

Conference

*Gays' and Lesbians' Rights in an Enlarged European Union*

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**Recognizing sexual orientation in Polish law -  
- from combating discrimination to claiming new rights**

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*In my paper, I would like to describe the situation of gays and lesbians in Poland from two perspectives:*

*Firstly, I want to present the situation in employment. The implementation of the Council Directive 2000/78 by the amendment of Polish Labour Code entered into force on 1 January 2004. This act and the Employment and Counteracting Unemployment act (amendment of 2002) are the first and, so far, the only Polish legal acts mentioning sexual orientation. I would like to say a few words about the new legislation and how it may be interpreted in practice.*

*At this point, it is worth to mention why other general antidiscrimination clauses in Polish law (including the Constitution) are not sufficient to protect sexual minorities in social and public life.*

*Secondly, I want to explore recent legal proposal concerning same-sex partnership, its way through the Polish Parliament (not without obstacles and not concluded yet), and present some opinions of legal experts against the project. I would like to evaluate some aspects of the project, its chances for adoption, as well as reactions of politicians and public opinion the issue.*

The question of the legal situation of sexual minorities in law gives rise to another question – where does discrimination end? Isn't it enough that we removed homosexuality from our criminal codes and we are not interested in what people do in the privacy of their homes? Or should we recognise sexual minorities as certain social group and equip them with several material and procedural rights to protect those rights? The standards of the European Court of Human Rights and the European Union have gradually moved the scale towards the second statement. Nonetheless, the question comes back again and again, whenever new legislation concerning LGBT persons is introduced, especially in countries, where those legal

changes are one or more steps ahead of social transformations. This is the situation in Poland, but the answer differs depending on personal, political and religious beliefs. For some, new laws are necessary to combat discrimination, for others they are unjustified and immoral claims.

Sexual orientation is a very new expression both in Polish law and in culture. Homosexuality was generally a taboo, while transsexuals have been usually confused with drag queens. The situation in law has significantly changed in the past year. The cultural and social situation is much more complex and demanding.<sup>1</sup>

The chapter IIa of the Polish Labour Code<sup>2</sup> entitled "Equal treatment of women and men" (introduced on 1 January 2002) has been modified by another amendment, which came into force on 1 January 2004. The chapter is now entitled "Equal treatment in employment" and it forbids discrimination based on sex, age, disability, race, religion, political opinion, trade union membership, ethnic origin, belief or sexual orientation.

Of course, the new regulations are the consequence of joining the European Union and the requirement to adjust Polish law to the EU *acquis communautaire*. There is no doubt that the authorities would not be so eager to introduce those amendments without this gentle "enforcement". As the amendment of 2004 constitutes, in fact, the implementation of the Council Directive 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation*<sup>3</sup>, the chapter IIa of the Labour Code repeats the Directive's articles with little difference.

The Code (article 18<sup>3a</sup>, §3 and §4), in accordance with the directive, defines and prohibits **direct discrimination**, which occurs whenever someone is treated less favourably than someone else would be treated in a comparable situation, on grounds specified in this chapter, and **indirect discrimination**, when an apparently neutral provision, criterion or practice results in people being unfavourably treated compared to others. Indirect discrimination is outlawed unless it can be objectively justified, but it is the employer who has to demonstrate that there was an objective and justifiable reason for a discriminatory decision<sup>4</sup>.

As the prohibition applies to employment, training, promotion, pay and dismissal, it is mostly the employer who should avoid a discriminatory behaviour in such situations. However, the Code bans, in addition, a situation, where someone encourages someone else to act in a discriminatory way, and **harassment** (§5), where someone behaves with the purpose or effect of humiliating or violating the dignity

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<sup>1</sup> Writing a doctoral thesis on sexual minorities in Poland sometimes feels like writing on unicorns. I guess many people in academic circles do not take me seriously, some advise to change the subject. I think this only proves that although queer theory in Poland already exists in areas like sociology or psychology, when it comes to other branches of science, like law – there is still an empty space. Personally, I know of only few other young lawyers, who write on LGBT rights.

<sup>2</sup> Kodeks Pracy, 1974 r. (Dz. U. z 1998, Nr 21, poz. 94, amended).

<sup>3</sup> Official Journal L 303, 02/12/2000 P. 0016 - 0022

<sup>4</sup> Article 18<sup>3b</sup> § 1.

of a person. This prohibition is addressed to other co-employees as well. This kind of harassment (as opposed to sexual harassment) is also a new term in Polish labour law.

The directive gives governments the option of excluding specific cases where differences in treatment can be justified by special circumstances. The Polish Labour Code also provides for such exceptions in article 18<sup>3b</sup> (for example it allows to fix a criterion of age or professional experience for access to employment and vocational training, or with relation to dismissal, remuneration and promotion conditions; it is also possible to set special conditions of employment for older or disable workers and persons with caring responsibilities in order to ensure their protection).

