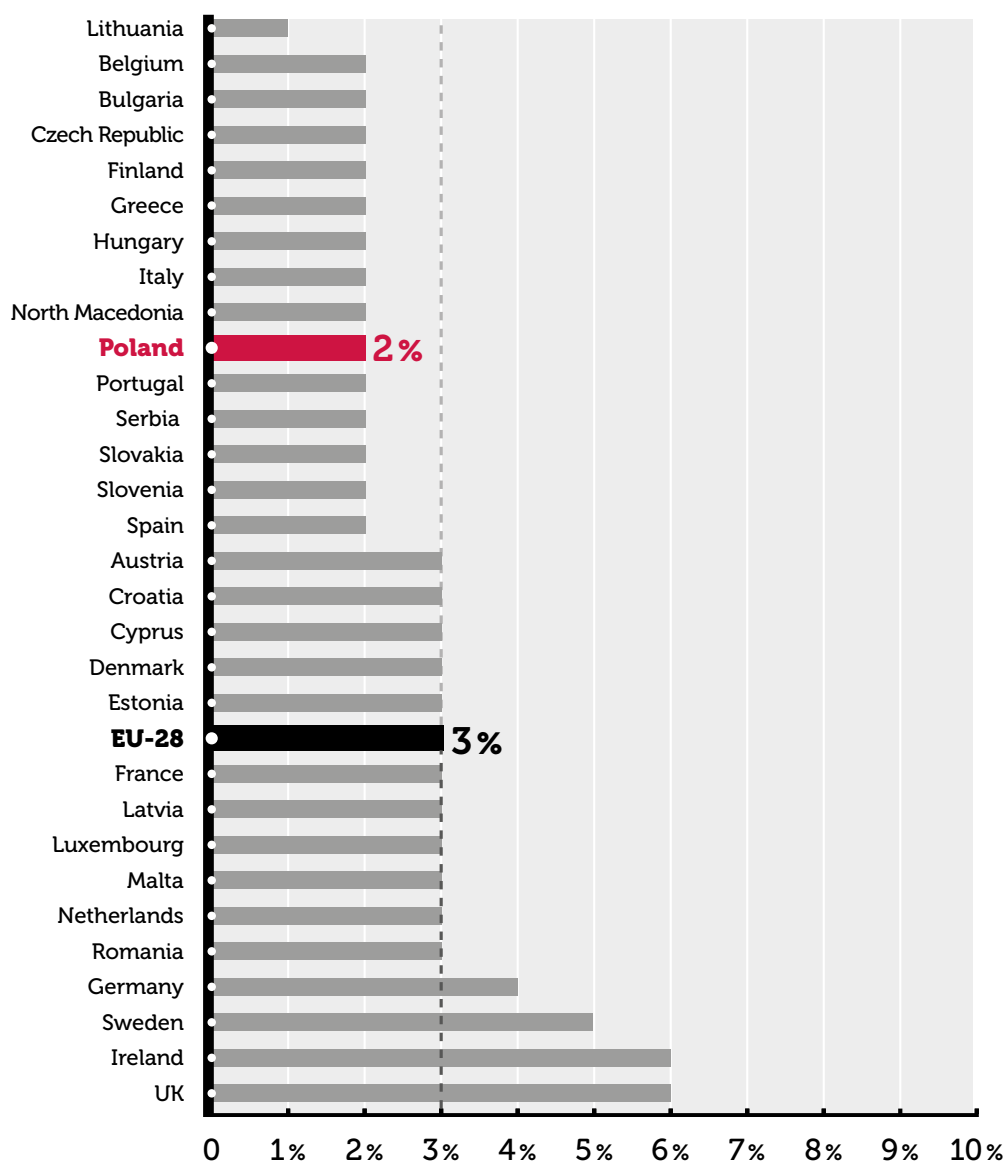
(% of respondents from the Member State)



Source: <https://fra.europa.eu/en/news/2020/fras-lgbti-survey-dataset-now-available> (date of access: 01 Feb 2021).

Responses to other questions show that just 2% of Polish respondents had difficulties in gaining access to healthcare since they identified as members of one of the LGBTI groups. The EU-28 average for this question was 3%. 2% is also a lower score than that for countries which are stereotypically considered “tolerant.” 3% of respondents from France, Denmark, and the Netherlands claimed to have had difficulties in accessing healthcare, 4% in Germany, 5% in Sweden, and as much as 6% in Ireland and the United Kingdom.

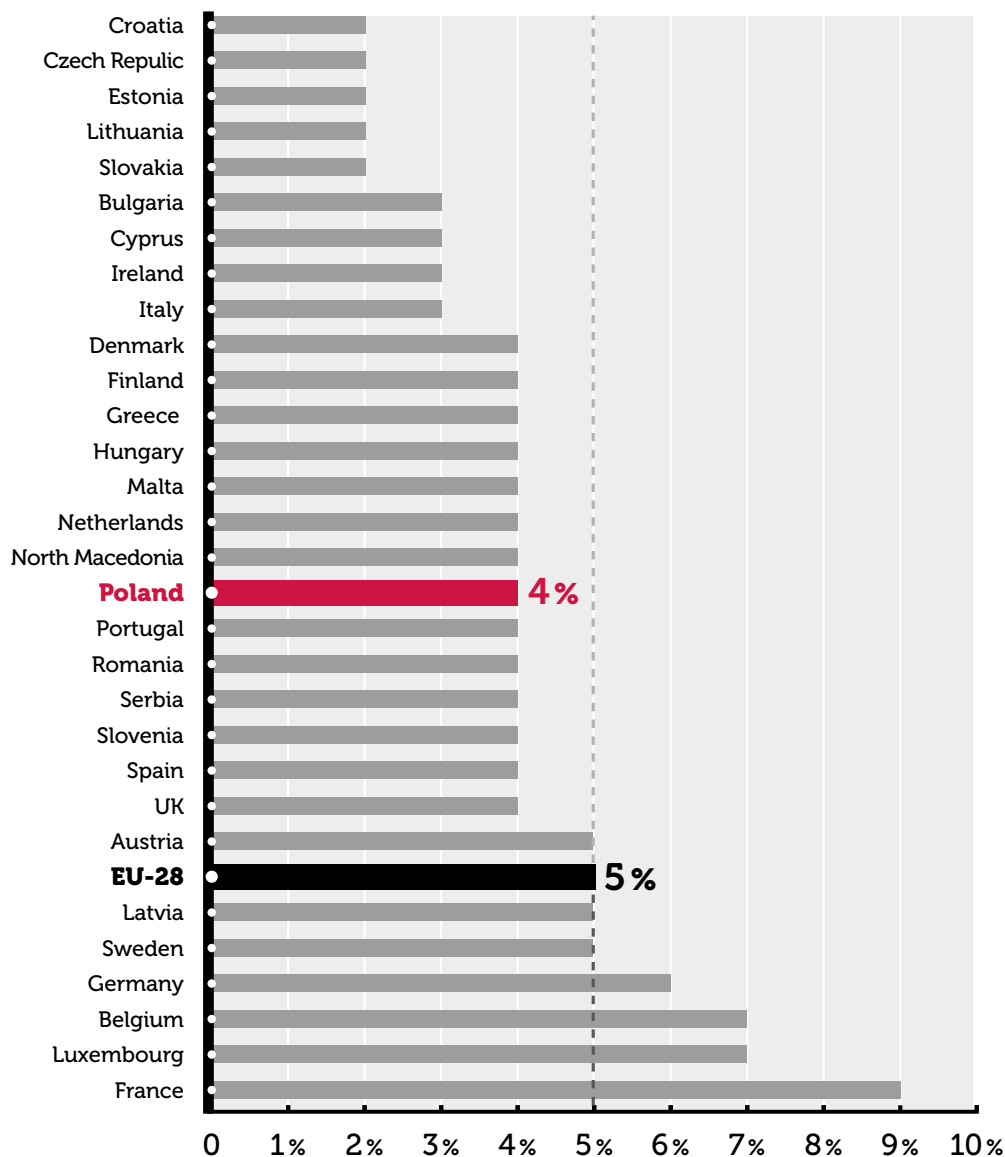
**Experience of difficulties in gaining access  
to healthcare because of their belonging to one of the “LGBTI” groups  
ACCESS TO MEDICAL SERVICES**  
(% of respondents from the Member State)



Similar distributions can be observed for the question that concerned having to change general practitioners or other specialists due to their negative reaction to the respondent being part of an LGBTI group. 4% of Polish respondents experienced this situation. 5% was the EU-28 average, as well as the result obtained for Swedish respondents. This level was exceeded in Germany (6%), Belgium (7%), Luxembourg (7%), and France (9%).

**Experience of difficulties in gaining access  
to healthcare because of their belonging to one of the "LGBTI" groups  
HAVING TO CHANGE GENERAL PRACTITIONERS OR OTHER  
SPECIALISTS DUE TO THEIR NEGATIVE REACTION TO THE RESPONDENT**

(% of respondents from the Member State)

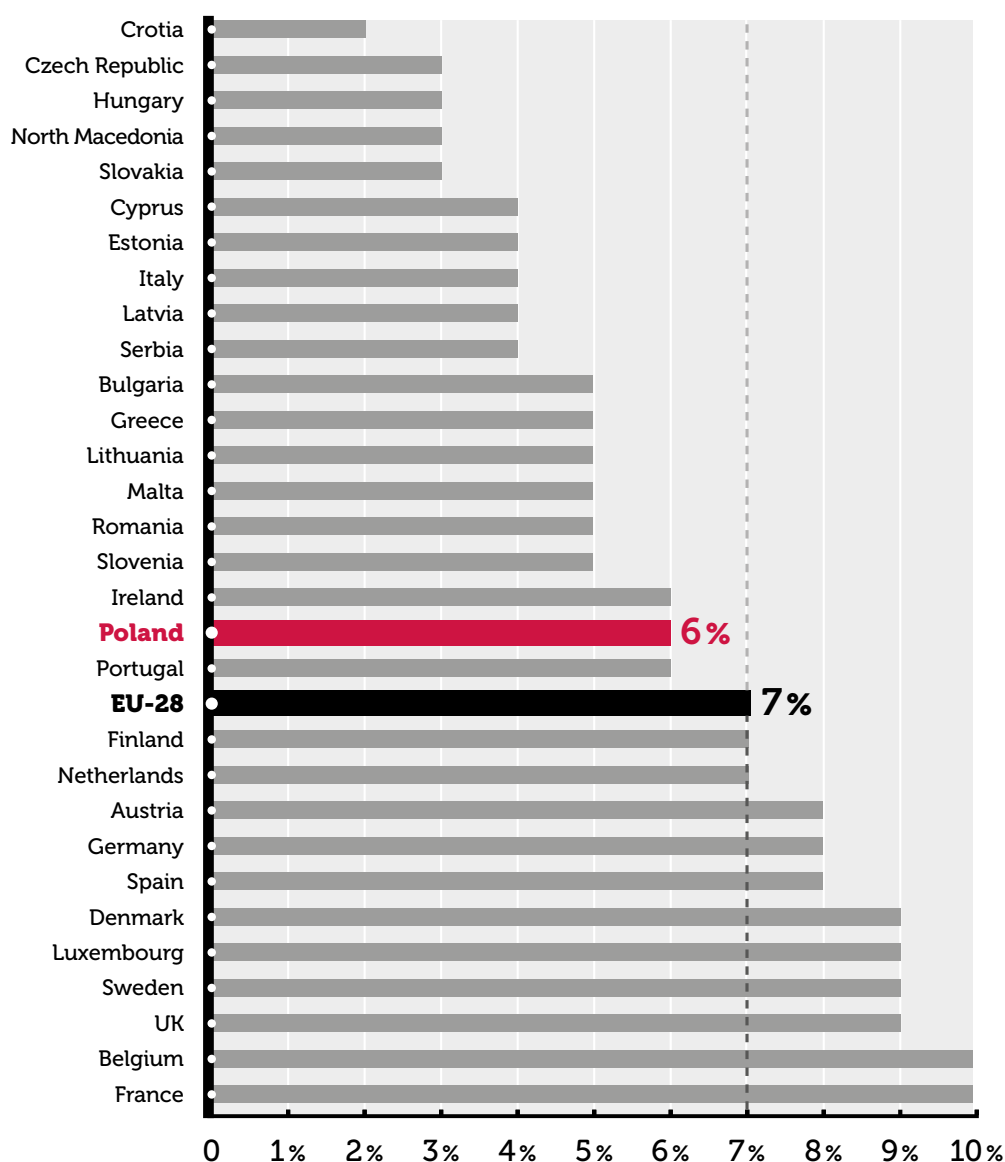


In Poland, the percentage of people who claimed that medical personnel ignored or did not take into account their specific needs arising from their identification with LGBTI groups is also lower than the EU-28 average – 6% compared to 7%, the latter also being the result for Finland and the Netherlands. Those who claimed to have had such problems amounted to 8% in Austria, Germany, and Spain, 9% in Denmark, Luxembourg, Sweden, and the United Kingdom, and even 10% in Belgium and France.

### Experience of difficulties in gaining access to healthcare because of their belonging to one of the „LGBTI“ groups

#### SPECIFIC NEEDS OF THE RESPONDENT WAS IGNORED OR DID NOT TAKE INTO ACCOUNT

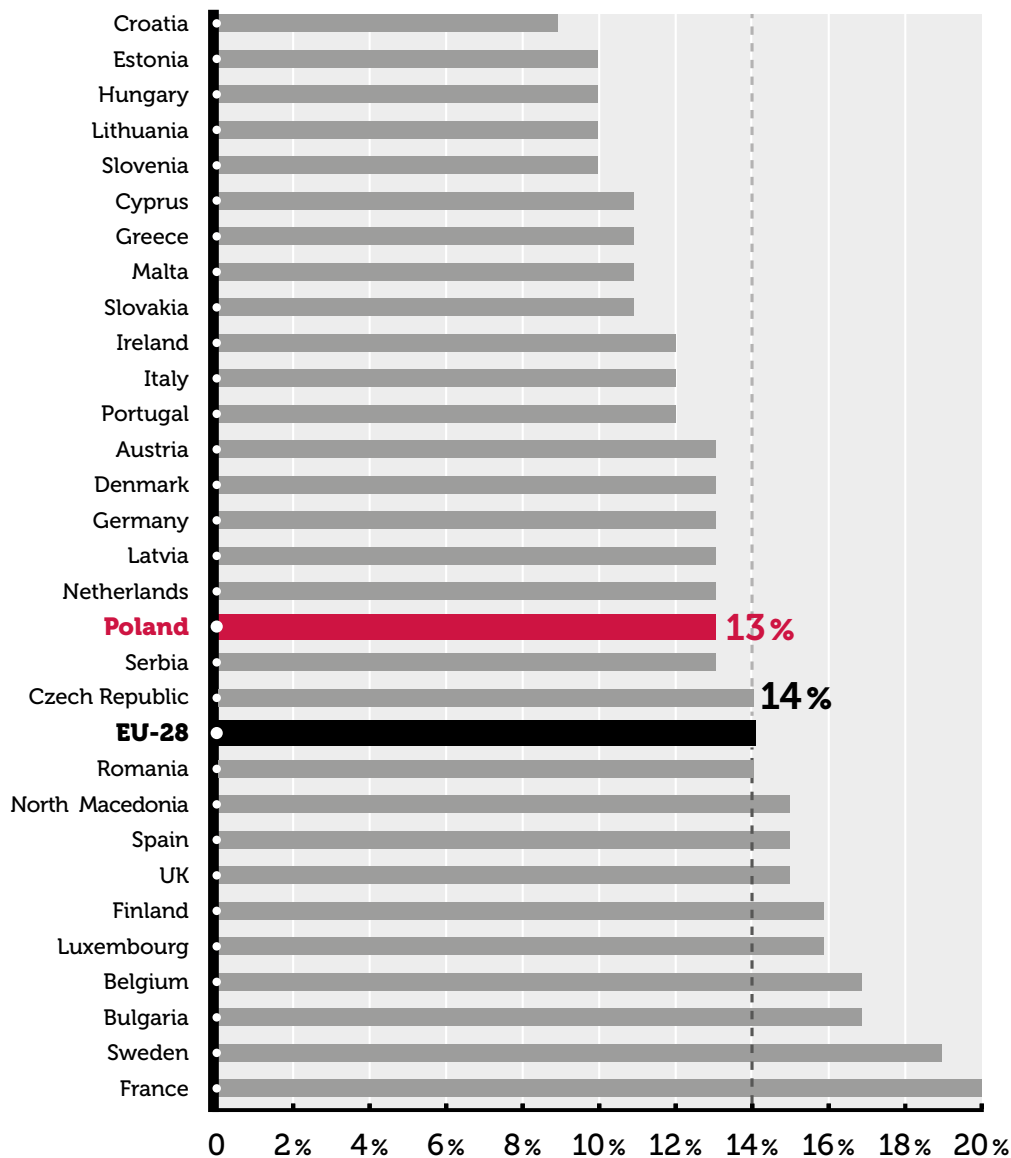
(% of respondents from the Member State)



Poland also fares well compared to other European countries when it comes to the experience of inappropriate curiosity or comments in accessing healthcare. As much as 71% of Polish respondents claimed that they did not experience such situations. 69% was the EU-28 average. 65% and 63% were the results for Sweden and France, respectively.

### Experience of difficulties in gaining access to healthcare because of their belonging to one of the „LGBTI“ groups INAPPROPRIATE CURIOSITY OR COMMENTS

(% of respondents from the Member State)





This means that in reference to concrete situations, detached from ideological stereotypes and prejudices, **Poland is one of the countries that ensures a higher level of security than the European standard for people with homosexual tendencies or experiencing gender identity disorders.** Further parts of this chapter and the chapter following it explain the ambiguities and manipulations concerning the actual situation of such people in Poland. They also lay out their legal situation, and the ways in which Poland fulfils its international obligations, guaranteeing relative well-being and equal treatment for all citizens irrespective of their sexual tendencies or the stability of their gender identities without unnecessary entanglements in ideology.

## 4. The scale of hate crimes in the light of OSCE data

The Office for Democratic Institutions and Human Rights (ODIHR) publishes annually information on hate crimes and incidents across the OSCE region that covers 57 OSCE participating States.

As ODIHR highlights, much of its information and data “has been provided by National Points of Contact on Hate Crimes (NPCs), appointed by the governments of OSCE participating States. Particular attention is devoted to gathering data relating to the specific bias motivations on which ODIHR has been asked to focus. Incidents reported by civil society groups, intergovernmental organizations and the Holy See are also published.”<sup>43</sup>

Although the data presented by the OSCE may not show all aspects of the problem, which is emphasized by the OSCE itself, it certainly sheds more light on it, allowing for a general orientation in the scale of the phenomenon under study. The chart below presents data collected by the OSCE for 2019 on the number of hate crimes against people with homosexual tendencies or experiencing gender identity disorders<sup>44</sup>.

The chart beneath takes into account the OSCE division into hate crimes and incidents. The first of them refer to criminal acts as recorded and reported by local authorities. These are usually recorded by police and then processed through criminal justice systems. The second are those reported by civil society and international organizations. While these incidents might constitute hate crimes, they may not have been verified by the state authorities.

In the light of the beneath data, **Poland turns out to be one of the countries where acts of aggression against these people occur the least frequently.**

43 ODIHR, *Our methodology*, <https://hatecrime.osce.org/what-do-we-know/our-methodology> (date of access: 08 Mar 2021).

44 ODIHR, *Bias against other groups - Sexual orientation or gender identity*, <https://hatecrime.osce.org/what-hate-crime/bias-against-other-groups-sexual-orientation-or-gender-identity#bm-background> (date of access: 08 Mar 2021)

## Number of hate crimes in 2019 against people with homosexual tendencies or experiencing gender identity disorders.

	Crime	Incident	Total amount	
Lithuania	2	7	9	
Croatia	6	11	17	
Bosnia and Herzegovina	1	18	19	
Ireland	35	1	36	
Finland	52	0	52	
<b>Poland</b>	<b>16</b>	<b>47</b>	<b>63</b>	
Denmark	76	0	76	
Norway	95	0	95	
Italy	107	51	158	
Ukraine	14	145	159	
Belgium	163	0	163	
Spain	278	3	281	
Netherlands	574	11	585	
Germany	248	516	764	
Great Britain (England and Wales)	18375	3	18378	

## 5. Rainbow Index

Another argument supporting the thesis that people with homosexual tendencies and experiencing gender identity disorders are allegedly discriminated against in Poland is that “[i]n recent years, Poland has fallen to 42<sup>nd</sup> place in the 2020 annual “**Rainbow index**” of the **International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe)**, which measures the level of respect for LGBTI rights in 49 European countries.”<sup>45</sup>

Said index<sup>46</sup>, established by LGBT activists, has serious faults in its foundations:

- it contains false information, calls on opinions as evidence, and ignores extant definitions and legal provisions;

45 *Memorandum...*, op. cit., p. 2.

46 Available at: [www.ilga-europe.org/resources/news/latest-news/rainbow-map-2020-points-make-or-break-moment-lgbti-rights-europe](http://www.ilga-europe.org/resources/news/latest-news/rainbow-map-2020-points-make-or-break-moment-lgbti-rights-europe).

- it is based on a **misinterpretation of the notion of human rights** which is not substantiated by any international treaties or other documents jointly adopted by various states. The report's methodology is based precisely on those wrong premises. It is the degree to which the LGBT activists' demands are brought to life that, according to the authors of the Index, should reflect the social situation that people with homosexual tendencies or experiencing gender identity disorders have to face in a given country.

### 5.1. False declarations as to facts, statements, and circumstances described

The report features a selective and biased description of certain events and circumstances that supposedly prove that the rights of individuals with homosexual tendencies or experiencing gender identity disorders are violated in Poland.

