

## **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**

The Government of the Republic of Poland ("the Government") take note of the *Memorandum on the stigmatisation of LGBTI people in Poland* ("the Memorandum") prepared by the Commissioner for Human Rights of the Council of Europe, Ms. Dunja Mijatović.

The Polish authorities consider that constructive dialog with the national authorities is of a particular importance in the implementation of the Commissioner's mandate. In this respect they should like to thank the Commissioner for the online meetings conducted with the representatives of the Polish authorities in the course of the preparation of the present Memorandum. They also take the possibility of presenting their position to the Commissioner's Memorandum as a part of the dialogue with the Commissioner.

### **I. General situation of LGBTI people in Poland**

With regard to the issue of amending the anti-discrimination legislation it should be pointed out that the Act of 3 December 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.<sup>1</sup>

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

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<sup>1</sup> 1) 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 (Official Journal L 359 of 19.12.1986, p. 56; Official Journal of the EU Polish special edition, chapter 5, v. 1, p. 330); 2) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Official Journal L 180 of 19.07.2000, p. 22; Official Journal of the EU Polish special edition, chapter 20, v. 1, p. 23); 3) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Official Journal L 303 of 02.12.2000, p. 16; Official Journal of the EU Polish special edition, chapter 5, v. 4, p. 79); 4) Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment for men and women in the access to and supply of goods and services (Official Journal L 373 of 21.12.2004, p. 37); 5) 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 (recast) (Official Journal L 204 of 26.07.2006, p. 23); 6) 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 (Official Journal L 128 of 30.04.2014, p. 8).

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 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”.

It should be further noted that many allegations that the Polish law avoids penalising discrimination and prejudice against LGBTI persons seem to be without factual or legal basis. It should be underlined that all Polish citizens are equal, thus it could be considered as inappropriate to grant special protection to particular groups upon their request.

With regard to hate speech and crimes committed out of hatred on the grounds of sexual orientation or identity the Government’s position towards the parliamentary bill amending the Criminal Code (Parliamentary Print No. 138) have remained valid, in particular:

- the Polish criminal law has adequate and effective instruments for the protection of and response to criminal conduct based on discriminatory grounds, regardless of the minority criterion identifying the victim or group of victims, including criminal conduct on grounds of sexual orientation or identity;
- although the Criminal Code does not specify particular types of crimes which would be characterised by the indicated criteria and because of which the causative activity in crime is carried out, it does not indicate lack of criminal and legal protection against this type of discriminatory acts;
- a significant part of the activities consisting in committing a prohibited act on discriminatory grounds constitutes a crime under the Polish legal system. The dignity and honour of human beings, their freedom, bodily integrity as well as mental and physical health are protected by a number of criminal law principles;
- moreover, Article 255 of the Criminal Code provides for criminal liability for public incitement to a crime and for public praise for committing a crime.

At the same time it should be noted that the Ministry of Justice is not carrying out and is not planning any legislative works on the establishment of a specific type of crimes committed to the detriment of the LGBTI+ persons in the catalogue of discriminatory crimes.

With regard to the statement contained in the Memorandum that the law enforcement officers are not required to establish whether the perpetrators of crimes had any LGBTI motives, which may cause that the homophobic bias underlying such crimes are overlooked, it should be noted that it seems not to be reliable. A policeman conducting the investigations should determine the motive of the perpetrator's actions for the purposes of the future bill of indictment and sentencing because an attack on a person because of their sexuality constitutes a premise for an aggravating sentence (Article 53 of the Criminal Code). Although the law enforcement officers do not collect information about sexual orientation of victims of the crimes this does not result from their passivity but rather from lack of appropriate regulations and the sensitive nature of the data related to sexuality.

In the context of comments related to the absence of legal recognition for the same-sex couples in Poland it should be noted that neither the European nor the international laws require the States to introduce the so-called "same-sex marriage" into their domestic legal systems, as these matters fall within the exclusive competence of States. The explicit protection of marriage and family has been included into international treaties. For example, Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") expressly states that "Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right." Similar provisions are contained in the Universal Declaration of Human Rights (Article 16), the International Covenant on Civil and Political Rights (Article 23), the International Covenant on Economic, Social and Cultural Rights (Article 23). The above international treaties confirm that men and women of marriageable age have the right to marry and that the family is the fundamental unit of the society and shall be entitled to be protected by the State.

Further, it should be noted that the European Court of Human Rights (hereinafter referred to as the "Court") in the judgement of 16 July 2014 in the case of *Hamalainen v. Finland* (§§ 71 and 96) has noted that Article 12 of the Convention protects the traditional vision of marriage as a union of a male and female, and the regulations of those European States that have introduced same-sex marriage reflect their own vision of marriage and do not result from the interpretation of fundamental rights contained in the Convention (§ 38).