However, one exemption might be misused with regard to sexual orientation. The directive (art. 4) formulates this exception in these words:

*(...) Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

In other words, the characteristic being a ground for discrimination is at the same time an essential characteristic to be able to do the job. The article in the Polish Labour Code is phrased slightly different – refusal of employment based on one of the grounds for discrimination will not constitute discrimination, if it is justified by the nature or conditions of employment, as well as occupational requirements. Moreover, it does not emphasise that the reason for treating people differently should be “legitimate” and the requirement “proportionate”.

I wonder, whether this difference allows for a different interpretation. It seems that the directive underlines, that an employer may need an employee with some particular characteristic, while the Labour Code rather allows not employing someone because of the specific feature.<sup>5</sup>

Some people may be tempted to invoke this regulation to discriminate LGBT persons, mainly in cases of occupations requiring exceptional “moral predisposition” – intentions to use this possibility have often been expressed, mainly by right-wing politicians, even during the debate in the Senate (the *upper house* of the Polish Parliament), when the amendments to the Labour Code were discussed. One of the senators<sup>6</sup> suggested, and the representative of the government agreed, that “a person with homosexual proclivity” or “a person who has been penalised for various behaviour of this kind” (sic!) applying for a job at schools or orphanages could be rejected due to requirement of upholding “the fundamental moral principles”. Similar statements suggest that in the perception of many people homosexuality is confused with paedophilia – an intolerable ignorance, which should not be promoted by representatives of the State. Sadly, they seem to share and influence the opinion of common citizens. Moreover, the first case

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<sup>5</sup> On the other hand, the section that allows churches or similar organisations to employ people who share their religion or beliefs in cases where this is ‘a genuine, legitimate and justified occupational requirement’, is phrased almost identically as in the directive.

<sup>6</sup> of the League of Polish Families

concerning infamy of homosexuals with regard to such statement in press has recently been dismissed by court<sup>7</sup>.

In Polish law there are plenty of similar occupational requirements, impossible to define; for example the requirement of an “immaculate character” (e.g. laws relating to occupational requirements of judges, advocates, solicitors, public service etc.) or “moral qualities” (e.g. the act on the Commissioner for Human Rights Protection – Ombudsman), or as in the cited above Teacher’s Charter “the obligation to uphold moral principles”.

Such interpretation - preventing people from taking up certain jobs or occupations or forcing them to conceal their orientation - is undoubtedly against the regulations of the directive, as well as certain constitutional rights – the right to legal protection of private life, of honour and good reputation and to make decisions about personal life (article 47 of the Constitution of the Republic of Poland) or the freedom to choose and to pursue occupation and to choose place of work (article 65). It also seems contrary to the Polish Labour Code (which anyway should be interpreted accordingly to the directive it implements), taking into consideration the substance and purpose of those acts – that is elimination of stereotypes and their consequences, such as discrimination. Claiming that someone is immoral and depraved simply because being homosexual takes us back to times when homosexuality was believed to be an illness.

It is worth mentioning, that the abovementioned amendment to the Labour Code introduced a new article 22<sup>1</sup> which has finally specified what kind of data an employer may demand from a person applying for the job, and it does not allow to ask about sexual orientation<sup>8</sup>.

Why the amendment of the Labour Code is so important? Since the first Polish Criminal Code of 1939 decriminalised homosexuality, the Labour Code is one of the first Polish legal acts that contain an explicit reference to sexual orientation. The first one was the amendment to the Act on Employment and Counteracting Unemployment (amendment in force since 6 February 2003), replaced in June 2004 by the new Act on Promotion of Employment and on Institutions of the Labour Market<sup>9</sup>, which introduced the ban to formulate job offers in a discriminatory way.<sup>10</sup>

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<sup>7</sup> See below.

<sup>8</sup> The list includes forename, last name, parents’ names, date of birth, education, professional experience, place of residence.

<sup>9</sup> *Ustawa o promocji zatrudnienia i instytucjach rynku pracy*, (Dz. U. z 2004, Nr 99, poz. 1001).

<sup>10</sup> The establishment of a Plenipotentiary for Equal Status of Women and Men in November 2001 should be mentioned here as an important instrument supporting both legal and social antidiscrimination actions; by a Government Ordinance of June 2002, the mandate of the Plenipotentiary was expanded to cover issues of non-discrimination generally, including discrimination of sexual minorities. The measures initiated within the extended mandate were mostly required by the EU Racial and Gender Equality Directives, 2000/43 and 2002/73 – educating the public on issues related to discrimination; reviewing the contents and effects of existing and planned national legislation in the light of relevant international standards; advising public authorities at all levels on issues related to discrimination. The Plenipotentiary hold many conferences, also relating to LGBT issues (e.g. a conference entitled

However, it is the Labour Code that provides the genuine and practical protection of an individual against discrimination (the possibility to find redress in court). Even before the amendment of 2004, the general prohibition of discrimination in employment constituted one of the fundamental principles of the Labour Law, expressed in articles 11<sup>2</sup> and 11<sup>3</sup> of the Labour Code, nevertheless the catalogue of the possible grounds of discrimination did not include sexual orientation. Moreover, article 32 of the Constitution<sup>11</sup> provides for prohibition of discrimination in political, social or economic life for any reason whatsoever, as well as the principles of equality before the law and equal treatment by public authorities. In theory, these clauses should embrace discrimination on ground of sexual orientation. It is not irrelevant, though, that at the time of drafting the Constitution, the proposition to add sexual orientation as one of the ground for discrimination was rejected (on the other hand, there are articles in the Constitution providing for particular protection of certain groups, e.g. war veterans, religious organisations, national minorities). This showed the reluctance of the legislature to interpret the principle of equality as encompassing homosexuals and transsexuals.