- **The report misrepresents the circumstances and rulings pertaining to the so-called “printer’s case,”**<sup>47</sup> suggesting that its subject matter was access to specific services for non-heterosexual people (in this case, printing services). This was not what happened in actuality. The case concerned representatives of a legal person (a foundation), and not natural persons, that were denied services – and not because of their sexual orientation (which the printer might not have even known), but because of the nature of materials that were to be printed. Thus, it was the nature of the service, and not the characteristics of the customers, that were the reason for the refusal.
- **The report manipulates politicians’ statements.** Jarosław Kaczyński, head of the Prawo i Sprawiedliwość (Law and Justice) party, was attributed to have said that “[t]he Warsaw mayor’s support of LGBT people is an attack on children and families.” Kaczyński never uttered such words. One may suppose that ILGA’s document refers to what he said during his party’s convention, “Polska sercem Europy” (“Poland – The Heart of Europe”), which was held in Jasionka near Rzeszów: “*If family is our priority, then we must realise that we are also dealing with a great trouble, a great challenge, a grave danger – this danger is an attack on the family, an attack executed in one of the worst ways possible, since it is an attack on children in essence,*” and “*This can hardly be considered upbringing; this is not upbringing. It is social engineering precisely, designed to change a human being*”.<sup>48</sup> Kaczyński did not refer to “support of LGBT people”, but to the LGBT+ Declaration.<sup>49</sup>
- **The report provides false information concerning actions taken by certain Polish local governments** (incorrectly claimed to be towns) which have supposedly declared themselves to be “LGBT-free zones.” Meanwhile, no local government in Poland had established such zones. Councillors either adopted the Local Government Charter of Family Rights which makes no single mention of people with homosexual tendencies or experiencing gender identity disorders, or passed legally non-binding statements objecting to an ideology understood as “controversial views that are not shared by the significant majority of society with respect to marriage, family, ways of expressing

47 See discussion of Article 138 of the Infraction Code in Chapter 1.4.

48 *Burza po słowach prezesa PiS. „Kaczyński dał sygnał do ataku na osoby LGBT+”, 10 Mar 2019, <https://wiadomosci.dziennik.pl/polityka/artykuly/593174,kaczynski-pis-polityka-lgbt-konwencja-rodzina-dzieci-trzaskowski-geje.html> (date of access: 01 Feb 2021).*

49 More information can be found in Chapter III.5.

human sexuality, and early sexualisation of children, as well as attempts at forcefully promoting these views in education, culture, and social life.”<sup>50</sup>

## 5.2. Vague arguments as the basis for the Index

### a) The notion of sexual orientation

It seems that the unclear terms ‘sexual orientation’ and ‘gender identity’ are key for the whole publication. The report provides no definitions thereof. Elsewhere, LGBT groups define sexual orientation as “an inherent or immutable enduring emotional, romantic or sexual attraction to other people,”<sup>51</sup> or “everyone’s ability to experience a profound emotional relationship, affection, and sexual drive, and to enter intimate and sexual relations with opposite-sex and same-sex individuals, as well as with representatives of more than one sex.”<sup>52</sup> In line with this definition, sexual orientation is a category that covers practically all close interpersonal relations: profound emotional relationships, affection, and intimacy of anyone with everyone (which would include parental love and friendship between two men). The whole wide range of relationships is reduced to the level of sexual orientation. In other words, a definition that covers such a broad range of interpersonal relationships, in fact, explains nothing.

### b) The notions of gender and gender identity

In turn, the notion of gender identity has no basis in binding international law documents. The exception is the controversial **Istanbul Convention**<sup>53</sup> which has not been ratified by eleven member states of the Council of Europe.<sup>54</sup> Its application in Poland is limited solely to substantive legal provisions. As Polish authorities ratified the Convention in 2015, they emphasised unambiguously that all its provisions should be interpreted in line with the Polish Constitution.<sup>55</sup> The Polish government stated

50 Resolution No XIX/192/2020 of the Tuchów Town Council..., op. cit.

51 *Sexual Orientation and Gender Identity Definitions*, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (date of access: 01 Feb 2021).

52 Definition presented in Article 2 Point 2 of the parliamentary bill on the prohibition of controversial practices, 20 Feb 2019, MK-020-1241/19, [http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1241-2019/\\$file/8-020-1241-2019.pdf](http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1241-2019/$file/8-020-1241-2019.pdf) (date of access: 01 Feb 2021). Cf.: R. Dorosiński, *Problematyka terapii reparatywnej na tle projektu ustawy o zakazie praktyk konwersyjnych*, 16 May 2019, <https://ordoiuris.pl/wolnosc-sumienia/problematyka-terapii-reparatywnej-na-tle-projektu-ustawy-o-zakazie-praktyk> (date of access: 01 Feb 2021).

53 Council of Europe Convention on preventing and combating violence against women and domestic violence, opened on 11 May 2011, Polish Journal of Laws of 2015, item 961.

54 The eleven states are Armenia, Bulgaria, the Czech Republic, Hungary, Latvia, Lichtenstein, Lithuania, Moldova, Slovakia, Ukraine, and the United Kingdom. It is also worth noting that on 29 March 2019 the Parliament of Slovakia passed a declaration calling on the government to reject the ratification of the Istanbul Convention by a decisive majority of votes (101 deputies out of 132 voted in favour of this declaration) (source: <https://www.nrsr.sk/web/Default.aspx?sid=schodze/uznesenie&MasterID=11415>, date of access: 01 Feb 2021), whereas on 25 February 2020, 95 deputies out of 107 voted to ultimately reject the motion to ratify the Istanbul Convention (source: <https://www.nrsr.sk/web/Default.aspx?sid=schodze/uznesenie&MasterID=12080>, date of access: 01 Feb 2021). In turn, on 5 May 2020, 115 out of Hungary’s 153 parliamentary deputies cast their votes in favour of a declaration that would reject the ratification of the Convention (source: [https://www.parlament.hu/internet/cplsql/ogy\\_irom.irom\\_adat?p\\_cki=41&p\\_izon=10393](https://www.parlament.hu/internet/cplsql/ogy_irom.irom_adat?p_cki=41&p_izon=10393), date of access: 01.02.2021). Both states found the Convention to be in conflict with applicable law and the fundamental values that are held by their citizens.

55 The full contents of reservations and declarations made by Poland during the ratification of the Convention is available at [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p\\_auth=4ebx9lxL](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/declarations?p_auth=4ebx9lxL) (date of access: 01 Feb 2021).

that “the primary EU legislation does not explicitly refer to gender identity, gender expression or gender characteristics, although the Charter of Fundamental Rights of the European Union does mention sexual orientation. Therefore, the Treaties of the European Union only use the terms «sex» and «sexual orientation».<sup>56</sup>

### **5.3. Misinterpreted notion of human rights, unsubstantiated by any international treaties or other documents jointly adopted by various states, as the basis for the Index**

The Index’s authors specify the “criteria that ILGA-Europe takes into consideration for each country,” which serve as the basis for their ranking. It is worth noting that the majority of these criteria do not refer to human rights at all. Rather than that, they are a detailed agenda of a political LGBT movement, categorised by specific types of forcefully promoted legal solutions. The following are examples of such “criteria”:<sup>57</sup>

- Health (sexual orientation) covers legislation prohibiting discrimination in the field of health. Only express mention of sexual orientation should be counted. The uncontroversial demand (criterion) concerning non-discrimination as regards healthcare services involves, for LGBT activists, “tak[ing] the appropriate legislative and policy measures to ensure that transgender persons have effective access to appropriate gender reassignment services, without being subject to unreasonable requirements,” “participating in cultural competency programs for students in medical, nursing, and other relevant health programs,” and “engag[ing] external LGBT organizations in the development and review of existing educational programming to ensure that it is LGBT-inclusive”.<sup>58</sup>
- “Conversion therapy (sexual orientation) covers legislation and policies prohibiting reparative or conversion therapy.”
- “Education (gender identity) covers legislation prohibiting discrimination in the field of education. Express mention of gender identity only should be counted. Equivalent grounds (sexual identity, gender reassignment, etc) are accepted too.”
- “Marriage equality\* covers when same-sex couples can marry, with the same level of rights as married different-sex couples.”
- “Joint adoption covers when same-sex couples can legally apply for joint adoption.”
- “Medically assisted insemination (couples) covers when couples (regardless the partners’ sexual orientation and/or gender identity) are not facing any legal barriers in order to get fertility treatment.”

56 *The comments of the Government of the Republic of Poland to the Commissioner for Human Rights of the Council of Europe’s Memorandum on the stigmatisation of LGBTI people in Poland*, 28 Nov 2020, <https://rm.coe.int/commdh-govrep-2020-11-en/1680a091dc> (date of access: 01 Feb 2021).

57 *Rainbow Europe, About*, <https://rainbow-europe.org/about> (date of access: 01 Feb 2021).

58 *Documentation of discrimination in the field of LGBT health in Romania. General overview, legal framework, findings and recommendations*, 2014, <https://www.ilga-europe.org/sites/default/files/Attachments/romania.pdf> (date of access: 01 Feb 2021).

- “Hate speech law (sexual orientation) covers when sexual orientation is expressly included in hate speech legislation as an aggravating factor.”
- “Self-determination covers when a) Legal gender recognition is based exclusively on the expressed wish of the person concerned e.g. by declaration b) Does not require third party involvement, e.g. judge, medical expert, intercessor.”

**None of these demands (or the majority of those included in the Index) that touch upon domestic legal systems fall within the category of human rights. None of them are supported by binding international agreements.** Therefore, the Index ranks countries by the degree to which they have achieved arbitrary expectations. These reflect not the “degree of respect for human rights,” but the degree of realisation of political demands – the demands of a political group of activists generously financed by public funds, including EU funds.

The crux of the report author’s arguments is the attempt at making opposition to the LGBT ideology tantamount to an attack on people with homosexual tendencies or experiencing gender identity disorders. This premise is evidently wrong. Moreover, as will be proven further herein, the Polish Constitution guarantees rights and freedoms, prohibits discrimination, ensures equal treatment, and protects against violence. The Constitution is an act that applies to all citizens, irrespective of any circumstances or characteristics. There are no reasons why Polish law should accord preferential protection to people because of the characteristics specified in the report. **Instilling the constructs suggested in, i.a., the ILGA report aims not at guaranteeing equal treatment, but at ensuring that a certain social group enjoys a privilege. This violates the fundamental values inscribed in a series of international treaties and constitutions of numerous countries across the world.**

## 6. The LGBT+ Declaration

In this discussion of the social situation in which people with homosexual tendencies or experiencing gender identity disorders find themselves, it would be impossible not to mention the widely commented LGBT+ Declaration. A detailed analysis of this declaration evidences that, in fact, the implementation of the majority of its provisions would not constitute pro-equality efforts. It would lead to actual privilege being granted to a group of certain ideologically defined individuals.<sup>59</sup> The key accusations against the LGBT+ Declaration are, among others, the following:

- This document was issued unilaterally, and not as a legally stipulated order or bill. No wide-scale social consultations preceded its issuance. **Rafał Trzaskowski limited the discussions to a closed circle of “confidants and confidantes” – selected organisations belonging to the LGBT movement which were also involved in the process of drafting the document** (Miłość Nie Wyklucza, Lambda Warszawa, Kampania Przeciw Homofobii (Campaign Against Homophobia), Fundacja

<sup>59</sup> B. Zalewski, N. Bernaciak, *Analiza Deklaracji „Warszawska polityka miejska na rzecz społeczności LGBT+” podpisanej 18 lutego 2019 r. przez Prezydenta m. st. Warszawy Rafała Trzaskowskiego*, 21 Feb 2019, <https://ordoiuris.pl/rodzina-i-malzenstwo/analiza-deklaracji-warszawska-polityka-miejska-na-rzecz-spolecznosci-lgbt> (date of access: 01 Feb 2021).

Trans-Fuzja, and Fundacja Wolontariat Równości). **Despite the fact that over a year has passed since the signing of the LGBT+ Declaration, social consultations still have not commenced in this respect. The Mayor of Warsaw and his “confidants” are stubbornly ignoring the citizens’ request filed on August 8<sup>th</sup>, 2019 by several thousand Warsaw residents.**

- The true nature of the LGBT+ Declaration lies in privilege accorded to a certain group of individuals, not in equal treatment. This was emphasised on February 25<sup>th</sup>, 2019 by the Warsaw Industry Social Dialogue Committee which found that “a situation where one of the minorities is protected to a greater degree than the other gives rise to doubts whether indeed the residents of Warsaw are treated equally, and are not discriminated against by the local government authorities.” The fact that the LGBT+ Declaration favours a certain group of individuals resulted in the Warsaw Mayor’s ordinance of July 11<sup>th</sup>, 2019, **retroactively removing the office of the Plenipotentiary for Equal Treatment**, effective from May 19<sup>th</sup>.
- One of the demands posited in the LGBT+ Declaration is the establishment of a **privileged ‘intervention hostel for LGBT+ individuals,’ which completely disregards the already extant and nation-wide network of crisis intervention centres**, the offering of which is addressed both to victims of violence, and to those who find themselves in difficult circumstances due to other reasons. This matter is regulated by the Act of March 12<sup>th</sup>, 2004 on social assistance. This act of law does not make assistance conditional on anyone’s sexual orientation, gender identity disorder, or political views. Financing a separate institution would constitute a **flagrant breach of the principle of equal treatment**.
- Another demand laid out in the LGBT+ Declaration was “the introduction of antidiscrimination and sex education in all schools that would account for issues concerning one’s psychosexual identity and sexual identification in line with the standards and guidelines of the World Health Organisation (WHO).” Said standards and guidelines cover such issues as “early childhood masturbation,” “sex in the media (including the Internet),” “enjoyment and pleasure when touching one’s own body (masturbation/self-stimulation),” “pleasure, masturbation, orgasm,” “abortion, contraception, emergency contraception,” “information about contraceptive services,” and finally, “transactional sex (prostitution, but also sex in return for small gifts, meals).” **This is in drastic conflict with the “integral vision of human sexuality” found in the national curriculum for family life education (type A sexual education).**
- What raises immense concern in the LGBT+ Declaration is the demand that a “network of social ‘lightkeepers’ be established, comprising teachers and school educators who would be monitoring the situation of LGBT+ students in Warsaw primary and secondary schools.” In practice, this would involve **imposing a sort of political oversight on schools, leading to the differentiation of the students’ situations on the grounds of their actual or merely suspected problems with sexuality or gender identity, and even on the grounds of their declaration in this respect alone**. Suggestions that such students “not always find support in their families” (and such ‘support’ would now have to be provided by Warsaw-based schools), aim at **openly violating Article 48 of the Polish Constitution, wherein the lawmakers have enshrined the parents’ right to raise their children in line with their beliefs**. This is because education law assumes that where the schools’ efforts concern upbringing, and not education, schools should only support and provide assistance to the family. Pitting the students against their own families is completely inadmissible

in the light of the supreme law of Poland. It is also worth noting that the activities carried out by the 'lightkeepers' in question would entail **legally unacceptable processing of sensitive data concerning the students' sexuality**, as defined in Article 9(1) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 04.05.2016).

## 7. Resolutions objecting to the LGBT ideology.

Resolutions adopted by local government bodies opposing the LGBT ideology turned out to be a source of many misunderstandings. They were a reaction to the efforts that have culminated in the issuance of the LGBT+ Declaration.

The Council of Europe Commissioner for Human Rights falsely described them as "declarations that are openly hostile to LGBT people,"<sup>60</sup> even though their authors clearly state in the resolutions themselves that the local governments they represent "will not interfere with the private life of Polish families," and that the resolutions are passed due to the ideological war waged by some politicians, as identified by the proponent. There is no mention of any criticism of people with homosexual tendencies or experiencing gender identity disorders. Such declarations are directed at a specific group of people **identified not through their personal characteristics, but through their external, political, or ideological involvement**. This group is considered to be "radicals" who "attack freedom of speech, the innocence of children, the authority of parents and schools, and entrepreneurial freedom." These are values protected by the Polish legal and constitutional order.

Furthermore, councillors have deliberately avoided including any personal characteristics in their description of what they objected to (such as homosexual orientation or experiencing gender identity disorders). They merely **described the behaviours that are in conflict with the Polish legal system**. One such behaviour is "appointing officers of political correctness in schools (so-called 'lightkeepers') in violation of the law." Here, the issue protected is the parents' right to raise their children in line with their beliefs (Article 48 Section 1 of the Polish Constitution). Another behaviour involves "the early sexualisation of Polish children." Sexualisation of children and adolescents has been identified as one of the dangers for public health in the Regulation of the Council of Ministers on the National Health Programme.<sup>61</sup> Other behaviours include "exerting administrative pressure to observe political correctness in certain professions (sometimes rightly referred to as, simply speaking, homo-propaganda)," or "imposing unprofessional performance criteria on teachers and entrepreneurs." **All of the described behaviours breach provisions of binding law**. At the same time, these behaviours infringe on the following rights enshrined in the Constitution of Poland: freedom of speech (Article 54), innocence of children (Article 72(1)), authority held by families (Article 18, 48(1), and 71), authority held by schools (Article 70(1)), and freedom of economic activity (Article 22).

60 *Memorandum...*, op. cit.

61 The Regulation of the Council of Ministers of 4 August 2016 on the National Health Programme for 2016-2020, Polish Journal of Laws of 2016, item 1492.



The allegations made against the resolutions are primarily based on **speculations, conjectures, concerns, assumptions, and subjective feelings**. The Polish Ombudsman appealed against those resolutions, pointing out that they “*may lead to discrimination*,”<sup>62</sup> that there are “*concerns* the Municipal Council’s resolution [...] *will be read*” in a specific manner assumed by the applicant, and finally, that the resolution *may be* a source of “*concern* for the municipality’s residents identifying as LGBT – who are *unsure* of the resolution’s effect on them, and who *subjectively* experience exclusion from the local government’s community.”<sup>63</sup>

In turn, the allegation that the resolutions are discriminatory in nature is totally **detached from the essence of discrimination** that has been extensively explained in case-law and doctrine. With respect to the principle of equality before the law, guaranteed under Article 32 of the Polish Constitution, the Constitutional Court distinguished two elements comprising said principle:<sup>64</sup>

- 1) equality before the law entailing the obligation incumbent on public authorities to ensure equal treatment in the process of **enforcing** legislation;
- 2) equality before the law entailing the obligation incumbent on public authorities to consider the principle of equality when drafting the texts of their acts (**enacting** legislation).

Meanwhile, the resolution that was the object of an appeal has nothing to do with enforcing legislation with respect to its addressees, nor with enacting legislation. This very fact alone makes the discrimination-related allegation totally misbegotten.

Unable to state specifically how any provision of domestic or international law would be violated, and in what specific way the rights, freedoms, and obligations of the individuals (their legal situation) would be infringed upon, those against the local governments’ resolutions have raised **the allegation**, just like the Polish Ombudsman, **that the resolutions violate the right to privacy**. However, since this claim is totally detached from the understanding of the right to privacy that arises from the Polish Constitution (see Part IV, Chapter 6.1. hereinbelow), the Polish Ombudsman, cites the ECHR judgment of 1978 in the case of *Dudgeon v. the United Kingdom*, and states that what may be considered as interference with private life is the sole fact that certain provisions of law exist “provided that they result in an individual’s fear and distress rendering them unable to live at peace with their identity.” At the same time, the Ombudsman totally misses the essence of the case for which this ruling was issued. The judgment concerned the search undertaken by the authorities in the house of Jeffrey Dudgeon (who had homosexual relations with another male), and the questioning he had to undergo for several hours at the police station. This was a consequence of the then-applicable legislation in Northern Ireland which made homosexual acts between males criminal offences. The ECHR found that the prohibition of private consensual homosexual acts involving adult male persons was a significant interference by the United Kingdom with the right to respect for one’s private life. The Court gave positive consideration to Mr. Dudgeon’s position, who claimed to have experienced fear, suffering, and psychological distress directly caused by the very existence of the laws in question, including fear of harassment and blackmail. The investigation carried out by the police in regard to Mr. Dudgeon was sufficient evidence that the danger of applying a penal sanction was real.

62 Appeal by Polish Ombudsman against Resolution No. VI/51/2019..., op. cit., point 44.

63 Ibidem, point 47.

64 Cf. B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, comment on Article 32.

The Government of the United Kingdom, in turn, did not challenge the claim that Mr. Dudgeon was directly affected by said provisions.

Strictly speaking, in light of the cited ECHR judgment, the potential incitement of fear and anxiety by the sole existence of provisions was linked to a real danger of penal sanctions, and the direct intrusion in the applicant's private life (house, private correspondence).

## 8. The Local Government Charter of Family Rights

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Another supposed display of stigmatisation of people with homosexual tendencies or experiencing gender identity disorders, is, as alleged by i.a. the CoE Commissioner for Human Rights, the adoption of the Local Government Charter of Family Rights on the part of local government authorities.<sup>65</sup>

Such opinions stem from a wave of calumnies uttered in the wake of "Atlas of Hate", the authors of which classified the regions that adopted the Charter as "LGBT-free zones" – zones where people with homosexual tendencies or experiencing gender identity disorders are purportedly discriminated against.

As drafted by Ordo Iuris experts together with over 20 social organisations, the Local Government Charter of Family Rights is, in fact, a declaration that promotes the constitutional principles of protection accorded to family, marriage, parenthood, and motherhood (Article 18 of the Constitution), protection accorded to family life (Article 47), and protection of children against moral corruption (Article 72). The Charter also stipulates for special protection for the parents' right to raise their children in line with their beliefs (Article 48 of the Constitution).