Under the Convention, the regulation of marriage falls under the exclusive competence of States being parties thereof. The Court has recognized in the judgement of 22 November 2010 in the case of *Schalk and Kopf v. Austria* that Article 14 in conjunction with Article 8 of the Convention

cannot be interpreted as imposing an obligation on the State being party thereof to ensure access to marriage. Similar observations were presented by the Court in the judgement of 21 July 2015 in the case of *Oliari and Others v. Italy* (§ 193) regarding Article 14 in connection with Article 12 of the Convention. Moreover, as emphasized in the case-law of the Court, there exists no right to contract same-sex marriage and there is no corresponding obligation on the part of States being parties of the Convention to introduce same-sex marriage or civil partnerships. In the judgement of *Hamalainen v. Finland* (§§ 71 and 96) the Court has ruled that neither Article 8 of the Convention protecting family life, nor Article 12 of the Convention, which guarantees the right to contract marriage, can be understood as “imposing obligations on contracting States to guarantee access to marriage for the same-sex couples.” The Court has reached similar conclusions in the judgements of 14 March 2018 in the case of *Orlandi and Others v. Italy* (§ 145, § 171, § 192), *Oliari and Others* (§§ 191-193) and in the judgement of 9 June 2016 in the case of *Chapin and Charpentier v. France* (§39).

Article 18 of the Constitution of the Republic of Poland states that “marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland”. Placement of this provision in the structure of the Constitution shows that it is one of the fundamental principles of the Polish system.

The Constitutional Tribunal of the Republic of Poland in its judgement of 11 May 2011 (file ref. no. SK 11/09) noted that “this provision, on the one hand, constitutes an interpretative directive of other constitutional and statutory norms imposing the fullest implementation of the principle of protection of motherhood, parentage and marriage. On the other hand, Article 18 of the Constitution serves as a programmatic norm. It is an element of constitutional axiology.” As a consequence, the ordinary legislator is obliged to undertake actions aimed at achieving this goal, in particular to create an institutional framework ensuring a permanent place for marriage, family, parenthood and motherhood in the Polish legal system. On the one side, this means that all public authorities should strive to affirm marriage, undertake actions aimed at strengthening family ties and maintaining the durability of the bond between spouses. On the other side, the institutionalization of alternative relationships (polygamous, heterosexual, homosexual) should be prohibited. The constitutional axiology shaped in this way recognizes the exceptional status of marriage based on its importance for social life, resulting from the procreative and educational function of the family (see: B. Banaszak, *Commentary on Article 18 of the Constitution of the Republic of Poland*, Legalis 2012, N.B. 1.).

In addition, the legislator has clearly emphasized that marriage is a union between a male and a female. As a consequence, it can only be contracted by persons of different sexes. Thus, the ordinary legislator is obliged to respect the identity of marriage, which means that it cannot give legal significance to other types of relationships or grant them a status even similar to the marriage. Therefore, it should be considered unacceptable to institutionalize any other forms of life between a

male and a female, and even more so between persons of the same sex (see: B. Banaszkiwicz, *“Marriage as a union of a male and a female.” On some of the implications of Article 18 of the Constitution of the Republic of Poland*, *Kwartalnik Prawa Prywatnego* 3 (2013), pp. 591-656). The provisions of the Act of 25 February 1964, the Family and Guardianship Code (Journal of Laws of 2020, item 1359) constitute the substantiation of the constitutional norms in question. According to Article 1 § 1 of the Family and Guardianship Code, a marriage may be contracted only by a male and a female.

Subsequently, the Memorandum points out that the National Plan for Equal Treatment should include provisions explicitly addressing the discrimination of LGBTI persons. However it should be underlined that the priorities listed in the National Action Programme for Equal Treatment are based on the material field of application of protection against unequal treatment and discrimination, as indicated in the Act on equal treatment. The Programme provides for activities in the areas such as: (a) anti-discrimination policy, (b) work and social security, (c) education, (d) health, (e) access to goods and services, and (f) data collection and research, and (g) coordination. The activities provided for in the Programme are systematized based on the above-mentioned areas. The activities are directed to all persons regardless of the legally protected prerequisite, including sexual orientation. According to Article 22 of the Act on equal treatment many activities included in the Programme focus on building awareness among the public in the field of equal treatment and non-discrimination.

Further, with respect to support and promotion of education campaigns designed to raise public awareness about LGBTI persons and the fact that they have the same rights as everyone else it should be noted that the right to education, equality and respect for every human being has been defined, both in the Preamble and in the provisions of the Act of 14 December 2016 - Educational Law (Journal of Laws of 2020, item 910) and executive acts. Legal provisions guarantee and ensure the right of children and young persons to education, upbringing and care appropriate to their age and development

The content of education and upbringing specified in the core curriculum for general education relates to shaping the attitude of opposing and counteracting the phenomena of discrimination, xenophobia and other forms of intolerance. These issues are implemented to an appropriate extent at all stages of education along with the activities specified in the educational and preventive programme.