These norms support the fundamental group unit of society, and thus are beneficial for the whole of society, irrespective of the fact that other citizens may potentially belong to other groups, and irrespective of their sexual preferences. No provision in the Charter changes the legal position of people who remain in non-marital relationships. The Charter is not an act of local law. It creates no concrete norms, and merely indicates the areas for the local executive, in which they are obliged to act by the provisions of the Constitution or other acts. The whole document features no references to homosexual tendencies or the LGBT movement.

Reaching unity in support of families, parents, and children has been the role of the Charter from the very beginning. For the Charter to be a platform of understanding beyond divisions, its provisions directly implement the principles enshrined in the Constitution of the Republic of Poland. Local governments have adopted the Charter regardless of political divisions, on the initiative of councillors representing Prawo i Sprawiedliwość, Polskie Stronnictwo Ludowe (Polish People's Party), and even as a result of a citizens' initiative.

The "Atlas of Hate" constitutes a deliberate attack and a conscious manipulation aiming to damage the local governments' reputation. By no means would it be difficult to verify the true contents of the

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65 Memorandum..., op. cit.

Charter, and see that it is not a document that incites hate or discrimination. **It is because of these reasons that the affected local governments, with help from Ordo Iuris, decided to take legal action against the authors of the publication.** The spread of misinformation about the Charter on the part of LGBT activists severely damages the reputation of those local governments that have adopted the Charter.

The fact that the Local Government Charter of Family Rights does not violate the Polish Constitution is supported by exhaustive opinions drafted by constitutional law experts – prof. Anna Łabno and dr hab. Jacek Zaleśny. Both confirmed that the document is fully consistent with the Constitution, and furthermore highlighted the fact that implementing pro-family solutions is a constitutional obligation of every local government.

Full compliance of the Charter with other legal norms was ultimately confirmed by LGBT activist Bartosz Staszewski, known for placing fake road signs reading “LGBT-Free Zone” on the borders of certain Polish municipalities. Staszewski directly said that his criticism was not directed at the Local Government Charter of Family Rights itself. The ombudsman, Adam Bodnar, who indubitably supports the radical demands arising from gender ideology, also did not challenge any of the resolutions adopting the Charter and did not refer them for administrative courts’ consideration – despite his ambiguous statements on the matter.

## 9. Summary and conclusions

01 As used in public debate, the term ‘LGBT ideology’ is understood to mean a body of objectives and views rooted in various movements, including postmodernism, queer theory, and radical feminism, as well as a set of demands that pertain to concepts of gender, sexuality, marriage, and family, and that entail “attempts to press for their realisation in culture, education, and social life.”<sup>66</sup>

02 The change in the public opinion’s attitudes consisting in greater disapproval of the political demands of LGBT activists resulted from numerous provocations and insults that have consecutively occurred over the course of several months, and that were directed at patriotic and religious symbols (involving the national emblem, the image of Christ and Mary, and the Holy Mass). At the same time, acts of aggression that appeared in response, deserve strong condemnation and should be ruthlessly prosecuted.

03 Fundamental Rights Agency surveys show a clear discrepancy between the convictions held by people with homosexual tendencies or experiencing gender identity disorders with respect to their social situation, and their personal and empirical experiences.

04 Polish respondents recorded one of the lowest numbers of displays of intolerance towards the behaviours of people belonging to the LGBT group in Europe. Incidents involving insults and threats, and difficulties in access to healthcare or employment alike, are among the rarest in Europe.

05 In the light of the data gathered by OSCE, Poland turns out to be one of the countries where acts of aggression against people with homosexual tendencies or experiencing gender identity disorders occur the least frequently.

06 The “Rainbow Index” of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe) is, in fact, a tool devised by LGBT activists to implement completely arbitrary expectations and criteria. It reflects not the “degree of respect for human rights”, but the degree of realisation of political demands – the demands of a political group of activists generously financed by public funds, including EU funds.

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<sup>66</sup> Resolution No. XIX/192/2020 of the Tuchów Town Council of 18 March 2020, <https://bip.malopolska.pl/umtuchow,a,1743507,stanowisko-w-sprawie-udzielenia-odpowiedzi-na-skarge-adw-pana-przemyslawa-lisa-markiewicza-z-dnia-18.html> (date of access: 01 Feb 2021).

07  
ILGA's publication contains false information, calls on opinions as evidence, and ignores extant definitions and legal provisions. Furthermore, the publication is based on a misinterpretation of the notion of human rights which is not substantiated by any international treaties or other documents jointly adopted by various states.

08  
The LGBT+ Declaration is a document which interferes with areas that extend beyond the authority of the capital city's local government without any legal basis whatsoever. Furthermore, it questions parents' constitutional right to raise children in line with their beliefs, and stipulates for unacceptable discrimination against entrepreneurs who object to the political demands of LGBT organisations.

09  
The document signed by the Mayor of Warsaw creates divisions instead of protecting and guaranteeing equal treatment. It distinguishes between those who suffer from discrimination in terms of the degree of their protection. It introduces a scale for the sense of grievance and injustice, depending on the reason behind discriminatory behaviours. Thus, the document itself is actually of discriminatory nature.

10  
The resolutions objecting to the LGBT ideology do not define the subject matter of their objections through any personal characteristics (e.g. sexual orientation or gender identity disorder), only by describing the behaviours that are in conflict with the Polish legal system and infringe on: freedom of speech (Article 54 of the Polish Constitution), innocence of children (Article 72(1)), authority held by families (Article 18, 48(1), and 71), authority held by schools (Article 70(1)), and freedom of economic activity (Article 22).

11  
The allegations made against the resolutions are primarily based on speculations, conjectures, concerns, assumptions, and subjective feelings, none of which can be the basis or the object of a legal claim or dispute.

12  
The Local Government Charter of Family Rights is, in fact, a declaration that promotes the constitutional principles of protection accorded to family, marriage, parenthood, and motherhood (Article 18 of the Constitution), protection accorded to family life (Article 47), and protection of children against moral corruption (Article 72).

13

These norms support the fundamental group unit of society, and thus are beneficial for the whole of society, irrespective of the fact that other citizens may potentially belong to other groups, and irrespective of their sexual preferences. No provision in the Charter changes the legal position of people who remain in non-marital relationships.

## IV. Legal situation

### 1. Protection against discrimination

#### 1.1. Non-discrimination enshrined in the Polish Constitution

One of the most prominent arguments presented in the debate concerning LGBT activists' demands is that the constitutional principle of equality before the law is supposedly violated, and that people with homosexual tendencies or experiencing gender identity disorders are discriminated against. In other words, Article 32 of the Polish Constitution is purported to be breached. Section 1 thereof states that “[a]ll persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.” In accordance with Section 2 thereof, “No one shall be discriminated against in political, social or economic life for any reason whatsoever.”

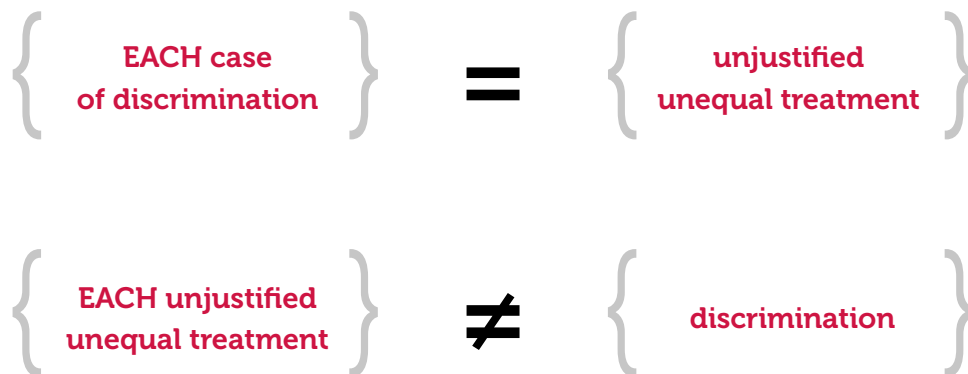
**In reference to that allegation, it is first worth concurring with the Constitutional Court that *the principle of equality is not synonymous with uniformity*. Both domestic and international case-law emphasises that “[t]he general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.”<sup>67</sup>**

This means that a violation of the principle of equal treatment may consist in both different treatment of similar situations (individuals), and unjustified equal treatment of dissimilar situations (individuals). In another ruling, the Polish Constitutional Court reiterated that the principle of equal treatment entails that **“equality is not abstract and absolute in its constitutional nature. In line with a common assumption, it does not entail that the rights of all individuals are identical (equivalent). (...)** Article

<sup>67</sup> Judgment of the Court of Justice of the European Union of 16 December 2008, Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre and Others*, para 23.

32 of the Constitution specifies the legal situation of an individual ‘together’ with another norm, which sets out the legal situation applicable to other individuals. Except for examples of general discrimination that are extremely rare nowadays (e.g., in the form of slavery or the caste system), there are few cases where equality does not have specific reference to certain rights, freedoms, or obligations of the individual. Therefore, as a rule, differentiation pertains to concrete rights or freedoms. [...] **The Constitution does not frame equality within universal egalitarianism.** Everyone has an equal opportunity to exercise one’s own rights and freedoms. This means that the right to equal treatment becomes fully constitutional in nature in ‘inequalities’ that touch upon specific constitutionally regulated rights and freedoms. [...] In recognising therefore the right to equal treatment as a constitutional right of an individual, the Constitutional Court wishes to emphasise that, **in a way, it is a ‘second-degree right’ (or a ‘meta-right’), i.e., individuals may enjoy it in relation to other specific legal norms or efforts taken by public authorities, but not in detachment therefrom and, as it were, independently.**<sup>68</sup>

Non-discrimination forms part of this principle of equality before the law. Literature on this subject also indicates that the mutual relationship between the principle of equality and non-discrimination can be reduced to a situation where “though each case of discrimination constitutes unequal treatment, not all cases of unjustified unequal treatment are tantamount to discrimination.”<sup>69</sup> This is all the more reason why justified unequal (different) treatment of dissimilar interpersonal relationships does not constitute discrimination.



As explained by the Constitutional Court, discrimination “amounts to the unacceptable enactment of different **legal norms** for addressees which should be classified (categorised) as the same, **or** the unequal treatment of similar norm-addressees in their **individual cases**, where differentiation has no grounds in legal norms.”<sup>70</sup>

Therefore, public authorities should not aim to bring down all inequalities, including those factual, e.g., concerning one’s financial status. This understanding of equality was characteristic for Marxist thought and **socialist political systems**. A democratic state that respects the rule of law, and implements the principles of social justice,<sup>71</sup> is a state where “public authorities must strive for the removal of only legal inequalities, having to refrain from establishing privileges for certain groups of citizens. The principle

68 Decision of the Constitutional Court dated 24 October 2001, case file no. SK 10/01, OTK [Constitutional Court Case-Law Journal] 2001 no. 7, item 225.

69 L. Garlicki, M. Zubik, komentarz do art. 32, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, [ed.] L. Garlicki, M. Zubik, Lex 2016, remark no. 27.

70 Judgment of the Constitutional Court of 15 July 2010, K 63/07, OTK-A 2010, No. 6, item 60.

71 This principle should be understood as “(at a minimum) efforts that aim to maintain equality in social relationships, and avoid establishing privileges for specific groups of citizens in a manner that would be unjustified and unsubstantiated by objective requirements and criteria; also, as a factor that leads to a fair, or other-



of social justice does not entail that all groups of individuals should have the same rights. The respective categories of individuals should be treated equally **provided that identical factual situations of those individuals underlie specific legal regulations** (cf. judgments of the Constitutional Court of May 29<sup>th</sup>, 1996 in case K 22/95,<sup>72</sup> and 1996 December 11/96 in case K 11/96<sup>73</sup>).<sup>74</sup>

## 1.2. Non-discrimination in international agreements that are binding on Poland

Polish legislation is consistent with all international agreements that are binding on Poland and with the principle of non-discrimination inscribed therein. In particular, the provisions worth mentioning here include Article 2(1) of the International Covenant on Civil and Political Rights,<sup>75</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights,<sup>76</sup> Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>77</sup> and many other field-specific conventions.

These conventions refer the principle of non-discrimination to the enjoyment of rights enshrined therein.<sup>78</sup> For sure, Article 26 ICCPR is more general in nature compared to other provisions.<sup>79</sup> At the same time, none of the aforementioned treaties makes any mention of sexual orientation or gender identity.

**It is worth mentioning that Poland has implemented all its binding international non-discrimination obligations.**

## 1.3. Non-discrimination in EU law

In European Union law, non-discrimination is primarily enshrined in Article 10 of the Treaty on the Functioning of the European Union (TFEU) which states that “[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Article 10 TFEU lays down the general principle which should be implemented by acts of secondary law enacted by the Union’s institutions. As regards non-discrimination, in line with Article 19 TFEU, this competence is conferred on the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the

wise just equalisation of the interests of the general public (the common good) and the interests of individuals.” Judgment of the Supreme Court of 10 February 2012, case file no. II PK 144/11.

72 OTK 1996 no. 3, item 21.

73 OTK 1996 no. 6, item 54.

74 Judgment of the Regional Administrative Court in Gdańsk of 17 October 2019, case file no. III SA/Gd 468/19.

75 International Covenant on Civil and Political Rights, opened for signature in New York, 19 December 1966 (Polish Journal of Laws of 1977, no. 38, item 167), hereinafter referred to as ICCPR.

76 International Covenant on Economic, Social and Cultural Rights, opened for signature in New York, 19 December 1966. (Polish Journal of Laws of 1977, no. 38, item 169).

77 Convention for the Protection of Human Rights and Fundamental Freedoms, opened in Rome, 4 November 1950, as amended by Protocols No. 3, 5 & 8, and supplemented by Protocol No. 2 (Polish Journal of Laws of 1993, No. 61, item 284), hereinafter also referred to as ECHR.

78 W. Borysiak, Art. 32, [in:] *Konstytucja RP. Komentarz*, ed. M. Safjan, L. Bosek, Legalis 2016, side remark nos. 25-36.

79 As stated in Article 26 ICCPR, “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

European Parliament. Consequently, this matter is the subject of many Council Directives (and Directives of the European Parliament and of the Council).<sup>80</sup>

**The EU Charter of Fundamental Rights also provides for non-discrimination.**<sup>81</sup> In accordance with Article 21(1) thereof, “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Furthermore, in accordance with Article 2 of Protocol (No. 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, which forms an integral part of the TFEU, “To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”<sup>82</sup>

**This means that non-discrimination laid out in Article 21(1) of the Charter does not give rise to effects beyond Polish domestic legislation, and its implementation may not cause conflicts with the Polish legal system and with the Constitution of Poland, as is obvious with any international agreement.**

**As in the case of international conventions, Poland has implemented its obligations arising from EU law with respect to non-discrimination.**

The Polish government brought this point up in its response to the Memorandum issued by the Council of Europe Commissioner for Human Rights:

” *With regard to the issue of amending the anti-discrimination legislation it should be pointed out that the Act of December 3<sup>rd</sup>, 2016 on the implementation of some regulations of European Union regarding equal treatment (Journal of Laws of 2016, as amended; hereinafter referred to as the “Act on equal treatment”) implements the provisions of the directives into the legal order.*

The provisions of the Act on equal treatment constitute a repetition of the provisions of the above-mentioned directives, both in terms of discriminatory prerequisites and areas that are to be covered by the principle of equal treatment. Article 1 of the Act on equal treatment defines the personal scope of application of the Act (discriminatory prerequisites). The prerequisites listed in the Act constitute a closed catalogue; however, their enumeration results from the scope covered by the implemented directives. The provisions of the Act on equal treatment do not constitute grounds for introducing differences in treatment due to circumstances other than those specified in the Act, nor may they be interpreted in a manner that allows for other forms or prerequisites of discrimination. The above interpretation of the

<sup>80</sup> These directives include Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ L 359, 19 Dec 1986); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19 Jul 2000); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02 Dec 2000); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21 Dec 2004); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26 Jul 2006); Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers (OJ L 128, 30 Apr 2014).

<sup>81</sup> OJ C 2007.303.1, 14 Dec 2007.

<sup>82</sup> Apart from that, Poland has made additional reservations in the form of unilateral declarations (no. 61 & 62) – for more details, see: T. Sieniow, [in:] *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, [ed.] A. Kuś, Lublin 2010, pp. 315-316.

provisions of the Act results from the overriding principle of compliance of statutory provisions with the Constitution of the Republic of Poland, which states that discrimination on any grounds shall be prohibited (Article 32 (2) of the Constitution of the Republic of Poland).

Moreover, the primary EU legislation does not explicitly refer to gender identity, gender expression or gender characteristics, although the Charter of Fundamental Rights of the European Union does mention sexual orientation. Therefore, the Treaties of the European Union only use the terms «sex» and «sexual orientation»<sup>83</sup>.

#### 1.4. Polish statutory regulations

The implementation of EU non-discrimination directives in the Polish legal system occurred by virtue of the Act of 3 December 2010 on the implementation of certain European Union provisions concerning equal treatment (hereinafter referred to as “the Antidiscrimination Act”),<sup>84</sup> and through amendments made to the Act of 26 June 1974 - Labour Code.<sup>85</sup>

Article 1(1) of the Antidiscrimination Act defines the fields and ways of preventing violations of the principle of equal treatment on the grounds of sex, race, ethnicity, nationality, religion, creed, worldview, disability, age, or sexual orientation, and specifies authorities competent in this respect. Under Article 13(1) everyone with respect to whom the principle of equal treatment is violated may seek damages. The provisions of the Civil Code apply in such cases.

An analysis published by the former Polish Ombudsman Adam Bodnar, who indubitably supports the radical demands of LGBT activists, states that “**the Republic of Poland has predominantly correctly implemented EU directives concerning equal treatment in its own domestic system.**”<sup>86</sup> The report nonetheless points out small-scale deficiencies which are not related to the situation of people with homosexual tendencies or experiencing gender identity disorders.

As a separate matter, it is worth noting that until 2019 some people treated Article 138 of the Infraction Code of May 20<sup>th</sup>, 1971 as an anti-discriminatory provision.<sup>87</sup> On June 26<sup>th</sup>, 2019 the Constitutional Court ruled, however, that Article 138 of the Infraction Code violated the Constitution of Poland.<sup>88</sup> The provision in question stated, “Whoever professionally provides services, and demands as well as collects payment higher than applicable for their performance, or resorts to a deliberate and unsubstantiated refusal to render performance to which they are obliged, is subject to a fine.”

83 The comments of the Government of the Republic of Poland to the Commissioner for Human Rights of the Council of Europe’s Memorandum on the stigmatisation of LGBTI people in Poland, 28 Oct 2020, <https://rm.coe.int/commdh-govrep-2020-11-en/1680a091dc> (date of access: 01 Feb 2021).

84 Uniform text: Polish Journal of Laws of 2020, item 2156.

85 Uniform text: Polish Journal of Laws of 2018, item 917.

86 Maciej Kułak, *Analiza poprawności implementowania do polskiego porządku prawnego dyrektyw Unii Europejskiej w obszarze równego traktowania. Ekspertyza przygotowana na zlecenie Biura Rzecznika Praw Obywatelskich*, 04 Jan 2021, <https://www.rpo.gov.pl/pl/content/m-kulak-analiza-poprawnosci-implementowania-dyrektywy-rownosciowej> (date of access: 01 Feb 2021).

87 Polish Journal of Laws of 2019, item 821.

88 Case file no. K 16/17, OTK-A 2019, item 49.

# EQUAL TREATMENT ACT OF 2010

Act of December 3rd, 2010

on the implementation of certain European Union provisions concerning equal treatment

Uniform text: Polish Journal of Laws of 2020, item 2156



Effective in Poland for over 10 years (since January 1st, 2011).



Article 1(1) defines the fields and ways of preventing violations of the principle of equal treatment on the grounds of sex, race, ethnicity, nationality, religion, creed, worldview, disability, age, or sexual orientation, and specifies the competent regulatory authorities in these matters.



Under Article 13(1) everyone with respect to whom the principle of equal treatment is violated may seek damages. The provisions of the Civil Code apply in such cases.



When discussing the bill, the deputies rejected the suggestion put forward on October 5th, 2010 that the text and title of the act should include the term 'gender identity.' Thus the Polish legislature consciously refused to equate homosexual preference with transsexual disorders.\*



Even LGBT activists themselves deemed that the act satisfied EU standards, by saying that *"admittedly, with respect to work and employment, the law increases the level of protection accorded to workers to the minimum standards set out by European Union legislation."*\*\*



An analysis published by Polish Ombudsman Adam Bodnar also states that *"the Republic of Poland has predominantly correctly implemented EU directives concerning equal treatment in its own domestic system."* Any errors or deficiencies are not related to the situation of people with homosexual tendencies or gender identity disorders.\*\*\*

\* First reading of the governmental bill on the implementation of certain European Union provisions concerning equal treatment (print no. 3386 of the 6th term Sejm), 05 Oct 2010.

\*\* Zofia Jabłońska, *Sytuacja prawna osób LGBT na rynku pracy – implementacja standardów unijnych do polskiego systemu prawa z uwzględnieniem przepisów Ustawy o wdrożeniu niektórych przepisów UE w zakresie równego traktowania*, [in:] Krzysztof Śmiszek (ed.), *Dyskryminacja ze względu na orientację seksualną i tożsamość płciową w zatrudnieniu*, Warszawa 2011, p. 91.

\*\*\* Maciej Kułak, *Analiza poprawności implementowania do polskiego porządku prawnego dyrektyw Unii Europejskiej w obszarze równego traktowania. Ekspertyza przygotowana na zlecenie Biura Rzecznika Praw Obywatelskich*, 04 Jan 2021, p. 50



**This provision came into force on January 1<sup>st</sup>, 1972 in totally different social, economic, and political circumstances. It has never been used for anti-discriminatory purposes which were ascribed thereto in recent years by LGBT activists, supported by Ombudsman Adam Bodnar.**

The function of this provision was justified in the context of command economy, where possibilities of obtaining certain products or services were significantly limited. Its premise, as follows from the literature on this subject, was to “prevent black marketeering”.

The provision in question was challenged as unconstitutional primarily due to three reasons:

- in a democracy ruled by law, a refusal to provide services should never be sanctioned with a fine, as civil proceedings are sufficient and adequate for any potential disputes;
- entrepreneurs should be able to refuse to provide their services on the grounds of their beliefs and conscience, as the right to act in line with one’s conscience is a constitutionally guaranteed right;
- essentially, the provision established an obligation to contract which violated the constitutional principle of freedom of economic activity, and freedom of contract, which includes the freedom to choose one’s counterparty.

In its justification, the Constitutional Court pointed out that Article 138 of the Infraction Code “constitute[d] an interference with the freedom of service providers, including with the right to decide whether they wish to enter into an agreement, the right to express their opinions, and the right to act in line with their own conscience.”

## **1.5. Summary**

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- 1) The principle of equality is not synonymous with uniformity. Both domestic and international case-law emphasises that “[t]he general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently, and different situations must not be treated in the same way unless such treatment is objectively justified.”
- 2) Though each case of discrimination constitutes unequal treatment, not all cases of unequal treatment are tantamount to discrimination. This is all the more reason why justified unequal (different) treatment of dissimilar interpersonal relationships does not constitute discrimination.
- 3) Poland has implemented all its binding international non-discrimination obligations.
- 4) As in the case of international conventions, Poland has implemented its obligations arising from EU law with respect to non-discrimination.

- 5) The Republic of Poland has correctly implemented EU directives concerning equal treatment, including equal treatment of people with homosexual tendencies, in its own domestic system.
- 6) Article 138 of the Infraction Code, which the Constitutional Court has ruled unconstitutional, had never been used for anti-discriminatory purposes which were ascribed thereto in recent years by LGBT activists. Essentially, the provision established an obligation to contract which violated the constitutional principle of freedom of economic activity. It also violated the right to act in line with one's conscience.

## 2. The right to life, safety, and protection against violence

### 2.1. The right to life

The right to life is protected in Chapter XIX of the Criminal Code, and its legal basis is rooted in Article 38 of the Constitution, which guarantees legal protection of life to all people. Protection is accorded to **lives of all human beings**, regardless of their properties and characteristics. This view is commonly approved in Polish case-law. As emphasised by the Supreme Court, "life of all human beings, regardless of their age, health, knowledge, culture, family status, and their actual social usefulness, is a superior value that is subject to equal legal protection. It would be unacceptable to quantify the value of a homicide victim's life on the grounds of the aforementioned or other criteria, and to apply this value to the premises determining the severity of a punishment."<sup>89</sup>

Though LGBT activists themselves apparently do not accept the right to life as universal, since they officially support depriving children at the prenatal stage of development of this right (their stance on euthanasia in old age being unclear), there are no communities in Poland that would question a truth commonly acknowledged that the lives of people with homosexual tendencies or experiencing gender identity disorders are subject to the same kind of protection as the lives of any other human being.



**The lives of people with homosexual tendencies or gender identity disorders  
are subject to the same kind of protection as the lives  
of any other human being**

<sup>89</sup> Judgment of the Supreme Court of 17 February 1989, IV KR 15/89, OSNKW [Case-Law Journal of the Supreme Court's Criminal and Military Chambers] 1989, Nos. 5-6, item 420.

## 2.2. Safety

**People with homosexual tendencies or experiencing gender identity disorders may benefit from a range of measures available in the Polish legal system, whether arising from criminal law or not, which are applicable with respect to offences against their lives, health, and freedoms, as well as violations of their honour or physical integrity.**

The relevant provisions include:

- Article 190 of the Criminal Code which penalises threatening another person to commit a crime against them or their close family or friends if said threat causes reasonable concern that the crime will be committed;
- Article 190a of the Criminal Code which penalises persistent harassment of another person or their close family or friends that engenders a reasonable sense of danger, abasement, or anguish, or that significantly violates their privacy;
- Article 191 of the Criminal Code which penalises violence and unlawful threats compelling another person to take, omit, or tolerate specific action;
- Article 217 of the Criminal Code which penalises hitting another person or violating their physical integrity in another manner.

As regards **civil law**, anyone, irrespective of their self-identification characteristics may pursue damages for injuries suffered (including personal injuries – i.a. bodily harm, worsened health, death, or other violations of personality rights), or for harm suffered due to tortious acts under Article 415 of the Civil Code, and Article 24 thereof in conjunction with Article 445 and 448 thereof.

Article 23 of the Civil Code specifies that personality rights include non-material values, such as one's own health, liberty, dignity, freedom of conscience, surname or pseudonym, image, and secrecy of correspondence. As regards the protection of these rights, victims of violations thereof may seek **injunctions prohibiting the offender from continuing to violate these rights, or ordering them to cure the effects of said violations, to pay out damages**, or to act with the aim of curing the effects of said violations – in particular, to make a specific statement in adequate form.

## 2.3. Hate crimes

As mentioned hereinabove, the Polish legal system features various legal norms which protect individuals against violence and violations of their safety. Despite this, LGBT activists and entities supporting them regularly attempt to change criminal law, justifying their efforts by saying that “prejudice motivated crimes committed on the grounds of sexual orientation or gender identity of the victim should

constitute aggravating circumstances.”<sup>90</sup> These changes would first and foremost involve broadening the criteria for criminal offences specified under Article 119 § 1, 256 § 1, and 257 of the Criminal Code. The motives considered for the offender’s actions would include sexual orientation and gender identity. The provisions in question are currently worded in the following way:

” **Article 119 § 1 of the Criminal Code** – *Whoever uses violence or unlawful threats towards a group of people or an individual because of their national, ethnic, racial, political or religious affiliation, or their lack of their religious affiliation, is subject to imprisonment for between three months and five years.*

” **Article 256 § 1 of the Criminal Code** – *Whoever publicly propagates a fascist or other totalitarian political system, or incites hatred on the grounds of national, ethnic, racial, political or religious affiliation, or lack of religious affiliation, is subject to a fine, restriction of liberty, or imprisonment for up to two years.*

” **Article 257 of the Criminal Code** – *Whoever publicly insults a group of people or an individual because of their national, ethnic, racial, political or religious affiliation, or their lack of religious affiliation, or violates the physical integrity of another individual for such reasons, is subject to imprisonment for up to three years.*

This demand has found its practical expression in draft acts that would amend the wording of these provisions. Authors of the last such draft act, dated December 2019,<sup>91</sup> suggested that crimes committed on the grounds of age, gender, disability, sexual orientation, and gender identity should be additionally penalised.

Notwithstanding the fact that, as mentioned above, adequate legal regulations are already in effect nowadays, these suggestions give rise to significant concern, such as:

**01** the offender’s motives must be already accounted for pursuant to the applicable provision of Article 53 § 2 of the Criminal Code, which the proponents of the bill seem to have forgotten about.

They are an objective measure that determines the social danger presented by the offence, pointing to the general scope of the offender’s emotional and intellectual thoughts and experiences that have shaped their intentions and that explain why they committed the very offence. The assessment of the offender’s motives is different where they commit the offence due to poverty than where they are motivated by hate, the desire to satisfy their drives, the willingness to harass or take revenge, or by a reason that is decisively contemptible and has no justification in view of the society.<sup>92</sup>

It is worth noting that the current legal system forces the court’s to consider discrimination as an aggravating circumstance in determining the offender’s sentence. It determines the offender’s motives which the court must assess in analysing criminal liability for each and every offence. First, the offender’s motives are circumstances which are obligatorily taken into consideration in determining the social damage presented by the offence, and thus its reprehensibility (cf. Article 115 of the Criminal

90 Adam Bodnar (ed.), *Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce*. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich, *Biuletyn Rzecznika Praw Obywatelskich* 2019, no. 6, p. 17.

91 Parliamentary bill amending the Criminal Code. The bill concerned supplementing the list of grounds protected against so-called hate crimes, with the following additional grounds: sex, disability, sexual orientation, gender identity, and gender expression (print no. 138), 12 Dec 2019, <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=138> (date of access: 01 Feb 2021).

92 Cf. Violetta Konarska-Wrzošek, art. 53, [in:] Ryszard Stefański (ed.), *Kodeks karny. Komentarz*, 2020, side remark no. 24.



Code). Said social damage is, in turn, mandatorily accounted for in the process of deciding the punishment for the offence at hand (Article 53 § 1 of the Criminal Code). Second, the motives themselves should be taken into consideration in pronouncing the offender's punishment (Article 53 § 2 of the Criminal Code).

## 02 considering the arguments provided above, the proponents of the amendments to the Criminal Code provisions in question point out that:

” *culprits who commit murder, cause major harm to one's health, use violence or unlawful threats on the grounds of race, nationality, ethnicity, faith, or lack thereof «face more severe criminal liability than those who perpetrate crimes on the grounds of sexual orientation or gender identity».*<sup>93</sup>

In response to this claim, it is worth noting why the Criminal Code distinguishes these very criteria, differentiating between various social groups:

” *Article 119 of the Criminal Code is found in Chapter XVI which covers crimes against peace and humanity, as well as war crimes. In turn, Article 256 and 257 are in Chapter XXXII on crimes against public order. The interests of people belonging to certain groups and communities is not the subject of protection accorded by these provisions. The current wording of Article 119, 256, and 257 of the Criminal Code arises (...) neither from oversight, nor from the lawmakers' bad faith in unjustifiably omitting various groups that are vulnerable to discrimination. The purpose of Article 119, 256, and 257 of the Criminal Code within that act of law is not the punishment of behaviours to which citizens may be exposed by the token of their certain personal characteristics, but the punishment of behaviours which in nature constitute a danger to nationwide peace and order.*

*Indisputably, one may differentiate between people in terms of dozens of various criteria. Nonetheless, Article 119, 256, and 257 of the Criminal Code specify only those criteria that, as history shows, may constitute a source of social unrest, riots, crimes against humanity, and civil wars. These provisions aim at preventing these very effects.*

*That is why Article 119, 256, and 257 of the Criminal Code establish «collective protection» of a kind. The main purpose of these provisions is to prevent outbursts of hatred between those groups of people who have already been antagonised by sharp conflict in the past. (...) That is why attempts at broadening the criteria specified in these provisions to include such factors as age, sex, or sexual orientation, are unjustified. There is no concern that these factors precisely will engender social unrest or cause armed conflict.»<sup>94</sup>*

## 03 the addition of new discriminatory characteristics is questionable with respect to its conformity with the constitutional principle of equality before the law.

**Given the remarks presented directly above, it is worth noting that Article 119, 256, and 257 not only avoid the mention of age, sex, or sexual orientation, but also of a range of (likely infinite) similar criteria, such as sickness, homelessness, obesity, or poverty.**

93 Adam Bodnar (ed.), *Sytuacja prawna...* op. cit., p. 24.

94 Assessment of the First Deputy Prosecutor-General concerning the parliamentary bill amending the Criminal Code, dated 11 August 2016.

Following the example of the Bureau of Research at the Chancellery of the Sejm, one may ask “why only such criteria as age, sex, sexual orientation, gender identity, and disability have been listed, and not such as mental illness, AIDS, alcoholism, drug addictions, obesity, homelessness, or the fact of being excessively tall or short. After all, these circumstances may give rise to discrimination.”<sup>95</sup>

**Therefore, the selection of these criteria, and exclusion of others, as meriting special protection, is dubious in light of the constitutional principle of equality before the law, and gives rise to concerns that certain groups of people may be unjustifiably privileged as a result of such provisions.**

## 04 Poland ensures that victims of crimes, and especially of prejudice motivated crimes, may satisfy their personal needs in line with the relevant Directive of the European Parliament and of the Council.

The specific act which imposes this obligation on Poland is Directive 2012/29/EU of the European Parliament and of the Council of October 25<sup>th</sup>, 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing the Council's Framework Decision 2001/220/JHA. In line with this Directive, assessments of the victims' needs should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, as well as the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive. **The directive was transposed into Polish national law** primarily through the Act of November 28<sup>th</sup>, 2014 on protection and assistance for victims and witnesses<sup>96</sup> and amendments to the Code of Criminal Procedure and Criminal Code introduced by the Act of June 13<sup>th</sup>, 2013.<sup>97</sup>

As a side note, it is worth noting that most behaviours specified under Article 119 § 1, Article 256 § 1, and Article 257 of the Criminal Code, constitute other tortious acts where the particular motives are not applicable. Among many, these include insult (Article 216), defamation (Article 212), violation of physical integrity (Article 217), unlawful threats (Article 190), and public incitement to crime (Article 255).

### 2.4. Summary

- 1) The lives of people with homosexual tendencies or experiencing gender identity disorders are subject to the same kind of protection as the lives of everyone else.
- 2) People with homosexual tendencies or experiencing gender identity disorders may benefit from a range of measures available in the Polish legal system, whether arising from criminal law or not, which are applicable with respect to offences against their lives, health, and freedoms, as well as violations of their honour or physical integrity.

<sup>95</sup> Legal opinion concerning the parliamentary bill amending the Criminal Code (parliamentary print no. 340), and the parliamentary bill amending the Criminal Code (parliamentary print no. 383), 23 Jul 2012, [http://orka.sejm.gov.pl/RexDomk7.nsf/0/AFBCED81C5179F28C1257A21002550D5/\\$file/i1567-12.rtf](http://orka.sejm.gov.pl/RexDomk7.nsf/0/AFBCED81C5179F28C1257A21002550D5/$file/i1567-12.rtf) (date of access: 01 Feb 2021), p. 6.

<sup>96</sup> Polish Journal of Laws of 2015, item 21.

<sup>97</sup> Polish Journal of Laws of 2013, item 849.

- 3) Broadening the criteria for criminal offences specified under Article 119 § 1, 256 § 1, and 257 of the Criminal Code, concerning the offender's motives, to include "sexual orientation or gender identity," as suggested by LGBT activists, is a misbegotten idea because of the following factors:
- a) the offender's motives must be taken into account already pursuant to the applicable provision of Article 53 § 2 of the Criminal Code;
  - b) Article 119, 256, and 257 of the Criminal Code specify only those criteria that, as history shows, may constitute a source of social unrest, riots, crimes against humanity, and civil wars. These provisions aim at preventing these very effects.
  - c) The selection of only these criteria, and exclusion of others, as meriting special protection, is dubitable in the light of the constitutional principle of equality before the law, and gives rise to concerns that certain groups of people may be unjustifiably privileged as a result of such provisions.
  - d) Poland ensures that victims of crimes, especially of prejudice motivated crimes, may satisfy their personal needs in line with the relevant Directive of the European Parliament and of the Council.

### 3. Freedom of association

#### 3.1. Domestic regulations

LGBT activists can (and do) unite both within formal and organised structures, as well as within less institutionalised movements.

**The legal basis for this is the freedom of association enshrined in the Constitution of Poland, which involves not only individual freedom (Article 58), but systemic bases for the functioning of various organisations, thanks to which individual freedoms may be exercised (Article 12).**

It is particularly worth noting where Article 12 is located in the Constitution's structure. It is found in Chapter I which constitutes the basis for the generally defined social and political system of the Republic of Poland. It defines the principles governing the state, and, to some degree, the society.<sup>98</sup> One may therefore understand that the existence and operations of entities specified in Article 12 have been deemed an essential and significant element of the state's structures, and, more widely, of the social order.<sup>99</sup> The significance of Article 12 also lies in the fact that the activities subject to protection are defined as broadly

98 M. Wild, *Komentarz do art. 12 Konstytucji RP* (and literature on the subject cited therein), [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1-86*, Warszawa 2016.

99 See judgment of the Constitutional Court of 24 February 2004 in case K 54/02, OTK-A 2004, No. 2, item 10, and of 2 June 2015 in case K 1/13, OTK-A 2015, No. 6, item 80, where it was found that by the token of being enshrined in Article 12, freedom of association is one of the fundamental elements of the constitutional social and political model of the state.

as possible. The guarantees pertain not only to the entities that are characterised by some degree of organisation (associations and foundations), but also to non-institutionalised social movements.

Specific regulations in this matter are primarily found in the Act of April 7<sup>th</sup>, 1989 – Law on Associations,<sup>100</sup> and the Act of April 6<sup>th</sup>, 1984 on Foundations.<sup>101</sup>

### 3.2. International regulations

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The freedom of association is recognised and guaranteed in many international acts, ranging from the Universal Declaration of Human Rights (Article 20(1)), through the International Covenant on Civil and Political Rights (Article 22(1)), the International Covenant on Economic, Social and Cultural Rights (Article 8(1)), to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11(1)), and the EU Charter of Fundamental Rights (Article 12).

The rights guaranteed in these treaties are not unconditional, which means that certain restrictions may be applied, as set out in the treaties themselves. For example, in line with Article 11(2) ECHR, restrictions are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

### 3.3. Activities of LGBT organisations in Poland

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**The numerous local and nationwide LGBT organisations in Poland are able to operate without any restrictions whatsoever.** Formally speaking, they are associations, foundations, or informal groups. Organisations which support LGBT activists are also able to operate freely and their demands are expressed without any limitations.<sup>102</sup> What is more, they are generously financed from public funds. For example, in 2019 alone, the authorities in Warsaw transferred or guaranteed PLN 876,500.00 in **public grants** for programmes implemented by LGBT organisations.<sup>103</sup> This notwithstanding, the capital city of Warsaw has also concluded individual agreements with such organisations, under which it sponsored the implementation of their projects.<sup>104</sup> These organisations also avail themselves of **municipal facilities**, which are made available to them on preferential conditions. Furthermore, since 2017, Warsaw-based LGBT organisations have received a total of at least PLN 2 million in **EU grants**.<sup>105</sup>

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100 Uniform text: Polish Journal of Laws of 2020, item 2261.

101 Uniform text: Polish Journal of Laws of 2020, item 2167.

102 Such as the Polish Society of Anti-Discrimination Law.

103 Marta Kowalczyk, Gabriela Szewczuk, *Finansowanie warszawskich organizacji LGBT*, 2019, [https://ordoiuris.pl/pliki/dokumenty/FINANSOWANIE\\_ORGANIZACJI\\_LGBT.pdf](https://ordoiuris.pl/pliki/dokumenty/FINANSOWANIE_ORGANIZACJI_LGBT.pdf) (date of access: 01 Feb 2021).

104 Ibidem.

105 Ibidem.

**The Polish Ombudsman has also pointed out that anyone may enjoy the freedom of association, stating that “Polish law does not restrict LGBT people’s freedom of association in any way whatsoever,”<sup>106</sup> and that “Poland does not violate international obligations with respect to ensuring that LGBT people may enjoy their freedom of association.”<sup>107</sup>**

## LGBT organisations are generously financed from public funds:



local government grants



preferential conditions for the use of facilities municipal



EU grants

### 3.4. Summary

- 1) Freedom of association enshrined in the Constitution of Poland involves not only individual freedom (Article 58), but systemic grounds for the functioning of various organisations, thanks to which individual freedoms may be exercised (Article 12).
- 2) Both locally, and on a nationwide scale, Polish LGBT organisations operate without restrictions, and are also generously financed from public funds.
- 3) Furthermore, the Polish Ombudsman has also pointed out that anyone may enjoy the freedom of association, stating that “Polish law does not restrict LGBT people’s freedom of association in any way whatsoever.”

106 Adam Bodnar (ed.), *Sytuacja prawna osób nieheteroseksualnych...*, op. cit., p. 39.

107 Ibidem.

## 4. Freedom of speech

### 4.1. Freedom of speech in Polish domestic regulations and in provisions of international law

LGBT activists, just like all people with homosexual tendencies or experiencing gender identity disorders, may and do enjoy the freedom of speech that is enshrined in Article 54 of Constitution, which states, “1. The freedom to express opinions, to acquire and to disseminate information shall be guaranteed to everyone. 2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require a permit for the operation of a radio or television station.”

Furthermore, activists are free to publish their content and use mass media, as under Article 14 of the Constitution, “[t]he Republic of Poland shall ensure freedom of the press and other means of social communication.”

The freedom of expression is one of the fundamental freedoms, and as such is inscribed into all international or supranational acts concerning the protection of human rights. It is ensured in, i.a., Article 19 UDHR, Article 19 ICCPR, Article 10 ECHR, and Article 11 CFR.

Ever since its 1976 judgment in *Handyside v the United Kingdom*,<sup>108</sup> the European Court of Human Rights (ECtHR) has been consistent in holding that the freedom of expression constitutes one of the foundations of a democratic society, and one of the basic conditions for its progress, and for the development of every person. Subject to Article 10(2) ECHR, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (para 49 of the judgment). This formula has been cited and reiterated in numerous further rulings.<sup>109</sup>

The Polish Constitutional Court, which keenly uses this “Handyside formula,” shares a similar view on the freedom of speech. This formula entails that:

- 1) **the value which lies in free and unrestrained public debate is directly justified by the essence of the democratic system**, a system which serves as the basis for the whole conventional order. Freedom of expression is one of the most significant instruments that guarantee the implementation of the basic properties of a democratic society – worldview pluralism, openness, and tolerance towards the views of others, including the views of minorities;

<sup>108</sup> ECtHR judgment of 7 December 1976, Application No. 5493/72.

<sup>109</sup> Including many well-known rulings concerning freedom of expression: ECtHR judgment of 26 April 1979 in *Sunday Times v. the United Kingdom* (No. 1) (Application No. 6538/74, para 65); ECtHR judgment of 23 May 1991 in *Oberschlick v. Austria* (No. 1) (Application No. 11662/85, para 57); ECtHR judgment of 8 July 1986 in *Lingens v. Austria* (Application No. 9815/82, para 41); and ECtHR judgment of 23 April 1992 in *Castells v. Spain* (Application No. 11798/85, para 42).