Educational regulations allow the school to organize activities to prevent the phenomena of aggression and violence, both individually for a given student, *e.g.* as part of psychological and pedagogical assistance, as well as for a peer group as part of the educational and preventive programme.

Additionally, as part of the Poland's National Health Program for 2016-2020 (hereinafter referred to as NHP), on the initiative of the Minister of National Education:

- the mental health promotion program "I think positively" was prepared (it covered 21,432 adults and nearly 36,000 students and pupils). In the program, the entire school environment and its surroundings are committed to mental health protection. Important elements of the program include shaping the ability to cope with difficult situations, ask for help and disseminate knowledge about possible intervention and support. The program has been evaluated;
- two guides on the role of teachers and parents in promoting mental health and preventing self-destructive behaviour in adolescents were developed and published;
- a 24/7 free telephone helpline was launched for children and adolescents, parents and teachers in crisis situations; it is run by the ITAKA Foundation - Centre for Missing People, phone No. 800 080 222, <http://www.liniadzieciom.pl/>;
- a project on building positive relations and atmosphere in the kindergarten and school environment was carried out. Its aim was to popularize the principles of non-violent communication. School mediation and peer mediation have been implemented among primary school students as a method of dispute and conflict resolution. Training programmes for teachers and parents were prepared.

Curricula for specific educational activities, including *Family Life Education*, under which sex education is carried out - are admitted for school use by the principal and should comply with the core curriculum, *i.e.* take into account the educational objectives and teaching content required in the core curriculum, as well as with the Constitution of the Republic of Poland.

## **II. Stigmatisation of LGBTI people**

At the outset it should be noted that the accusations concerning the alleged LGBT-free zones seem to be misleading and designating cities in this way could be considered detrimental to the local communities.

It needs to be noted that the Local Government Charter of the Rights of the Family reminds that the protection and care of marriage as a union of a male and a female, family, motherhood and parenthood, as well as taking into account the good of the family in social and economic policy, constitute the implementation of the provisions of the Constitution of the Republic of Poland. These norms support the fundamental unit of society which is the family. In a number of international documents - to which Poland is a party - the family is recognized and protected as "the fundamental group of society and the natural environment for the growth and well-being of all its members, particularly children" (Preamble to the Convention on the Rights of the Child). It is not couples that

are protected, but the family which “is entitled to protection by society and the State” (Article 16 § 3 of the Universal Declaration of Human Rights and 23 § 1 of the International Covenant on Civil and Political Rights). Moreover, the protection of the family results from its responsibility which is “the care and education of dependent children” (Article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights).

Attention must be also paid to the explanatory statement to *a bill to amend the Constitution of the Republic of Poland* (parliamentary print no. 456), where it can be read that the statutory norm stating that a minor may be adopted only for his/her best interest (Article 114 § 1 of the Family and Guardianship Code) will be raised to the constitutional rank. The Constitutional Tribunal of the Republic of Poland assumes that the best interest of the child is a general clause, the reconstruction of which should be carried out by referring to the constitutional axiology and general systemic principles (including Article 18 of the Constitution of the Republic of Poland, which states that the family is based on marriage of a man and a woman). The Constitutional Tribunal of the Republic of Poland emphasizes that the principle of the best interest of the child is most fully implemented in the natural family, in which the parents and the child are bound by biological ties. As a consequence, the best interest of the child in the framework of adoption, raised to the constitutional rank, will directly indicate that only spouses can adopt a child together. The bill implements the idea of protecting and supporting the family, in particular minor children. Caring for children is inextricably linked with protecting the family as a natural environment. This protection is inextricably linked with the vision of the family adopted in the Constitution of the Republic of Poland as a permanent relationship between a woman and a man focused on motherhood and responsible parenthood. This means that the relationship that is favoured by the constitutional legislator to have the character of a family is one based on marriage (among others the judgement of the Constitutional Tribunal of 12 April 2011, case no. SK 62/08).

As far as the allegations concerning the Justice Fund are concerned, it should be pointed out that the Programme for tackling the causes of crime supports the implementation of various activities undertaken by non-governmental organisations, which constitute part of crime prevention. They are aimed at society, including potential perpetrators and victims. The supported activities comprise broadly understood information, educational activities, socialisation, raising public awareness and knowledge of risks as well as shaping positive moral and social attitudes. The aforementioned values are an immanent feature of the democratic state of law and civil society.