- 2) the conventional protection covers the **form of the debate** too, where it is sometimes possible to resort to such tactics as exaggeration, provocation, and vituperation, especially when the subject matter of said debate is highly controversial, and the statements are polemical in nature.

## Limitations to the freedom of speech

Like other constitutional freedoms, freedom of expression is not absolute. **The Constitution of Poland regulates the matter of limitations to rights and freedoms in the form of so-called limitation clauses, i.e., provisions which specify the conditions, forms, and degrees in and to which the rights and freedoms may be limited.** The text of the Constitution features a general limitation clause (which generally [directly] describes the prerequisites for imposing limitations to all constitutional rights and freedoms), as well as several specific limitation clauses (which specify the conditions for imposing limitations to concrete [specific] rights and freedoms enshrined in the Constitution). The general limitation clause in Article 31(3) of the Constitution stipulates,

” Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

The abovementioned restrictions notwithstanding, it is further worth noting that, essentially, Article 31(3) of the Polish Constitution may not serve as the sole (and exclusive) basis to justify limitations to constitutional rights and freedoms. Other constitutional norms, implying the need for the implementation of specific values (e.g., based on Article 5 of the Polish Constitution) also need to be invoked.<sup>110</sup>

## 4.2. Attempts at censoring public debate

### 4.2.1. Social networks

The primary threefold function of social media platforms is most typically fulfilled through the option of sharing certain content between the users. It involves:

- communication – individual and group contact (either through private messaging or open/closed group discussions);
- information – the reception and publishing of generally understood messages (both private and public), and postings (including adverts);
- journalism – the practice of sharing one’s views publicly and commenting on a practically unlimited range of topics.

110 L. Bosek, M. Szydło, Komentarz do art. 31 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

The largest social media platforms in their respective markets hold a dominant position, if not a monopoly. This fact is of considerable significance when we consider what implications this has for the society. Excluding individuals from participation in forums, the fundamental platform for debate on current social and political affairs, leads to marginalisation within the entirety of public discourse.

Therefore, it is extremely concerning that **for several years the largest social media platforms have been engaging in the practice of censoring conservative content and profiles that publish religious, pro-family, and patriotic materials.** In 2019, for example, these unlawful practices were targeted at, i.a., Paweł Lisicki, a well-known journalist and chief editor at weekly magazine “Do Rzeczy”. Together with Marek Miśko, he hosted an Internet show at wSensie.tv called “Wierzę. Magazyn katolicki” (“Credo. A Catholic Magazine.”) Episodes of this programme which featured a presentation on the teachings of the Catholic Church regarding homosexuality were purported by YouTube to “incite hatred,” and were deleted from the platform.

The same fate befell content produced by **PCh24 and wRealu24** streaming channels, and **recordings of Fundacja Życie i Rodzina.** Recent years have also seen unfounded blocks placed on pages and comments of well-known journalists: **Rafał Ziemkiewicz, Tomasz Terlikowski, and Magdalena Ogórek.** Before each Independence Day, censors carry out mass-scale **attacks on patriotic and history-themed profiles.** Over 300 are removed from various Internet platforms each year. The censorship attacks have also been targeting websites dedicated to the Cursed soldiers and winged hussars. Images featuring the symbol of Fighting Poland (the Kotwica) have been removed.

**Given the foregoing, it is particularly worth noting that in no way whatsoever do these practices concern profiles of LGBT organisations or entities promoting LGBT agenda. This puts them in a privileged position as groups which are free from arbitrary difficulties in their enjoyment of freedom of speech that are imposed by international corporations – a position of downright favouritism.**

#### **4.2.2. Hate speech**

The problem mentioned above, involving social media platforms’ censorship on the part of social media platforms of pro-family content and materials that conflict with LGBT activists’ demands, can be considered a manifestation of a larger trend that sees freedom of speech being restricted under the pretext of combating hate speech.

**There are few phrases that appear so often in public debate, that are simultaneously so ambiguous. This term has not been defined in any international treaty or by any international court, nor has this been done by Polish lawmakers.**

Despite the lack of any binding definitions, certain international authorities assign their own meanings to “hate speech”, which nonetheless does not provide any clear understanding of the term. The definitions show far-fetched arbitrariness and lack of objective criteria. Furthermore, as remarked in the Council of Europe’s fact sheets, “[t]he identification of expressions . . . [of] ‘hate speech’ is sometimes difficult



because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which may seem rational or normal at first glance”<sup>111</sup>.

To see the problematic nature of such definitions, let us cite just one, which is included in Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech.” It states that the term ‘hate speech’ covers “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

In practice, this definition of hate speech, like others, gives room to such random, peculiar, and subjective interpretations that it becomes a clear threat to the freedom of public debate.

**This is particularly manifested in how LGBT activists or entities supporting them use that term. For example, what they consider to be “homophobic hate speech” is, i.a.,**

- “seeing the political demands of the LGBT movement as unsubstantiated”;<sup>112</sup>
- being convinced that gay and lesbian people are not discriminated against;<sup>113</sup>
- believing that homosexuals behave immorally and commit sins.<sup>114</sup>

One could reasonably assume that provisions penalising hate speech on the grounds of one’s sexual orientation or gender identity, as proposed from time to time in parliamentary bills amending the Criminal Code, would serve a similar, strictly censorial purpose. The essence of the last such bill is discussed in Chapter 2.3 hereinabove.

**Here, it is only worth adding that since freedom of expression is not absolute in nature just like other constitutional freedoms, the current legal system already stipulates for limitations to that freedom, thereby protecting individuals against defamation (Article 212 of the Criminal Code) and insult (Article 216), and allowing them to seek protection of their personality rights (Article 23 of the Civil Code).**

**Considering the foregoing, it is not without significance that the proponents of the bills penalising hate speech deemed that homophobia is one of the most evident of dangers, against which criminal law should guarantee protection (in the context of “hate speech”).<sup>115</sup>**

**The ways in which LGBT organisations would like to exploit the ban on hate speech on the grounds of sexual orientation or gender identity are evidenced by documents drafted**

111 Hate speech – Council of Europe (2009), [https://www.coe.int/t/DC/Files/Source/FS\\_hate\\_en.doc](https://www.coe.int/t/DC/Files/Source/FS_hate_en.doc) (date of access: 01 Feb 2021), p. 2.

112 M. Winiewski et al., *Mowa nienawiści, mowa pogardy. Raport z badania przemocy werbalnej wobec grup mniejszościowych*, 2016, [www.batory.org.pl/upload/files/pdf/MOWA\\_NIENAWISCI\\_MOWA\\_POGARDY\\_INTERNET.pdf](http://www.batory.org.pl/upload/files/pdf/MOWA_NIENAWISCI_MOWA_POGARDY_INTERNET.pdf) (date of access: 01 Feb 2021), p. 22.

113 Ibidem.

114 Ibidem, p. 71.

115 Parliamentary bill of 7 March 2012 amending the Criminal Code, print no. 340, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=340> (date of access: 01 Feb 2021).

by these very organisations, which have listed the following as examples of “homophobic hate speech”:<sup>116</sup>

- “the statement by Agnieszka Liszka, spokesperson for cabinet of the former Prime Minister Donald Tusk that, the Council of Ministers would not be preoccupied with gay and lesbian people’s rights;”
- the statement by deputy Jarosław Gowin, former member of the Civic Platform, and head of the bioethics committee, that *in vitro* fertilisation should be available only for married couples;
- the position of the Law and Justice parliamentary club “saying «no» to granting same-sex couples the same rights as those enjoyed by traditional families.”

### 4.3. Summary

- 1) Freedom of speech enshrined in Article 54 of the Constitution, which should be read in conjunction with Article 14, guarantees the freedom to publish one’s content and use mass media, also to those with homosexual tendencies or experiencing gender identity disorders.
- 2) The Constitution of Poland regulates the matter of limitations to rights and freedoms in the form of so-called limitation clauses, i.e., provisions which specify the conditions, forms, and degrees in and to which the rights and freedoms may be limited. The general limitation clause is found in Article 31(3) of the Constitution.
- 3) LGBT activists not only seem to be treated in a privileged way with respect to their freedom of expression, but they also aim to stifle their opponents’ freedom.
- 4) In recent years, the largest social media platforms have been engaging in the practice of censoring conservative content and profiles that publish religious, pro-family, and patriotic materials, very often under the pretext of combating hate speech. In no way whatsoever do these practices concern profiles of LGBT organisations or entities promoting LGBT groups’ demands. This puts them in a privileged position as groups which are free from arbitrary difficulties in their enjoyment of freedom of speech that are imposed by international corporations – a position of down-right favouritism.
- 5) The term ‘hate speech’ has not been defined in any international treaty or by any international court, nor has this been done by Polish lawmakers. The non-binding definitions constructed by various international organisations give room to such random, peculiar, and subjective interpretations that it becomes a clear threat to the freedom of public debate.

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116 As cited in: ed. G. Czarnecki, *Raport o homofobicznej mowie nienawiści w Polsce*, 2009.

- 6) LGBT activists use the term “homophobic hate speech” to denote statements or actions that conflict with their social and political propositions.
- 7) Given the above, the LGBT activists’ suggested amendments to criminal law, regardless of their questionable conformity with the constitutional limitation clause, are a considerable threat to the freedom of speech in Poland.

## 5. Freedom of assembly

In accordance with Article 57 of the Polish Constitution, everyone has the right to organise and participate in peaceful assemblies, whereas limitations upon this freedom may be imposed by statute. Like other rights and freedoms listed in Chapter II of the Constitution, freedom of assembly is not absolute. It is the state institutions that are primarily obliged to ensure that assemblies are conducted in an undisturbed manner and to guarantee that the rights of other individuals which could be infringed on during said assemblies may still be enjoyed. Potential reasons for limiting the freedom of assembly are specified in Article 31(3) of the Constitution, as cited in Chapter 4.1. hereinabove.

Actions that are seen as completely consistent with Article 57 in conjunction with Article 31(3) of the Polish Constitution include, for example, imposing the obligation on the organisers of the assembly to inform the authorities of the course the assembly takes, implementing adequate safeguards, and preventing any potential threats.<sup>117</sup>

Practice shows that **demonstrations organised by LGBT activists in Poland enjoy the full scope of the constitutional freedom of assembly. Every year since 2006, the capital of Poland has seen the “Equality Parade,” an equivalent of Western pride marches, held without any formal difficulties.** It was only in 2020 that the Warsaw LGBT demonstration did not take place for the first time in 15 years, due to the COVID-19 pandemic.

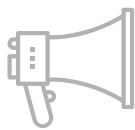
Similar assemblies and marches have also been organised in other Polish cities for several years. However, it must be noted that **LGBT activists have recently started abusing their freedom of assembly.** Chapter III.2 hereof described the most extreme instances of such abuse. They occurred on July 9<sup>th</sup>, 2018 in Częstochowa (near the Jasna Góra Monastery), July 23<sup>rd</sup>, 2018 in Warsaw (St. Anne’s Church), October 13<sup>th</sup>, 2018 in Lublin (“rainbow eagle”), March 10<sup>th</sup>, 2019 in Bydgoszcz (another “rainbow eagle”), May 25<sup>th</sup>, 2019 in Gdańsk (parody of the Most Blessed Sacrament, which was substituted with a drawing of a vagina), and June 8<sup>th</sup>, 2019 in Warsaw (parody of the Holy Mass).

**Each of these incidents could have served as the reason for representatives of public authorities to disband these assemblies. As stated in the judgment of the Constitutional Court of April 5<sup>th</sup>, 2011 (case file no. P 26/09), “the prerequisite of «public morality» allows for legal interference against actions that are commonly considered to cause social harm.” Nonetheless, the authorities have not availed themselves of this opportunity, which would point to the preferential treatment of LGBT activists compared to, e.g., patriotic communities that**

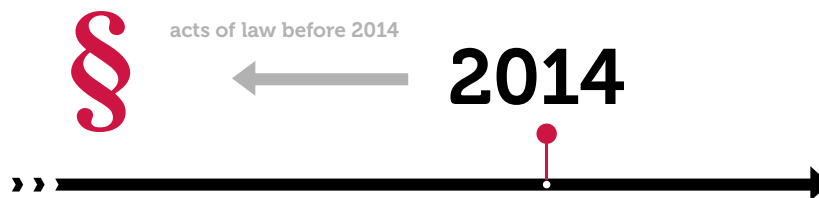
117 J. Sułkowski, Komentarz do art. 57 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

hold annual marches on Independence Day and the anniversary of the Warsaw Uprising. These assemblies, in contrast, have been disbanded on numerous occasions on the orders of subsequent mayors of Warsaw.

It is furthermore worth noting that the freedom of assembly has also been subject to violations on the part of the lawmakers, though this concerned acts of law passed prior to 2014.



The freedom of assembly has also been subject to violations on the part of the lawmakers, though this concerned acts of law passed prior to 2014



The bill of September 14<sup>th</sup>, 2012<sup>118</sup> amending the Act of July 5<sup>th</sup>, 1990 – Law on Assemblies, which was presented by the President of Poland at the time, Bronisław Komorowski, was met with criticism not only from deputies representing the opposition, but also from the incumbent Ombudsman Irena Lipowicz, human rights organisations, and future Ombudsman Adam Bodnar.<sup>119</sup> After only a year, during the preparations for new parliamentary elections, a totally different act of law was passed, the Act of July 24<sup>th</sup>, 2015 – Law on Assemblies,<sup>120</sup> which guaranteed high levels of protection for the freedom of assembly. The law came into force on October 14<sup>th</sup>, 2015, ten days before the parliamentary elections that saw the then ruling party lose its majority both in the Sejm and in the Senate. Assemblies that have taken place under these new regulations have not been subject to restrictions in the following years.<sup>121</sup> From the day the Act took effect and up until the COVID-19 pandemic, formal bans on assemblies have been practically unseen in the Polish legal environment.

As per the information available in the media, the organisers of the pride march in Białystok (that took place on July 20<sup>th</sup>, 2019), planned their route to run in the direct vicinity of a Catholic archcathedral (ref). Although the purpose of the counter-demonstration was to prevent potential provocations against a place of religious worship or profanations of religious symbols, some of its participants committed acts of aggression against the participants of the march. According to the police, 25 people were arrested, several people were charged with committing a crime, 75 fines were imposed and several

118 Polish Journal of Laws of 2012, item 1115.

119 Adam Bodnar, Michał Szwał, *Wolność zgromadzeń publicznych w Polsce po wyroku Trybunału Konstytucyjnego z 18 września 2014 r.*, Helsinki Foundation for Human Rights 2015, [https://www.hfhr.pl/wp-content/uploads/2015/02/hfpc\\_analiza\\_i\\_rekomendacje\\_22015.pdf](https://www.hfhr.pl/wp-content/uploads/2015/02/hfpc_analiza_i_rekomendacje_22015.pdf) (date of access: 01 Feb 2021).

120 Uniform text: Polish Journal of Laws of 2019, item 631.

121 Rafał Dorosiński, *Freedom of Assembly*, [in:] Joanna Banasiuk, Tymoteusz Zych, *State of Democracy, Human Rights and the Rule of Law in Poland. Recent Developments*, Warszawa 2016, [https://ordoiuris.pl/pliki/dokumenty/Ordoluris\\_HumanRights.pdf](https://ordoiuris.pl/pliki/dokumenty/Ordoluris_HumanRights.pdf) (date of access: 01 Feb 2021), pp. 63-65.

applications to the court for punishment for offenses<sup>122</sup>. **Due to the involvement of the Police, the events were not allowed to escalate and this legal assembly was not blocked.**

In turn, Krzysztof Żuk, the Mayor of Lublin, did attempt to oppose the organisation of a pride march in his city, using his statutory authority. However, on September 26<sup>th</sup>, 2019, the Regional Court in Lublin repealed his decision, stating that “the facts in this case were not sufficient to deem that participants of the 2<sup>nd</sup> Equality Parade in Lublin would pose a significant threat to other individuals’ health, lives, or property.”<sup>123</sup> The Court of Appeals upheld this decision the following day, thanks to which the march was held legally and without formal difficulties on the part of any of the authorities.<sup>124</sup>

The opponents of the march tried to block it, but the police successfully thwarted it. During the march and immediately after it, the policemen detained 38 people, most of them heard accusations concerning, inter alia, active participation in a public assemblage, public incitement to commit a crime or violating the inviolability of a policeman<sup>125</sup>. Seven of them were brought to trial<sup>126</sup>, including a couple who carried a dangerous explosive device, for which the couple were sentenced to one year in prison<sup>127</sup>.

**To summarise, as at the end of 2020, none of the Pride parades organised across Poland have been banned. Each time, either the authorities of the respective towns or cities (20), or the Regional Administrative Courts (4) allowed the participants to organise and follow through with said events.**

## 5.1. Summary

- 1) Demonstrations organised by LGBT activists in Poland enjoy the full scope of the constitutional freedom of assembly. Every year since 2006, the capital of Poland has seen the “Equality Parade,” an equivalent of Western pride marches, held without formal difficulties. Similar assemblies and marches have also been organised in other Polish cities for several years.
- 2) LGBT activists have recently started abusing their freedom of assembly to insult and profane religious symbols. Despite this, the authorities have not availed themselves of the opportunity to disband such assemblies, which would point to the preferential treatment of LGBT activists compared to, e.g., patriotic communities that are responsible for holding annual marches on Independence Day.
- 3) Freedom of assembly has also been subject to violations on the part of lawmakers, though this concerned acts of law passed prior to 2014.
- 4) As at the end of 2020, none of the Pride parades organised across Poland have been banned. Each time, either the authorities of the respective towns or cities, or the Regional Administrative Courts allowed the participants to organise and follow through with said events.

122 *Policja o „Marszu Równości” w Białymstoku: nie dopuściliśmy do zablokowania tego legalnego zgromadzenia*, 8 Aug 2019, [www.rpo.gov.pl/pl/content/policja-do-rpo-o-marszu-rownosci-w-bialymstoku-nie-dopuscilismy-do-jego-blokady](http://www.rpo.gov.pl/pl/content/policja-do-rpo-o-marszu-rownosci-w-bialymstoku-nie-dopuscilismy-do-jego-blokady).

123 *Sąd uchylił decyzję prezydenta Lublina zakazującą organizacji zapowiadanego na sobotę II Marszu Równości*, 26 Sep 2019, <https://samorząd.pap.pl/kategoria/prawo/zakaz-uchylony-sad-uchylil-decyzje-prezydenta-lublina-ws-marszu-rownosci> (date of access: 01 Feb 2021).

124 *II Marsz Równości w Lublinie*, 28 Sep 2019, <https://www.pap.pl/aktualnosci/news%2C518793%2Cii-marsz-rownosci-w-lublinie.html> (date of access: 01 Feb 2021).

125 *38 osób zatrzymanych podczas II Marszu Równości*, 29.09.2019, [www.policja.pl/pol/aktualnosci/179399,38-osob-zatrzymanych-podczas-II-Marszu-Rownosci.html](http://www.policja.pl/pol/aktualnosci/179399,38-osob-zatrzymanych-podczas-II-Marszu-Rownosci.html)

126 A. Pospiszcil, *Lublin. Rzucali kamieniami w uczestników Marszu Równości. Staną przed sądem*, 8.01.2020, <https://lublin.wyborcza.pl/lublin/7,48724,25575097,byli-agresywni-podczas-marszu-rownosci-siedem-osob-stanie-przed.html>.

127 *Lublin: Kary więzienia za przyniesienie bomby na Marsz Równości*, 20 Feb 2020, <https://www.wnp.pl/parlamentarny/spoleczenstwo/lublin-kary-wiezienia-za-przyniesienie-bomby-na-marsz-rownosci,56035.html>

## 6. The right to legal protection of private and family life

### 6.1. Constitutional guarantees of the right to protection of private and family life

As stated in Article 47 of the Constitution, “Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.”

#### 6.1.1. The right to protection of private life

Based on the Polish Constitution, as well as in other constitutional systems, the right to privacy is first and foremost considered through the prism of the “right to seclusion”<sup>128</sup> or the “right to be alone.” At the same time, one’s private sphere is made up of various areas which are, to a lesser or greater degree, open to external legal circumstances or admissible interference.<sup>129</sup> The right to protection of private life covers, “most of all, the individual’s informational autonomy” pertaining to the state of their affairs (especially their health, financial situation, and pending court proceedings). The right to privacy is also expressed in the demand to restrict the presence of third parties in acts of strictly personal and intimate nature. As noted by the Constitutional Court, “the obligation to respect and protect human dignity is the one from which arises the obligation to respect the purely personal sphere of an individual, where they are not obliged to ‘live with others’ or ‘share with others’ their feelings and experiences of intimate nature.”<sup>130</sup> As aptly indicated in legal literature, the term ‘private life’ is most easily described in reference to its antonym, ‘public life,’ which entails involvement in social, political, and other types of activities.<sup>131</sup>

**It would be difficult to find anything in the Polish social and legal environment which could be considered as an interference with any of the abovementioned aspects of privacy of people with homosexual tendencies or experiencing gender identity disorders.**<sup>132</sup>

#### 6.1.2. The right to protection of family life

By virtue of the lawmakers’ explicit decision, family life is accorded **stronger protection than private life.**

**This is because the right to respect for family life is related to Article 18 of the Polish Constitution, and is a specific extension thereof<sup>133</sup>. That is also the reason why case-law of the Constitutional Court indicates that Article 47 of the Polish Constitution should be read “in the context of” Article 18<sup>134</sup>.**

128 M. Wild, Komentarz do art. 47 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

129 Judgments of the Constitutional Court of: 4 November 2014 in case SK 15/13, OTK-A 2014, No. 10, item 111; and 12 December 2005 in case K 32/04, OTK-A 2005, No. 11, item 132.

130 *Ibidem*.

131 M. Wild, Komentarz do art. 47 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

132 The former Polish Ombudsman alleged that the local governments’ resolutions objecting to LGBT ideology violated the right to privacy. See: Part III, Chapter 5 hereinabove.

133 See judgment of the Constitutional Court of 27 January 1999 in case K 1/98, OTK 1999, No. 1, item 3.

134 Judgment of the Constitutional Court of 26 November 2013 in case P 33/12, OTK-A 2013, No. 8, item 123.

Legal provisions demand the fulfilment of certain obligations and expectations from those who are bound by a family relationship (within the meaning of the Constitution, and Article 18 thereof in particular), thereby specifying the scope of family life that is subject to protection. The reason for such special protection is not only the autonomy of an individual, but the particular contribution of family life to the society and its functioning.

**It is the axiology of social life, however, that decides what family life is, and not the individuals themselves. Nonetheless, an individual's autonomy may manifest itself in the decision to enter (or not to enter) a family relationship as understood in this manner.**

Consequently, this understanding is different from the one adopted under [Article 8](#) of the ECHR, where the fundamental criterion for determining the existence of family life is the proximity of personal ties between people, rather than the nature of the relationships from the perspective of social life.

Given the close connection between the right to protection of family life and the constitutional status of the family, it must be assumed that this right does not refer to other relationships than marriage, consanguinity (by nature or adoption), or affinity. In particular, cohabitation and other types of informal relationships are not subject to protection under this right. **Obviously, this does not mean that the personal and private nature of these relationships is not subject to any protection. This protection should, however, fall under protection of the individual's private life.** Relationships which do not make up families within the constitutional meaning of that term do not substantiate the attribution of special guarantees, as provided for in the Constitution of Poland. Because of these very same reasons, the right to protection of family life cannot engender an obligation to extend protection accorded to such constitutionally understood relationships to other factual relationships. Once again, this does not entail that the intimate nature of those other relationships is not subject to constitutional protection. The point is that such relationships may not be accorded as considerable a protection as is the case with family life.<sup>135</sup>

## **6.2. The right to respect for private and family life in the light of the case-law of the European Court of Human Rights**

In accordance with Article 8(1) ECHR, everyone has the right to respect for his private and family life, his home and his correspondence.

The right to respect for private life is the first of four spheres protected under this provision. Its essence seems to lie in ensuring that individuals enjoy a certain fundamental privacy (autonomy) which is protected against external interference, public or private, insofar as it is possible in modern-day society ("**right to live privately, away from unwanted attention**").<sup>136</sup> This fundamental sphere of privacy comprises, most of all, the individual's identity, as well as their mental and physical integrity, including honour and reputation. At the opposite end, there are aspects of active ties individuals have with the

<sup>135</sup> M. Wild, Komentarz do art. 12 Konstytucji RP (and literature on the subject cited therein), [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1-86*, Warszawa 2016.

<sup>136</sup> ECtHR judgment of 27 July 2004 in *Sidabras and Džiautas v. Lithuania*, para 43.

society, where greater interference (interaction) is inevitable, especially as regards the collection and making available of personal data.<sup>137</sup>

The obligation to respect private life should not be incorporated into the common law concept of privacy. The Strasbourg Court ascribes broader meaning to the notion of “private life,” giving it a social dimension, referring it also to the development of contacts with individuals and the outside world. **Nonetheless, the extensive interpretation of private life has its boundaries, and does not cover “activities which are of an essentially public nature.”**<sup>138</sup>

Despite these interpretational frameworks, it must be noted that Article 8 of the ECHR is generally non-specific. “This leaves the Court with a wide scope for determining its substantive dimension. **In application, Article 8-11 of the Convention have become construed in a manner that goes significantly beyond the original intentions of the authors of these provisions.**”<sup>139</sup>

This assessment is also adequate with respect to the ECtHR’s interpretation of family life. Its evolution can be traced through the history of rulings made in cases brought by the members of the LGBT subculture, evidencing the shift from protection of their private lives to protection of family life. Even though the Court was originally in favour of criminalising acts of homosexuality,<sup>140</sup> it has since then deemed they should ultimately be protected under the right to private life. It was in its judgment in *Schalk and Kopf v. Austria* that the Court modified its position,<sup>141</sup> finding that homosexual relationships are not only subject to protection within the notion of private life, but also constitute a valid category of family life. Since *Schalk and Kopf*, the sole fact that two people have sexual relations with each other and live together as a couple in a stable relationship has been sufficient to determine the existence of family life. Neither marriage nor the presence of children are essential conditions for granting protection within the notion of family life). From the judgment in *Vallianatos* onwards,<sup>142</sup> the Court does not even consider such conditions necessary. To lead a family life, it is sufficient for “individuals of full age [...] [to be] in same-sex relationships and in some cases cohabit” (para 49).<sup>143</sup>

It follows from the above that **currently, for the existence of family life to be determined, public commitments, presence of children, and the fact of living together and engaging in sexual relations, are not required.** It may therefore be the case that within the meaning of Article 8 of the ECHR, family life is characterised by the presence of feelings. Feelings, however, have consistently been treated by law as an irrelevant factor in the domain of private life. In turn, the stability of a relationship is an exceptionally relative criterion.<sup>144</sup> Therefore, it seems that objective definitions of the family and family life are increasingly more often treated as “relicts of the past.”<sup>145</sup>

137 Cf. M. Garlicki, *Komentarz do art. 8 Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*, [in:] L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18. Tom I*. Warszawa 2010.

138 See ECtHR decision of 15 September 2009 in *Friend and Countryside Alliance v. the United Kingdom*, para 42 – fox hunting.

139 M. Garlicki, *Komentarz do art. 8 Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności*... op. cit.

140 For example, judgment of the Court No. 104/55 of 17 December 1955, or No. 7215/75 of 7 July 1977.

141 ECtHR judgment of 24 June 2010, Application No. 30141/04.

142 ECtHR judgment of 7 November 2013 in joint cases of *Vallianatos and Others v. Greece*, Applications Nos. 29381/09 & 32684/09.

143 At the same time, it is true that the Court never considered the factor of living together as a necessary one to determine the existence of private life where the couple was married, divorced, or had a child, as it was marriage or child that constituted family life.

144 ECtHR judgment in joint cases of *Vallianatos*, para 73, op. cit.

145 Cf. G. Puppinc, *Wyrok w sprawie Vallianatos przeciwko Grecji w świetle przemian w sposobie pojmowania rodziny i „życia rodzinnego” w orzecznictwie ETPCz*, 20 Sep 2016, <https://ordoiuris.pl/rodzina-i-malzenstwo/wyrok-w-sprawie-vallianatos-przeciwko-grecji-w-swietle-przemian-w-sposobie>.



The above interpretations of the conventional right to respect for private and family life clearly breach the guarantees granted in the Polish Constitution. In its current interpretation, the Convention seems to resolve value conflicts differently than the Constitution.

In light of these circumstances, “finding that the changes in the ECtHR’s interpretation should determine the construal of the Polish Constitution would be tantamount to depreciating the supreme law of Poland. This way, its construal would depend on that of an inferior law. Such a view may be unreservedly substantiated only with respect to ECtHR’s case-law issued before the adoption of the Polish Constitution, as it indubitably contributed to and shaped the understanding of protection of private and family life as guaranteed by Article 47 of the Constitution. Nonetheless, subsequent changes in the line of the Strasbourg Court’s case-law do not result in amendments to Article 47.”<sup>146</sup>

At the same time, due to its special force, the Polish Constitution remains “the superior law of the Republic of Poland” with respect to all international agreements binding Poland, including primary EU law and the ECHR. **“The norms enshrined in the Constitution regarding the rights and freedoms of individuals specify the minimal and definitive threshold which may not be reduced or challenged due to the introduction of Community regulations. [...] Therefore, the Constitutional Court does not recognise the possibility of undermining the force of an applicable constitutional norm by the sole fact of introducing a contrary Community regulation into the EU law system.”**<sup>147</sup> This standpoint should all the more be referred to situations where the introduction of certain regulations into the EU legal system would be based on the dynamically changing interpretations of the ECtHR.

What is also not without significance, is the provision contained in Article 4(2) of the Treaty on the European Union, under which **the Union shall respect the Member States’ national identities, inherent in their fundamental structures, political and constitutional.**<sup>148</sup>

### 6.3. The principle of protection of marriage

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As per Article 18 of the Polish Constitution, marriage, being a union of a man and a woman, is placed under the protection and care of the Republic of Poland. This provision effectively renders it impossible to introduce same-sex ‘marriages’ in Poland, and through the protection of marriage ensured therein also *de facto* excludes the possibility of introducing civil partnerships. It is legally impossible to put any other type of relationship in a position equal to that of marriage in the Polish legal system.<sup>149</sup>

146 M. Wild, Komentarz do art. 47 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

147 Judgment of the Constitutional Court of 11 May 2005 in case K 18/04, OTK-A 2005, No. 5, item 49.

148 See also judgments of the Constitutional Court of: 24 November 2010 in case K 32/09, OTK-A 2010, No. 9, item 108, and of 16 November 2011 in case SK 45/09, OTK-A 2011, No. 9, item 97.

149 B. Banaszkiwicz, “Małżeństwo jako związek kobiety i mężczyzny”. O niektórych implikacjach art. 18 Konstytucji RP, “Kwartalnik Prawa Prywatnego” 3 (2013), pp. 591-656; M. Olszówka, *Konstytucyjny obowiązek otoczenia małżeństwa ochroną i opieką*, in: *Prawa i obowiązki członków rodziny*, ed. M. Gołowkin-Hudała, A. Wilk, P. Sobczyk, Vol. I, Opole 2017, pp. 13-15; M. Szydło, *Instytucjonalizacja związków partnerskich w świetle art. 18 i 32 Konstytucji RP*, “Zeszyty Prawnicze BAS” 4 (2017), pp. 9-12; R. Szytchmiller, *Konstytucyjna ochrona małżeństwa i rodziny a ekspansja gender*, “Studia Prawnoustrojowe” 27 (2015), pp. 226-232; B. Banaszak, *Konstytucyjna regulacja małżeństwa a prawo do zawarcia małżeństwa*, in: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, pp. 75-82; W. Skrzydło, *Komentarz do art. 18 Konstytucji RP*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Lex 2013.

### **6.3.1. Coherence of administrative and legal practice within the Polish legal system**

The Polish Constitutional Court, Supreme Court, and Supreme Administrative Court have expressed a consistent position on this matter.

The Supreme Court found that “[g]iven the constitutional principle of the protection of marriage and the absence of reasons to consider the lack of regulation on extramarital relationships as a legal loophole, applying norms of marital law (including those pertaining to community property and divisions thereof) is inadmissible even by means of an analogy to non-marital relationships that are characterised by the existence of personal and financial ties.”<sup>150</sup>

In 2013, the Constitutional Court reiterated that “[...] Article 47 of the Constitution guarantees everyone the right to legal protection of his private and family life, reputation, and dignity, and to decide about his personal life. This provision is strictly related to Article 18, and should be read in its context.”<sup>151</sup>

An analogous opinion was voiced by the Supreme Administrative Court in its judgment of March 11<sup>th</sup>, 2016, in which it additionally highlighted the fact that such a uniform position is consistently upheld in the legal doctrine.<sup>152</sup>

### **6.3.2. Rights of people in informal relationships within the Polish legal system**

Considering the constitutional axiology adopted by the legislature and the rationale behind it, alternative non-marital relationships are not accorded the privileges reserved for married couples. At the same time, this does not prohibit the legislature from establishing fair and rational legal solutions which would help people living in a community of one sort or another to coordinate their private interests and avail themselves of the state’s assistance in this respect. However, non-marital unions do not have to be made institutional for this purpose. Those who live in such relationships, including same-sex unions, have at their disposal several extant legal institutions that are indifferent to the question of sex or sexual orientation. Their scope of application is universal. These include powers of attorney, the institution of joint ownership, nominate and innominate contracts, unjust enrichment claims, and last wills and testaments.

Furthermore, as noted by the Supreme Court, it is admissible for the legislature to regulate by statute certain specified legal effects of living together. Consequently, the fact that an unmarried couple lives together is, in many provisions, treated as a legal event. In turn, the scope of the notion of “living together” (Polish: “wspólne pożycie”) was extended to include same-sex couples in the Supreme Court’s resolutions of November 28<sup>th</sup>, 2012<sup>153</sup> and February 25<sup>th</sup>, 2016.<sup>154</sup>

150 Judgment of the Supreme Court of 6 December 2007, case file no. IV CSK 301/07, Lex no. 361309.

151 Judgment of the Constitutional Court of 26 November 2013, case file no. P 33/12, OTK-A 2013/8/123.

152 Judgment of the Supreme Administrative Court of 11 March 2016, case file no. II FSK 1682/14, SIP Legalis no. 1455910.

153 Case file no. III CZP 65/12 (OSNC 2013, no. 5, item 57).

154 Resolution of the Supreme Court, case file no. I KZP 20/15.

As a result, those who live together with a person of the same sex may, among other things:

- a) obtain information on their sick partner's health,<sup>155</sup> and access their medical documentation;<sup>156</sup>
- b) become the tenant of their apartment, replacing the dead partner in that role;<sup>157</sup>
- c) draft their last will and testaments in which they both appoint each other as heirs;<sup>158</sup>
- d) collect their partner's remuneration for work<sup>159</sup> and postal items addressed to them at either their place of residence or post office;<sup>160</sup>
- e) keep a joint bank account;<sup>161</sup>
- f) indicate their partner as the person to be entitled to compensation by the insurance company in the event of their partner's death;<sup>162</sup>
- g) receive the widow's/widower's pension in the event of their partner's death resulting from bodily injury or health disorder;<sup>163</sup>
- h) be exempt from testifying or being examined with respect to the defendant if they are in a particularly close relationship with them;<sup>164</sup>
- i) take out a bank loan together;<sup>165</sup>
- j) collect the body of the deceased partner and bury it;<sup>166</sup>
- k) act on behalf of their partner and represent them i.a. before banks, tax offices, the National Health Fund, and the Social Security Institution pursuant to a power of attorney, and regulate the division of their property based on a mutual agreement.

155 Article 31(2) of the Act of 5 December 1996 on the professions of medical doctor and dentist states: "2. Medical doctors may provide information specified in Paragraph 1 to other persons upon consent of the patient or their statutory representative." Said Paragraph 1 states: "1. Medical doctors are obliged to provide patients or their statutory representatives with intelligible information on their health, diagnosis, suggested and potential diagnostic methods and treatment, foreseeable effects of applying or not applying them, treatment outcomes, and prognoses."

156 Article 18(3) of the Act on Healthcare Institutions of 1991 stipulates that healthcare institutions make the documentation available to a person authorised by the patient.

157 Article 691 § 1 of the Civil Code.

158 Article 931-933 of the Civil Code. The issue that is sometimes raised is that last wills and testaments do not satisfy all the expectations of same-sex unions, as the institution of legitim (Article 991 of the Civil Code) guarantees those not appointed in the testament one half of what they would be entitled to, were the person to die intestate. However, the legitim is a universal institution, which applies equally to all testators. So, even taking into account the need to transfer the legitim, drafting the last will and testament provides for transferring a greater part of one's estate to the surviving partner than that which spouses usually leave to each other (since heirs are usually appointed by statute).

159 Pursuant to Article 98 of the Civil Code in conjunction with Article 300 of the Labour Code, an employee may authorise another person to collect their remuneration, by granting them a relevant power of attorney for that purpose.

160 Article 37(2) of the Act of 23 November 2012 Postal Law. In line with this provision, a postal item may be served on 1) the addressee, 2) the statutory representative of the addressee or attorney thereof, as appointed pursuant to a power of attorney granted under general rules or pursuant to a postal power of attorney, 3) a person aged over eighteen who lives with the addressee (in the postal office, after submitting a declaration of cohabitation with the addressee).

161 Article 51 of the Banking Law Act allows so-called joint bank accounts.

162 Article 831 § 1 of the Civil Code.

163 Article 446 § 2 of the Civil Code.

164 Article 185 of the Code of Criminal Procedure. The Supreme Court has even held that such an exemption may be granted pursuant to the provision on living together.

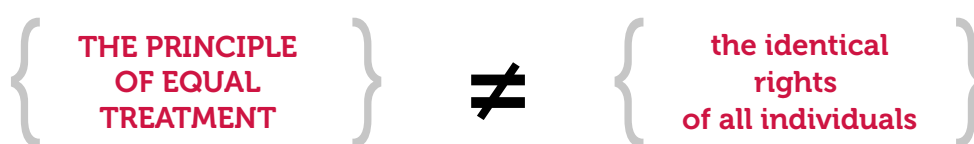
165 The persons taking out the loan do not necessarily have to be a married couple, in line with the provisions.

166 In line with Article 10(1) of the Act on Cemeteries and the Burial of the Dead, the right to bury bodies of the deceased rests with the closest family members thereof (surviving spouse, ascendants, descendants, and relatives by blood or marriage) or any person who voluntarily obligates themselves to do so.

All these rights are grounded in statutes, which means that they do not have to be established by the judiciary. Together with the legal instruments mentioned above, they ensure a wide sphere of legal certainty.

### 6.3.3. The non-discriminatory nature of different treatment of marriages and other relationships

The Polish Constitutional Court has pointed out that, as widely discussed in Chapter IV.1.1. hereina-bove, the principle of equal treatment “does not entail that the rights of all individuals are identical (equivalent).”<sup>167</sup>



As emphasised by the European Court of Human Rights, discrimination is not equal to just any difference in treatment when it comes to enjoying the rights and freedoms enshrined in the Convention. The difference in treatment is of discriminatory nature if it has no objective or rational justification.<sup>168</sup>

In indicating such objective and rational reasons for different treatment of marriages and other relationships, the following may be added to what has already been stated above:

” Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behaviour, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. (...) [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other.<sup>169</sup>

### 6.3.4. European Union law

**Notwithstanding the foregoing, the Treaty on the Functioning of the European Union enumerates the exclusive<sup>170</sup> and shared<sup>171</sup> authority of the EU. Family law belongs to neither**

<sup>167</sup> Decision of the Constitutional Court of 24 October 2001, case file no. SK 10/01.

<sup>168</sup> Judgment in a Belgian case; see also *Varnas v. Lithuania* of 9 July 2013, Court (Second Section), application no. 42615/06 – unjustified different treatment of detained and convicted individuals as regards conjugal visits; *Maktouf and Damjanović v. Bosnia and Herzegovina*, Grand Chamber, §81–83 – similar war crimes tried before different courts; *Topčić-Rosenberg v. Croatia* of 14 November 2013, Court (First Section), application no. 19391/11 – excessively formal interpretation of law concerning maternity leave with respect to an adoptive mother.

<sup>169</sup> R. J. Cordy, dissenting comments to the ruling in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003).

<sup>170</sup> Article 3 TFEU.

<sup>171</sup> Article 4 TFEU.

**of the two categories. Furthermore, the Treaty on European Union clearly states that any powers not conferred on the Union under the Treaties belong to the Member States.<sup>172</sup>**

The boundaries of these powers are set out by the principle of conferral, whereas their exercise is subject to the principles of subsidiarity and proportionality.

Similarly, in accordance with Article 9 of the Charter of Fundamental Rights:

” *The right to marry and the right to establish a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*

Therefore, the Member States have exclusive authority to regulate the issues pertaining to family law and marriages.

**Furthermore, in line with the so-called ‘UK/Poland Protocol,’ Protocol (No. 30) to the Charter of Fundamental Rights, the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland, to find that the laws of Poland are inconsistent with the Charter.**

Poland has also made its own declaration on the Charter (No. 61), ensuring that:

” *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.*

It made a similar declaration (No. 39) with respect to the Treaty of Accession of 2003, stating that:

” *nothing in the provisions of the Treaty on European Union, of the Treaties establishing the European Communities and the provisions of treaties amending or supplementing those treaties prevents the Polish State from regulating questions of moral significance, as well as those related to the protection of human life.*

Finally, it is worth emphasising that the sovereignty of the Republic of Poland as regards the institution of family law has also been clearly established in the resolutions adopted by the Polish Sejm. Though these resolutions are not legally binding, they are significant as a moral commitment and an indication of the real intentions of the lawmakers that have conferred part of the state’s power on the institutions of the European Union. Two months before the EU membership referendum, the Sejm adopted the resolution of April 11<sup>th</sup>, 2003 on the question of independence of Polish legislation as regards morality and culture (Monitor Polski 2003, No. 19, item 290), indicating that:

” *with respect to the moral order of social life, the dignity of family, marriage, upbringing, and the protection of life, Polish legislation is not subject to any limitations imposed by means of international regulations.*

<sup>172</sup> Article 5 TFEU.

This position was reiterated in the resolution of April 1<sup>st</sup>, 2008 on the consent for the ratification of the Lisbon Treaty:

” *The European Union's Charter of Fundamental Rights does not affect in any way the right of the Republic of Poland 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.*<sup>173</sup>

Furthermore, the Sejm also adopted a resolution of May 27<sup>th</sup>, 2011 which states that:

” *the purpose of the Treaties is not the transposition of substantive family law regulations concerning civil partnerships from those states in the European Union that have in recent years introduced such regulations in their domestic legal systems to countries which do not provide for similar legal constructs (including Poland, where the protection of marriage, being a union of a man and a woman, is a principle expressed in Article 18 of the Constitution). In the assessment of the Sejm, the European Union has no authority to adopt provisions which concern substantive family law, especially provisions which would cause the introduction of civil partnerships regulated by the laws of registering countries in countries that do not provide for such a legal institution.*<sup>174</sup>

Here, it is worth recalling the standpoint of the Polish Constitutional Court which has deemed that:

” *due to its special force, the Constitution remains the superior law of the Republic of Poland in respect of all international agreements binding on Poland. (...) Within the territory of Poland, it enjoys superiority in terms of its applicability and enforcement.*<sup>175</sup>

Among other institutions, the German Federal Constitutional Court holds a similar (and even further reaching) position. It sees itself as an institution that is authorised and obliged to control EU bodies and institutions in terms of whether they exceed the competences conferred on them in their efforts. This is for the purpose of determining whether the respective acts passed by the EU institutions should be applied in the German legal system.<sup>176</sup>

### 6.3.5. The European Court of Human Rights

Even though on the one hand, ECHR case-law views the institutionalisation of same-sex unions as one of the elements of the right to respect for an individual's private and family life, on the other hand, it sees that States have a certain margin of appreciation in this respect, one that depends on the social, cultural, and moral context in the given state, ethical controversies related to the issue at hand, and the prevailing community interest. The Court itself views the regulation of homosexual relationships as linked to sensitive moral or ethical issues and, as it seems, allows States not to regulate the status of same-sex couples to protect the morals of society, and the traditional concept of marriage as a union between a man and a woman, adopted by the society.