In this context it should be mentioned that the Foundation which received a grant joined the open tender for entrusting the implementation of tasks from the resources of the Victim and Post-release Assistance Fund of the Justice Fund in the field of tackling the causes of crime for the years

2020-2023, and as a result of its evaluation in the tender procedure, it received a grant for the implementation of tasks specified in the submitted tender offer.

With regard to the project being carried out, it should be noted that it is of an educational nature, covering activities in the area of preventing the causes of crime. These activities are aimed at promoting pro-social and pro-citizen attitudes, including respecting others regardless of their national, ethnic, racial or religious affiliation. In accordance with the objectives of the Justice Fund in terms of tackling the causes of crime, the main goal of the above-mentioned project, in line with the submitted offer, is to prevent crimes defined in Chapter XXIV of the Criminal Code as well as to reduce, and ultimately eliminate, cases of restriction of freedom of conscience from the Polish public space. Moreover, in connection with the implementation of the tasks, the current level of knowledge in society in terms of familiarity with the aforementioned provisions of the Criminal Code will be analysed in detail. In addition, measures will be developed to increase the citizens' awareness of their rights in matters of freedom of conscience and freedom of religion.

The Ministry of Justice has successfully for several years now carried out tasks related to, *i.a.*, equipping Voluntary Fire Service units throughout the country, thanks to funds from the Justice Fund. Any municipality in Poland may apply for a grant for a designated purpose by submitting a duly substantiated application. Awarding the grant is not dependent on ideological issues but on the actual needs of the Voluntary Fire Service units, as indicated by the local government units submitting the application. The application must also be supported by a recommendation of the locally competent Chief Commandant of the State Fire Service.

The statement that the Catholic Church in Poland stigmatises LGBTI persons cannot be agreed upon as it always expresses respect for them and underlines their dignity. Taking into account all possibilities available to help LGBTI persons, the Hierarchy of the Catholic Church endeavours to support them. The numerous requests of the clergy to alleviate disputes and to respect one another are also invaluable. The accusation that the public authorities do not react to the alleged critical statements made by the clergy (which is not actually the case) seems to be incomprehensible, as there is a well-respected separation between the Church and the State in Poland, thus making it impossible for the State to interfere with the sphere of church institutions or vice versa. In turn, numerous acts of vandalism of religious sites and vulgar attacks on the clergy carried out by LGBTI persons should be noted.

Finally, it can be noted that the activities of the so-called anti-LGBTI trucks have indeed led to many complaints. However, apart from an isolated incident in which one of the trucks was stopped by the Police in order to check its technical condition, the Police are not authorized to evaluate the "educational or ideological" information presented. This is in the competence of the courts.



Notwithstanding, the Police are obliged by law to intervene in the event that the circulation of the trucks is hindered or they are damaged, or in cases of threat to their drivers.

### **III. Conduct of the law enforcement agencies and the banning of Pride (equality) Marches**

As concerns the Commissioner's statement that the stigmatizing rhetoric was often accompanied by the harassment and intimidation of LGBTI activists by the law-enforcement officers and the prosecution it needs to be emphasized that the activities of the Police could have never been considered as harassing or intimidating and they resulted only from respecting the law in force and the related obligation to respond to violations of public order indicated in the Code of the Petty Offences and the Criminal Code.

Moreover, with regard to the information on the arrest of one of the LGBTI activists on suspicion of involvement in the vandalizing of an anti-LGBTI truck, it should be noted that the Police was acting upon an order of a domestic court. Further, as concerns another activist who spray-painted the buildings, the Police detained this person solely because the building, which is on the list of monuments, was destroyed. The activist declarations of the perpetrators are not relevant to the Police as long as they do not constitute a crime. However, acts of vandalism cannot be tolerated.

Spontaneous protests against the pre-trial detention of one of the activists in Warsaw and in some other cities in Poland have been noted in the Memorandum. The events described in that context have been thoroughly investigated and independent bodies have not found any inhuman or degrading treatment in the activities of the Police. It should be also noticed that statements made by media, politicians, and even bar associations should not be considered as legal assessments of actions conducted by the Police. Although the Police was surprised by the intensity of the protests in August and the behaviour of some protesters who attacked Police officers, climbed onto patrol cars and damaged the equipment the policemen acted nevertheless respectfully and proportionally, detaining only the most aggressive protesters.

As it was indicated in the Memorandum, the reaction of the Police was reviewed by the courts and positively assessed by the Police's Internal Control Bureau, public prosecutor and the Polish Sejm. It should be also added that the establishment of a procedure for dealing with detained transsexual persons is not only a matter of competence to the Police but all authorities having the right to detain persons.

Lastly, the Police cannot agree with many allegations contained in the Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 16 September 2020 published on 28 October 2020. It should be also underlined that the Polish Police is open for cooperation with all social environments in Poland on the basis of dialogue and mutual respect.