173 Monitor Polski of 2008, No. 31, item 270.

174 Monitor Polski of 2011, No. 47, item 522.

175 Judgment of the Constitutional Court of 18 May 2005, case file no. K 16/04.

176 M. Balczyk, *Polski i Niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, p. 216.

Given the Polish legal academic literature, and based on the case-law of the Constitutional Court, Supreme Court, and Supreme Administrative Court, a high degree of coherence of administrative and legal practice within the Polish legal system can be observed with respect to matters pertaining to same-sex relationships. Polish courts, unlike the Italian courts in the case of *Oliari and Others*, do not pave the way towards the institutionalisation of same-sex unions. On the contrary, they actively reject such postulates, given the provision of Article 18 of the Constitution.

At the same time, people living in informal (same-sex or opposite-sex) relationships may use the many legal instruments specified hereinabove, allowing them to take care of their private interests and avail themselves of the state's assistance in this respect.

## 6.4. The right to be raised by a mother and a father

### 6.4.1. The well-being of children as a constitutionally protected value and one enshrined in international law

The Polish Constitution enshrines the principle of protection of the rights of the child in Article 72(1). By virtue of this provision, **the well-being of children is a constitutionally protected value.**

**This premise permeates the whole text of the Constitution,<sup>177</sup> and is best fulfilled by ensuring that the child can be raised in a family, most of all a natural family, and therefore by ensuring parental guardianship on the part of people who have blood ties to the child.<sup>178</sup>**

Similarly, the Convention on the Rights of the Child of November 20<sup>th</sup>, 1989 states in its preamble that:

” *the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.*<sup>179</sup>

This premise results from elevating parts of the demands presented in the Declaration of the Rights of the Child of November 20<sup>th</sup>, 1959 to the level of a ratified international agreement. In its first and second sentence, Principle 6 of the Declaration specifies that:

” *the child, for the full and harmonious development of his personality, needs love and understanding. It shall, wherever possible, grow up in the care and under the responsibility of its parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from its mother.*<sup>180</sup>

177 See judgment of the Constitutional Court of 28 April 2003 in case K 18/02, OTK-A 2003, No. 4, item 32.

178 See judgment of the Constitutional Court of 28 April 2003 in case K 18/02, OTK-A 2003, No. 4, item 32; in doctrine: E. Morawska, *Ochrona praw dziecka*, pp. 132-133

179 Convention on the Rights of the Child adopted and opened for signature by the General Assembly of the United Nations on 20 November 1989 (Polish Journal of Laws of 1991, No. 120, item 526).

180 The Declaration of the Rights of the Child adopted by the UN General Assembly on 20 November 1959, <http://libr.sejm.gov.pl/tek01/txt/onz/1959.html> (date of access: 26 Jan 2021).

In line with Article 7(1) of the Convention, the child has the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by its parents. In turn, Article 9 of the Convention stipulates that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Given the foregoing, it is worth reiterating that **Poland does meet its international obligations, guaranteeing legal protection and assistance to the child both before and after birth, and ensuring that the child has the right to be raised in a family.** In the interests of proper development, it is preferred that the child be brought up by a mother and a father, even if they are not the child's biological parents. The legal recognition of a biological fact consisting in the sexual complementarity of the child's parents is essentially based on the right of the child, and on the right of the parents. The ordinary lawmakers have emphasised this fact twice in the Family and Guardianship Code (in Article 58 § 1a and 107 § 2), reiterating that the child has the right to be brought up by both parents. Therefore, the demands of the LGBT movement to deny children the exercise of their right by expecting that their upbringing be entrusted with same-sex couples, are in clear conflict with that principle.

In this context, it is also worth adding that in ratifying the Convention on the Rights of the Child, Poland made its own interpretational declaration, in accordance with which:

” *the Republic of Poland considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12 to 16, shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family.*

#### **6.4.2. Transcription of foreign birth certificates**

In accordance with Polish law, each birth certificate features details concerning the mother and the father of the child. The mother is the woman who gave birth to the child, and the father is a man, most often the woman's husband. If the identity of the father, or in the rare case that of the mother, cannot be determined, fictitious data are entered in the certificate. Therefore, it is impossible for a Polish birth certificate not to feature details concerning the mother or the father, as Polish law fully respects the natural order and the fact that children originate from the union of the mother (woman) and the father (man).

LGBT activists argue that the refusal to transcribe a foreign birth certificate where same-sex people are entered as parents of the child is a limitation on the rights of the child by rendering it impossible for that child to obtain a Polish identity document and passport.

**This argumentation was unanimously dismissed by a resolution of seven Supreme Administrative Court judges.<sup>181</sup> In presenting the oral motives for the resolution's justification, prof. Jacek Chlebny, Head of the Supreme Administrative Court's General Administrative Chamber noted that “[i]ndividuals who were refused transcription of their birth certificates have not been deprived of their potential rights that would arise from their status as**

<sup>181</sup> Resolution of the Supreme Administrative Court of 2 December 2019, case file no. II OPS 1/19.



***a national of Poland, especially with respect to applying for a PESEL number or a Polish identity document.”***

Thus, the Supreme Administrative Court challenged the main argument put forward by the Polish Ombudsman Adam Bodnar and representatives of the Helsinki Foundation for Human Rights who were demanding for a resolution to be passed, mandating the transcription of birth certificates with same-sex people indicated as parents. The totally unjustified nature of this argumentation has been pointed out by the Ordo Iuris Institute,<sup>182</sup> a representative of the National Public Prosecutor's Office, and the Polish Children's Ombudsman, all of whom were also parties to the proceedings in question. The Supreme Administrative Court was in favour of Ordo Iuris' position, concurring that a foreign birth certificate constitutes evidence of facts contained therein, and thus may be invoked in court and administrative proceedings without the need for its transcription.

## 6.5. Summary

- 1) Based on the Polish Constitution, as well as in other constitutional systems, the right to privacy is first and foremost considered through the prism of the “right to seclusion”. It covers “most of all, the individual's informational autonomy” pertaining to the state of their affairs.
- 2) The right to legal protection of family life is related to Article 18 of the Polish Constitution, and is a specific extension thereof. That is also the reason why Constitutional Court case-law indicates that Article 47 of the Polish Constitution should be read “in the context of” Article 18.
- 3) It is the axiology of social life, however, that decides what family life is, and not the individuals themselves. Nonetheless, an individual's autonomy may manifest itself in the decision to enter (or not to enter) a family relationship understood in this manner.
- 4) The personal and intimate nature of cohabitation and other informal relationships is respected as part of the individuals' private lives, but not family lives.
- 5) The right to protection of family life cannot engender an obligation to extend protection accorded to such constitutionally understood relationships to other factual relationships.
- 6) Some interpretations of the conventional right to privacy clearly breach the guarantees granted in the Polish Constitution, thereby even questioning the conformity of the ECHR with certain provisions of the supreme law of Poland.
- 7) Finding that the changes in ECtHR's interpretation should determine the construal of the Polish Constitution would be tantamount to depreciating the supreme law of Poland. This way, its construal would depend on that of an inferior law. In turn, due to its special force, the Polish

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182 Legal position of the Party to the proceedings – the Ordo Iuris Institute for Legal Culture, [https://ordoiuris.pl/sites/default/files/inline-files/Stanowisko\\_OI\\_ws\\_transkrypcji\\_0.pdf](https://ordoiuris.pl/sites/default/files/inline-files/Stanowisko_OI_ws_transkrypcji_0.pdf)

Constitution remains “the superior law of the Republic of Poland” in respect of all international agreements binding on Poland, including primary EU law and the ECHR.

- 8) Pursuant to Article 4(2) TEU, the European Union respects the Member States’ national identities, inherent in their fundamental structures, political and constitutional.
- 9) Article 18 of the Constitution renders the institutionalisation of same-sex relationships impossible. The Polish Constitutional Court, Supreme Court, and Supreme Administrative Court have expressed a consistent position on this matter.
- 10) At the same time, this does prohibit the legislature from establishing fair and rational legal solutions which would help people living in a community of one sort or another to coordinate their private interests and avail themselves of the state’s assistance in this respect. However, non-marital unions do not have to be made institutional for this purpose.
- 11) Those who live in such relationships, including in same-sex unions, have at their disposal several extant legal institutions that are indifferent to the question of sex or sexual orientation. Their scope of application is universal. These include powers of attorney, the institution of joint ownership, nominate and innominate contracts, unjust enrichment claims, and testaments. People in informal relationships are also able to obtain information on their sick partner’s health and a bank loan together.
- 12) The Treaty on the Functioning of the European Union enumerates the exclusive and shared competences of the EU. Family law belongs to neither. Furthermore, the Treaty on the European Union clearly states that any competences not conferred on the Union under the Treaties belong to the Member States.
- 13) The sovereignty of the Republic of Poland as regards the institution of family law has also been clearly declared in the resolutions adopted by the Polish Sejm. Though these resolutions have no legally binding effect, they are a significant indication of the real intentions of the lawmakers that have conferred part of the state’s competences on the institutions of the European Union.
- 14) Polish courts, unlike the Italian courts in the case of Oliari and Others, do not pave the way towards the institutionalisation of same-sex unions. On the contrary, they actively object to such postulates, given the provision of Article 18 of the Constitution.
- 15) The principle of the children’s well-being is best fulfilled by ensuring that the child can be raised in a family, most of all a natural family, and therefore by ensuring parental guardianship on the part of people who have blood ties to the child.
- 16) Poland does meet its international obligations, guaranteeing legal protection and assistance to the child both before and after birth, and ensuring that the child has the right to be raised in a family.
- 17) Individuals who were refused transcription of their birth certificates have not been deprived of their potential rights that would arise from their status as a national of Poland, especially with respect to applying for a PESEL number or a Polish identity document.

## 7. The right to work

As previously mentioned, legal protection against employment discrimination is guaranteed in Poland by the Equal Treatment Act of December 3rd, 2010.<sup>183</sup> Immediately after its adoption, LGBT activists deemed that this act satisfied EU standards, by saying that:

” *admittedly, with respect to work and employment, the law increases the level of protection accorded to workers to the minimum standards set out by European Union legislation.*<sup>184</sup>

The Council of Europe Commissioner for Human Rights has also confirmed that employees are effectively protected against discrimination by the virtue of both labour law and civil law. She indicated that:

” *the Polish Labour Code allow[ed] victims to claim damages for discrimination on the ground of sexual orientation in employment, and the Civil Code allows them to claim financial and non-financial reparation for breaches of ‘personal rights’, which include reputation, name and image.*<sup>185</sup>

**This means that any potential reservations concerning the access to employment of people with homosexual tendencies or experiencing gender identity disorders do not refer to their legal situation in any way, but may concern the application of certain provisions by courts and other public authorities.**

” *As follows from the studies conducted on behalf of the Ombudsman, employment discrimination occurs on a daily basis for many transgender people in Poland. One of its forms, and, at the same time, one of the potential reasons for stigmatisation and discrimination in the workplace, is the necessity for transgender people to use employment certificates containing such personal data and details concerning their sex as were applicable prior to their gender recognition procedure.*<sup>186</sup>

In response to this claim, it is worth citing the decision of the Supreme Court of May 22<sup>nd</sup>, 1991 (case file no. III CRN 28/91), in line with which “were the court to rule that a gender transition had taken place, **such a ruling would only be effective *ex nunc*.**” Its force would be applicable to documents issued only after its pronouncement. The ruling would have no effect on any acts drafted beforehand. This was also confirmed by the Supreme Court in its more recent case-law, primarily in the already cited judgments of December 6<sup>th</sup>, 2013 (case file no. I CSK 146/13) and January 10<sup>th</sup>, 2019 (case file no. II CSK 371/18). Employment certificates therefore remain valid regardless of gender transitioning, which does not have retroactive effect.

183 Uniform text: Polish Journal of Laws of 2020, item 2156.

184 Zofia Jabłońska, *Sytuacja prawna osób LGBT na rynku pracy – implementacja standardów unijnych do polskiego systemu prawa z uwzględnieniem przepisów Ustawy o wdrożeniu niektórych przepisów UE w zakresie równego traktowania*, [in:] Krzysztof Śmiszek (ed.), *Dyskryminacja ze względu na orientację seksualną i tożsamość płciową w zatrudnieniu*, Warszawa 2011, p. 91.

185 *Memorandum...*, op. cit., p. 2.

186 Adam Bodnar (ed.), *Sytuacja prawna...*, op. cit., p. 98.

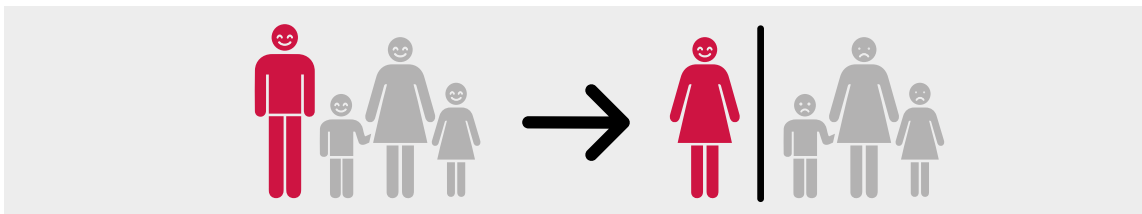
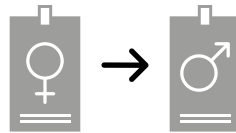
## Transsexualism does not justify “going back in time.”

“The need to protect family ties means that a ruling on legal gender recognition is effective *ex nunc*, thus from the moment of its issuance”.

— § Decision of the Supreme Court of March 22nd, 1991, case file no. III CRN 28/91 —

Therefore, such documents as employment certificates which feature details applicable prior to legal gender recognition remain valid.

In its judgment of December 6th, 2013 (case file no. I CSK 146/13), the Supreme Court stated that “the transsexual person has fulfilled their ambitions in the social role ascribed by law to the gender they reject (regardless of accompanying feelings). At the same time, they have done so not alone but with another, opposite-sex individual, and for the dignity of that other individual, it cannot be without significance whether they were in a same-sex or opposite-sex relationship.”



The Polish Ombudsman also believed that the right to work had been violated by the Regulation of the Minister of National Defence of January 24<sup>th</sup>, 2018 on the determination of fitness for active military service and procedure followed by military medical commissions in such cases (Polish Journal of Laws of 2018, item 258, as amended), where “transsexualism” is listed as a condition that justifies the assignment of category E – totally and permanently unfit for military service. **This is, however, consistent with the global classification of transsexualism (currently referred to as gender dysphoria) as a disorder.**

The Polish Ombudsman himself has admitted that:

” *protection against employment discrimination on the grounds of sexual orientation or gender identity [was] relatively broad, especially when compared to the protection of the Polish LGBT individuals’ rights in other areas. It [was] ensured by both the Labour Code and the Equal Treatment Act, and the applicable provisions should be considered to satisfy the international standards in this scope.*

## 7.1. Summary

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- 1) Protection against employment discrimination on the grounds of sexual orientation is ensured both by the Labour Code and the Equal Treatment Act, both of which implement EU directives concerning this subject.
- 2) Any potential reservations concerning the access to employment of people with homosexual tendencies or experiencing gender identity disorders do not refer to their legal situation in any way, but may concern the application of certain provisions by courts and other public authorities.

## 8. The right to education

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Pursuant to Article 70(1) of the Polish Constitution, everyone has the right to education. Up until the age of 18, education is compulsory. The way in which the obligation to attend school is enforced is specified by statute. In Poland, the right to education is exercised by all children up to the age of 18 (for whom it is also an obligation to exercise it), regardless of any self-identification issues or hardship experienced.

### 8.1. Anti-discrimination education

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**The allegations brought forward by LGBT activists and supporting organisations in this regard concern what they believe to be insufficient presence of anti-discriminatory teaching material in school education.** For example, the Council of Europe Commissioner for Human Rights “encourages the authorities to support and promote education campaigns designed to raise public awareness about LGBTI people and the fact that they have the same rights as everyone else, such as the “Rainbow Fridays” educational initiative, and to provide all children with comprehensive sexuality education.”<sup>187</sup>

Therefore, the essence of these demands is not “caring about the children’s and adolescents’ upbringing in the spirit of acceptance and respect for others”<sup>188</sup> or “ensuring that every student has the conditions necessary for their development, and preparing them for the fulfilment of their obligations as family members and citizens based on the principles of solidarity, democracy, tolerance, justice, and freedom.”<sup>189</sup> These objectives are already contained in the national curriculum and education law.

It is worth noting that, in practice, the curriculum for anti-discrimination education classes significantly exceeds what should intuitively be taught in such classes – equality before the law, and equal treatment. What lies at the heart of anti-discrimination education, and is variously referred to as equality education,

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187 *Memorandum...*, pp. 4-5.

188 Preamble to the national curriculum for general education in four-year general secondary schools and five-year technical secondary schools, constituting Schedule No. 1 to the Regulation of the Minister of National Education on the national curriculum for general education in general secondary schools, technical secondary schools, and stage II sectoral vocational schools of 30 January 2018 (Polish Journal of Laws of 2018, item 467).

189 Preamble to the Act of 14 December 2016 – Education Law (uniform text: Polish Journal of Laws of 2019, item 1148).

teaching of tolerance, promotion of equal treatment, education on human rights,<sup>190</sup> is post-Marxist ideology. As stated by the Anti-discrimination Education Society in its publication, the condition for obtaining the status of a certified anti-discrimination education trainer is the completion of a “gender-oriented workshop or training session.”<sup>191</sup>

Anti-discrimination classes present a controversial set of beliefs that conflict with the convictions held by many parents. This includes the belief that sex, parenthood, and family are concepts that are modifiable in any way we want – that we may change and reassign them (as regards sex) or create them (as in two-mother families). Publications concerning anti-discrimination education hold that “there are more gender options in the world than man and woman”<sup>192</sup> and present other beliefs that are consistent with the queer theory, proponents of which openly declare their pursuit of “the deconstruction and destabilisation of categories of gender and sexuality, and the ensuing destruction of the social stratification system based thereupon.”<sup>193</sup> They also express the belief that school coursebooks should present the image of “families based on open sexual relationships, and polyamorous families.”<sup>194</sup>

Evidently, such contents interfere with the sphere of upbringing, which as assumed by the Constitutional Court in its case-law, involves “instilling and reinforcing in the child a certain worldview, set of beliefs, value system, as well as customs and moral and ethical rules.”<sup>195</sup> Obviously, this scope covers sexuality.<sup>196</sup>

Moreover, the scope in which anti-discrimination classes touch upon the question of gender, sexuality, marriage, family, and parenthood, exceeds the scope of the national curriculum for family life education. As admitted by authors of one coursebook for anti-discrimination education, “the analysis of the core curriculum for that subject has shown us that the thematic scopes are essentially the same.”<sup>197</sup> Therefore, anti-discrimination classes not only interfere with the powers of the minister competent for education and upbringing,<sup>198</sup> but also contribute to the decomposition of the education system defined by commonly applicable law. The youth participating in such classes is taught in line with two contrary models of education and upbringing.

## 8.2. The right of the parents to raise their children in line with their beliefs

Consequently, one must note that with respect to upbringing, the role of the school is narrowed down only to “supporting the role of the family,” as stated in the Education Law Act.<sup>199</sup> This is further confirmed by regulations that set out the national curriculum, in accordance with which schools should “support the role of the family in upbringing, (...) promote the integral view of human sexuality, (...)

190 ed. J. Świercz, *Lekcja równości. Jak prowadzić działania antydyskryminacyjne w szkołach*, Kampania Przeciw Homofobii, 2015

191 „Edukacja antydyskryminacyjna i jej standardy jakościowe”, TEA, 2011.

192 *Szkoła równości. Dziennik praktyk. Wywiady z praktykami i praktyczkami edukacji antydyskryminacyjnej*, Towarzystwo Edukacji Antydyskryminacyjnej, 2016.

193 J. Kochanowski, M. Abramowicz, R. Biedroń, *Queer studies. Podręcznik kursu*, 2010.

194 L. Lew-Starowicz, K. Wąż, J. Kochanowski, R. Kowalczyk, *Przegląd treści szkolnych podręczników do biologii, wiedzy o społeczeństwie i wychowania do życia w rodzinie pod kątem przedstawienia w nich problematyki LGBTQ i treści homofobicznych*, 2013.

195 See judgment of the Constitutional Court of 12 April 2011 in case SK 62/08.

196 W. Borysiak, Komentarz do art. 48 Konstytucji RP, [in:] ed. M. Safjan, L. Bosek, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016.

197 E. Majeska, E. Rutkowska, *Równa szkoła – edukacja wolna od dyskryminacji...* op. cit., p. 11.

198 The Regulation of the Minister of National Education of 12 August 1999 on school education and scope of teaching contents concerning knowledge about human sexual life, conscious and responsible parenthood, the value of the family and life in its prenatal stage of development, as well as methods and measures of conscious procreation contained in the national curriculum for general education.

199 Article 1(2) of the Act of 14 December 2016 – Education Law (hereinafter referred to as “Education Law”).

shape pro-family attitudes,<sup>200</sup> whereas teachers should ensure that students “appreciate the value of the family.”<sup>201</sup>

The priority role of parents in raising their children is also confirmed by international agreements ratified by Poland. Most of all, these include:

- the Universal Declaration of Human Rights of December 10<sup>th</sup>, 1948, Article 26(3) of which states that, “[p]arents have a prior right to choose the kind of education that shall be given to their children;”
- the International Covenant on Civil and Political Rights of December 19<sup>th</sup>, 1966 which protects the priority role of parents in their children’s upbringing in Article 18(4), “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions;”
- the European Convention on Human Rights of November 4<sup>th</sup>, 1950, with Article 2 of Protocol No. 1 thereto laying down one of the elements of the “right to education,” and thereby specifying the right of the parents to choose how they raise their children. The second sentence of this provision states that “[i]n the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”

Respecting these guarantees, the Polish lawmakers have given families the freedom to decide whether they wish that their children participate in family life education classes, which concern gender, marriage, sexuality, parenthood, and family. The Regulation of the Minister of National Education explicitly states that students do not participate in family life education classes if “their parents file a written declaration with the headmaster on the student’s resignation from attending the classes.”<sup>202</sup> There is no basis whatsoever to claim that anti-discrimination education classes should be treated differently in this respect, and be deemed mandatory.

### 8.3. Summary

- 1) In Poland, the right to education is exercised by all children up to the age of 18, regardless of any self-identification issues or hardship experienced. The allegations brought forward by LGBT activists and supporting organisations in this regard concern what they believe to be insufficient presence of anti-discriminatory teaching contents in school education.

200 The Regulation of the Minister of National Education on the national curriculum for kindergarten upbringing and national curriculum for general education in primary schools, including for students with moderate or severe intellectual disabilities, for general education in stage I sectoral vocational schools, for general education in special vocational training schools, and general education in post-secondary schools of 14 February 2017 (hereinafter referred to as “the national curriculum for general education in primary schools”).

201 Ibidem.

202 § 4(1) of the Regulation of the Minister of National Education of 12 August 1999 on school education and scope of teaching contents concerning knowledge about human sexual life, conscious and responsible parenthood, the value of the family and life in its prenatal stage of development, as well as methods and measures of conscious procreation contained in the national curriculum for general education (uniform text: Polish Journal of Laws of 2014, item 395).

- 2) However, the curriculum for anti-discrimination education classes significantly exceeds what should intuitively be taught in such classes – equality before the law, and equal treatment. The condition for obtaining the status of a certified anti-discrimination trainer is the completion of a gender-oriented workshop or training session, which shows such classes are ideologically skewed towards post-Marxism.
- 3) Anti-discrimination classes present a controversial set of beliefs concerning gender, marriage, sexuality, parenthood, and family that conflict with the beliefs of many families. Evidently, such elements interfere with the sphere of upbringing, where it is the parents who have priority, as confirmed by a range of international agreements ratified by Poland.

## 9. Right to health protection

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### 9.1. Protection of people who suffer from experiencing gender identity disorders

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One of the most important demands put forward by LGBT activists regarding health (incorporated sometimes into the right to privacy) concerns “introducing legal regulations concerning gender recognition which would at least fulfil the standards formulated in the bill of September 10th, 2015 on gender recognition.”<sup>203</sup>

Notwithstanding a number of problems of social nature which would arise from the introduction of a summary gender recognition procedure (concerning such issues as toilets, locker rooms, hospital rooms, prison cells, and support centres for rape victims or for female victims of violence or discrimination in female-dominated occupations), in light of the Supreme Court’s case-law, it is possible to conduct a legal gender recognition procedure resulting from a real and empirically evidenced change in the state and behaviours of an individual who suffers from a transgender disorder. The change in state manifests itself in a series of medical procedures that aim to make the external physical characteristics of the transsexual individual more like those of the other sex. However, to effectively conduct the legal gender recognition procedure, a change in the individual’s behaviours, resulting in a real change in how the environment perceives that individual’s gender, must also be substantiated. That environment includes, most of all, the closest members of the transsexual person’s family – ascendants, descendants, and the spouse, all of whom are in a legally protected relationship with that person. In its judgment of December 6<sup>th</sup>, 2013 (case file no. I CSK 146/13), the Supreme Court stated that:

” *the transsexual person has fulfilled their ambitions in the social role ascribed by law to the gender they reject (regardless of accompanying feelings). At the same time, they have done so not alone but with another, opposite-sex individual, and for the dignity of that other individual, it cannot be without significance whether they were in a same-sex or opposite-sex relationship.*

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203 Adam Bodnar (ed.), *Sytuacja prawna...*, op. cit., p. 92.



In line with Article 47 of the Constitution, it is not only private life of the respective individuals that is protected, but also family life that is, in essence, a relationship between multiple people. Therefore, from the perspective of safeguarding the rights of all people bound by a legally protected relationship, the appropriate solution is to include them in the procedure that aims to eliminate a significant characteristic of one of the people in that relationship, which had heretofore been a determinant of the unique nature of said relationship.

Recent case-law has restricted the scope of necessary passive participants in the procedure in question solely to the transsexual person's parents, as, in the assessment of the Supreme Court contained in its judgment of January 10<sup>th</sup>, 2019 (case file no. II CSK 371/18):

” *the judgment in favour of the plaintiff is the basis for legal gender recognition solely in the plaintiff's birth certificate, where the details of their parents, and not children, are entered.*

Obviously, spouses and children of transsexual people may still participate in the procedure, though that is not necessary for a ruling to be issued. This way, the Supreme Court upheld its position formed around 24 years before in its resolution of September 22<sup>nd</sup>, 1995 (case file no. III CZP 118/95), a position in favour of the autonomy of people who have decided to have the gender legally recognised irrespective of their age and family status. Still, where the person's parents are dead, the claim for legal gender recognition may be brought against a court-appointed guardian representing the parents' interests.

**Legal gender recognition, however marginal a phenomenon, remains possible in the Polish legal system.** Precision, meticulousness, and the relatively time-consuming nature of the procedure aimed at the legal reassignment of sex entered in the birth certificate therefore does not constitute unequal treatment of those who suffer from transsexual disorders. These features of the procedure **protect the people from hasty and immediate implementation of their potentially reckless decisions**, just like with any other irreversible medical procedure.

Even publications affirmed by LGBT organisations reiterate that:

” *international standards of protection of transgender people are minimal in nature, as they only require states to legally recognise the transsexual people's gender, and allow them to pursue adequate therapy for their gender identity disorders. Therefore, they do not mandate the manner in which the gender identity of an individual should be recognised, or specify the conditions for the commencement of the procedure. They also do not define the effects that legal gender recognition has for legal affairs.*<sup>204</sup>

Such assessment of the relationship between Polish law and the international agreements signed by Poland has to be agreed with, even if the publication cited reached this assessment based on a totally misbegotten diagnosis of domestic legislation.

204 Anna Śledzińska-Simon, *Prawna sytuacja osób transpłciowych w Polsce*, [in:] Wiktor Dynarski, Krzysztof Śmiszek (ed.), *Sytuacja prawna osób transpłciowych w Polsce. Raport z badań i propozycje zmian*, Warszawa 2013, p. 152.

### The bill of September 10<sup>th</sup>, 2015 on gender recognition

The bill of September 10<sup>th</sup>, 2015 on gender recognition has been the subject matter of a separate analysis drafted by the Ordo Iuris Institute. Here, it is worth reiterating only its main points.

The question of integral importance is the way in which the term ‘gender recognition’ (or ‘gender reconciliation’ – the word-for-word translation of the Polish term ‘uzgodnienie płci’) is used in the title of the bill, as well as the actual subject matter of and reason for such ‘reconciliation’. The genetic structure of sex is invariably defined through conception. The subjective experience of sexuality and physical sexual characteristics, may, at certain stages of human development, be subject to disorders. Therefore, it seems that the term ‘reconciliation’ should involve the adjustment of the emotional experience of gender and physical sexual characteristics to the objective information arising from the individual’s genetic structure. However, the bill in question defines the notion of ‘reconciliation’ in a totally different way. Its proponents disregarded the biological definition of sex, and used the ideological paradigm of gender instead, which sees sex as an element of identity that is determined not through genetics but through the individuals’ own decisions. Because of this, the bill raised significant concern in light of Article 25(2) of the Polish Constitution which declares the state’s neutrality on worldview.

The bill aimed to deprive biological determinants of sex – the human being’s genetic structure – of their importance in the law. Thus, the details concerning an individual’s sex in vital records (and thus in the whole legal system) would be modifiable at the behest of the individual and in line with their ever-changing subjective feelings.

The bill, if passed, would not only essentially destabilise the legal system, but could also allow socially pathological practices. **The effortlessness with which one would be able to change their sex assigned in the birth certificate would be a gateway to abuse in the context of the institution of marriage.** One could easily imagine how following a gender transition based only on an individual’s personal feelings attested by two medical practitioners, **that individual could marry a person who is formally and legally opposite-sex, but who is nonetheless same-sex as regards their physical, genetic, and social characteristics.** Such provisions would undermine the constitutional protection of the institution of marriage enshrined in Article 18 of the Polish Constitution. It is also worth remembering that there would be potential **for abuse in labour and social insurance law**, especially with respect to the **minimum age threshold for retirement**, which differs between the sexes.

In turn, the Bureau of Research at the Chancellery of the Sejm aptly raised that the refusal to ideologically manipulate the notion of ‘gender’ does not constitute discrimination against any group of individuals:

” *It seems that protection of the rights and dignity of transsexual people, including preventing actual discrimination on the grounds of gender identity disorders, may be pursued by other means. The deconstruction of a notion that, its legal scope notwithstanding, has a deeply rooted and unambiguous social and cultural meaning, seems to be an excessively radical procedure. Difficulties regarding*

*gender identification for what is actually a small group of citizens are not valid reasons which would necessitate the redefinition of the concept of gender. Rather than that, the individuals in question should have access to adequate and publicly funded therapies.*<sup>205</sup>

President of Poland Andrzej Duda concurred with this argumentation, having vetoed the bill.<sup>206</sup>

## 9.2. The acceptability of voluntary reparative therapy

**Voluntary psychotherapy aimed at changing unwanted homosexual tendencies**, sometimes referred to as reparative therapy, is a response to the real need of people who experience sexual desires towards same-sex individuals but nonetheless do not wish to adopt the homosexual way of life or, having experienced it, wish to reject it.

The possibility of providing such kind of assistance is based on the belief that **all people who do not want homosexual tendencies to define their lives should enjoy the same rights as people who do decide to live by these tendencies**. The elementary freedom of self-determination and autonomy in directing the course of one's affairs is one that everyone may enjoy, even when decisions are made that are not in favour of one lobbying group or another. The integral element of this freedom is the opportunity to seek assistance in subduing unwanted homosexual desires.

Professional LGBT activists have made attempts at prohibiting the provision of such assistance services. Their efforts have revealed how detached they are from other people with homosexual tendencies or experiencing gender identity disorders, and how anti-freedom the LGBT movement is. There are several points to be made in response to their demand to penalise conversion therapy.

First, a ban on reparative therapy would jeopardise the right to protection against arbitrary interference with one's privacy, family, and home, and the right to medical care, as guaranteed in Article 12 and 25 of the Universal Declaration of Human Rights, respectively. It would also conflict with the right of the client (patient) to autonomously choose the type of professional assistance oriented towards the achievement of their therapy objectives in line with their own values, as confirmed by **the Code of Ethics of the Psychologists of the Polish Psychological Society, in accordance with which psychologists "respect the right of recipient to autonomy and recognition."**<sup>207</sup>

**It is surprising that a community which has inscribed freedom on its standards so bluntly tries to deny it to those who do not fall into line with the political agenda of LGBT organisations.**

205 Jan Lipski, Legal and substantive opinion on the parliamentary bill on gender recognition (print no. 1469), 29 Jan 2014, [http://orka.sejm.gov.pl/RexDomk7.nsf/0/152CF0241581A17FC1257C39004DCD1E/\\$file/i3092\\_13.rtf](http://orka.sejm.gov.pl/RexDomk7.nsf/0/152CF0241581A17FC1257C39004DCD1E/$file/i3092_13.rtf) (date of access: 01 Feb 2021).

206 Motion of the President of the Republic of Poland to reconsider the Act of 10 September 2015 on gender recognition, 02 Oct 2015, print no. 3978, <http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3978> (date of access: 01 Feb 2021).

207 Article 4(1) of the Code of Ethics of the Psychologists of the Polish Psychological Society.

In their justification for the bill on the prohibition of controversial practices,<sup>208</sup> LGBT activists and deputies that have formally filed the bill tried to discredit decisions made in light of various motives, including:

- the awareness of health risks,
- beliefs and faith,
- the will to establish a family.

The bill's proponents have tried to discredit, overrule, and ridicule all these motives, desires, and beliefs. They rejected them and tried to present them as manifestations of fear, phobia, or some other disease. For this purpose, they used specially developed categories aimed at negating the freedom of an individual to choose a way of life that is not accepted by the self-proclaimed representatives of sexual subcultures. A desire to change became classified as "internalised homophobia," while decisions to overcome unwanted tendencies were classified as "internalised heterosexism." In other words, **anyone who makes a decision that is different from the LGBT activists' expectations, was presented by them as a sick individual who suffers from a phobia, and is unable to make conscious and voluntary choices.**

Second, the refusal to provide homosexuals with assistance in overcoming tendencies they do not accept due to religious reasons **would be a violation not only of their autonomy, but also of their freedom of thought, conscience, and religion**, as guaranteed in Article 18 of the Universal Declaration of Human Rights. This matter notwithstanding, such refusal (or legal prohibition) would simply be unethical. In reality, **the standard involves providing psychological assistance concerning the sphere that covers moral and religious convictions, in particular for such topics as divorce and abortion.**

Third, the classification of an issue as a disorder or disease is not necessary for psychotherapy. Thus, it is all the more not necessary with respect to assistance provided by people who do not render medical services, as is the case for such prayer support groups as Grupa Pascha.

Fourth, the will to disempower those who see in reparative therapy a hope to improve their physical and mental condition is based on anecdotal accounts and testimonies of single individuals. This line of argumentation is poor – not only because individual testimonies may support practically any proposition – but because, most of all, practically no therapy guarantees certain success. Essentially, every type of therapy involves a risk of failure. The consistent application of this logic, where a few testimonies of unsatisfied clients would suffice to introduce a ban on the given type of therapy, would necessitate putting an end to all sorts of therapies and delegating the profession of the psychologist.

Finally, statements that the ban on reparative therapy is "necessitated by the international obligations binding on Poland," and that the adoption of the bill "would have a significant impact on the fulfilment of the international obligations binding on Poland" are blatantly wrong. No such obligations exist. What is more, there are no more than six countries across the whole world that do prohibit reparative therapy.

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<sup>208</sup> Cf. R. Dorosiński, *Problematyka terapii reformatywnej na tle projektu ustawy o zakazie praktyk konwersyjnych*, 16 May 2019, <https://ordoiuris.pl/wolnosc-sumienia/problematyka-terapii-reformatywnej-na-tle-projektu-ustawy-o-zakazie-praktyk> (date of access: 01 Feb 2021).

### 9.3. The rights of the patient with respect to close friends and relatives of same-sex partners

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One must also briefly touch upon the allegation that “the rights of the patient with respect to close friends and relatives of same-sex partners are being questioned.”<sup>209</sup> However, as admitted by the Polish Ombudsman himself, the problem lies not in applicable law, but in ignorance thereof on the part of medical personnel (and the patients themselves). In accordance with Article 31(6) of the Act of December 5th, 1996 on the professions of medical doctor and dentist, “If a patient is under 16 years of age, or is unconscious or unable to understand the meaning of the information provided, the medical practitioners shall provide information to the patient’s close friends and relatives.”<sup>210</sup> At the same time, this provision refers to the definition of ‘close friends and relatives’ contained in the Act of November 6th, 2008 on the rights of the patient and the Patient Rights Ombudsman.<sup>211</sup> Within the meaning of Article 3(1)(2), close friends and relatives mean spouses, first- and second-degree relatives by blood, direct first- and second-degree relatives by marriage, statutory representatives, people who live together with the patient in a sexual relationship, and, finally, people indicated by the patient themselves.

### 9.4. Summary

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- 1) The legal gender recognition procedure, however marginal a phenomenon, remains possible in the Polish legal system which satisfies adequate international agreements binding Poland.
- 2) The term ‘gender recognition’ (referred to word for word as ‘gender reconciliation’ in Polish) should involve the adjustment of the flux emotional experience of gender to the objective information arising from the individual’s genetic structure. A contrary approach propounded by LGBT activists is marked by the ideological paradigm of gender, which sees sex as an element of identity that is determined not through genetics but through the individuals’ own decisions.
- 3) The effortlessness with which one would be able to change their sex assigned in the birth certificate could be changed would be a gateway to abuse in the context of the institution of marriage. There would also be potential for abuse in labour and social insurance law, especially with respect to minimum retirement age.
- 4) Difficulties regarding gender identification for what is actually a small group of citizens are not valid reasons which would necessitate the redefinition of the concept of gender. Rather than that, the individuals in question should have access to adequate and publicly funded therapies.
- 5) The elementary freedom of self-determination and autonomy in directing the course of one’s affairs is one that everyone may enjoy, even when decisions are made that are not in favour of one lobbying group or another. The integral element of this freedom is the opportunity to seek assistance in subduing unwanted homosexual desires.

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209 Adam Bodnar (ed.), *Sytuacja prawna...*, op. cit., p. 113.

210 Polish Journal of Laws of 2020, item 514, as amended.

211 Polish Journal of Laws of 2020, item 849.

- 6) A ban on reparative therapy would jeopardise the right to protection against arbitrary interference with one's privacy, family, and home, and the right to medical care. With respect to those who want to overcome unwanted tendencies due to religious reasons, this would also constitute a violation of their freedom of thought, conscience and religion.
- 7) Anyone who makes a decision that is different from the LGBT activists' expectations, is presented by them as a sick individual who suffers from a phobia, and is unable to make conscious and voluntary choices.
- 8) Poland is not bound by international regulations to prohibit reparative therapy. On the European and global scale, the number of countries that did introduce bans on such therapy is within the margin of error.
- 9) Close friends and relatives who have the right to obtain information about a patients' condition if they are unconscious or unable to understand the meaning of information provided also include, by virtue of statute, the person who lives together and has sexual relations with the patient, and the person indicated by the patient themselves.

## V. Final conclusions.

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The results of surveys conducted by the Public Opinion Research Centre and the EU Fundamental Rights Agency cited herein show that despite all claims disseminated by radical LGBT activists, **Poland is not a country where there are more instances of discrimination on the grounds of homosexual tendencies or experiencing gender identity disorders than in other European states.** It is rather concerning that such false statements are blindly taken for granted by such institutions as the Polish Ombudsman or the Council of Europe Commissioner for Human Rights.

The available data contradicts these institutions' narrative, which have been successful in convincing people with homosexual tendencies or experiencing gender identity disorders that their general situation in Poland is bad. However, **answers to specific questions on daily life experiences in areas such as access to employment or healthcare indicate that their real status as human beings and citizens of Poland does not significantly differ from what they would enjoy in other Western European states. In fact, in some aspects, their status is even better.** Over the course of the last decade, the percentage of Poles who believe "homosexuality is not normal and must not be tolerated" has not changed significantly and remained a relatively low level (23% in 2010, 24% in 2019).

**In turn, what grew in the past few years, is the degree of disapproval Poles express towards the political demands of LGBT activists.** These demands conflict with the Polish Constitution and the autonomy of EU Member States. They are mistakenly presented as "human rights". Careful observation of events that took place between 2018 and 2019 allows one to conclude that **the real reason for greater disapproval lies not in efforts of public authorities but in the abuse and unlawful actions publicly committed by LGBT activists themselves.**

**Poland has satisfied all its international obligations and commitments that arise from EU law regarding non-discrimination and other key areas.** People with homosexual tendencies or experiencing gender identity disorders may benefit from a range of measures available in the Polish legal system, whether arising from criminal law or not, which are applicable with respect to offences against their lives, health, and freedoms, as well as violations of their honour or physical integrity. **Their enjoyment of the freedom of association, freedom of assembly, the right to work, and the right to education, remains unrestricted.**

With respect to **the freedom of speech**, LGBT activists seem to be a group that is treated in a privileged manner. Despite this, they promote bills which would amend the law in a way that would stifle their opponents' freedom.

**Cohabitation and other types of informal relationships are subject to protection within the notion of private life.** Article 18 of the Polish Constitution, which protects the unique position of the social institution of marriage, renders it impossible to institutionalise same-sex relationships. At the same time, this does not prohibit the legislature from establishing fair and rational legal solutions which would help people living in a community of one sort or another to coordinate their private interests and avail themselves of the state's assistance in this respect. However, non-marital unions do not have to be made institutional for this purpose.



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This report is an overview of the social situation and legal protection enjoyed in Poland by people with homosexual tendencies or experiencing gender identity disorders who often refer to themselves as lesbian, gay, bisexual, or transgender (LGBT). With misinformation spread through the efforts taken by lobbying groups that usurp the right to represent LGBT people, it has become necessary to present the facts surrounding the social and legal environment, in which such individuals find themselves.

Since the efforts of many members of these groups have proven detrimental to the fairness of public debate, it is difficult to keep the discussion on the subject of LGBT people's social and legal situation calm. However, this report is precisely an attempt at that.

The comparison between the social and legal reality, and the fiction propounded by many Polish LGBT activists, aims to present various myths on the enjoyment of fundamental rights and freedoms in Poland.

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