Thus, even a broad antidiscrimination clause seems not enough to protect anyone effectively against discrimination. The Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles, when visiting Poland in November 2002<sup>12</sup>, also indicated, that “despite the wide anti-discrimination clause in the Constitution, Poland has very little specific anti-discrimination legislation”; besides “Poland has not yet signed Protocol N°12 to the European Convention on Human Rights relating to the general prohibition of discrimination, though it is being considered”.

Therefore, the amendment of the Labour Code can be perceived as a success and a milestone on the way to improving the situation of LGBT persons in law and in public life, even though it is too soon to see the tangible effects of this legislation.

However, we might wait a long time for those effects. Although the implementation of the Directive is very proper, it does not guarantee a proper execution of the law. Polish Labour Code provides for a very complex protection of an employee’s rights, yet in practice the employee’s rights have been frequently infringed – because of the difficult situation in employment, people are willing to tolerate violation of their rights to maintain the job, and seldom use the protection instruments provided by law, including court. Furthermore, those who decide to file a suit (usually only after the termination of employment), are often discouraged by long trials (often a few years), costs of professional advice and sometimes unpredictable results. The situation is even worse in cases concerning discrimination of women, which exists in many aspects of employment; it is worth mentioning, that since the amendment of 2002 (relating equal treatment of men and women in employment) there have been almost none trial cases filed by women. I presume this tendency will not be dramatically changed by massive suits filed by homosexuals or transsexuals, when this would additionally involve coming out and public condemnation.

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*Equality and Tolerance in School Curricula and Textbooks* on 8 October 2002 or a conference relating to the draft of the same-sex partnerships act in November 2003) and supported events and conferences organised by LGBT NGOs.

<sup>11</sup> The Constitution of the Republic of Poland of 2 April 1997.

<sup>12</sup> Report of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on his visit to Poland, 18–22 November 2002, for the Committee of Ministers and the Parliamentary Assembly.

Nonetheless, those legal changes did not bring about public debates on homosexuality – in fact, most articles on labour law commenting the amendment seemed to ignore the words *sexual orientation* and everything behind it. Maybe, due to above-mentioned reasons, most authors perceive these changes as cosmetic, not leading to a real change of the legal situation of a significant social group.

The “storm” began in November 2003, when professor Maria Szyszkowska (senator of the governing party – Democratic Left Alliance) proposed a project of a bill on same-sex registered partnerships<sup>13</sup> (according to Polish law, if the bill passes the Senate, it is subsequently sent to the Sejm (*Lower House*) as a legislative initiative). The project (supported by 36 senators) provided that a registered partnership<sup>14</sup> would constitute rights and obligations similar to civil marriage as relates to economic matters, mainly: right of inheritance after partner’s death, right to use partner’s health insurance, right to joint taxation of income. The adoption of children would be impossible, however one of the provisions gave the partners right to raise and care together for a biological child of one of the partners.

The project was not perfect from the legal point of view, its main weakness being, I think, too many references to the Family and Care Code instead of being a coherent and self-contained act. Another problem issue was the provision relating the care for partner’s children – it was accused<sup>15</sup> of being a disguised adoption and it imposed rights and obligation connected only with the parental rights. Although the project itself did not intend to equate registered partnership with marriage, these points supported the main argument of the project’s antagonists – that a marriage is an institution between a man and a woman (the constitutional definition of marriage), with the purpose of procreation, so gays and lesbians do not have the right to be called a family.

The project has not received an enthusiastic backing from its author’s party<sup>16</sup> – most of her colleagues considered the project a waste of time, with no chance to go through the Polish Parliament.<sup>17</sup>

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<sup>13</sup> In fact, professor Szyszkowska prepared the project and sent it to her parliamentary club for internal opinion procedures in July 2003. Before, in February 2002, a Deputy of Democratic Left Alliance - Joanna Sosnowska, proposed an act on legally recognised domestic partnership (*konkubinat*), for hetero- and homosexual couples. The project was never accepted as an initiative.

<sup>14</sup> Available only for same-sex couples.

<sup>15</sup> By, *inter alia*, legal experts giving opinion on the project.

<sup>16</sup> Sadly, the personal consequences of the proposal for its author have been shocking – many newspapers ceased cooperation with her and people returned her books; she has received threat letters and wishes of death and for a few months was under special police protection.

<sup>17</sup> Most parties do not declare its official stance on LGBT rights; the *League of Polish Families* and the *Law and Justice* are the most obvious antagonists. The parties that openly support LGBT rights and the project of the bill, beside the *Labour Union* (whose present leader, Izabella Jaruga-Nowacka was formerly the first Plenipotentiary for Equal Status of Men and Women) are the *Greens 2004* and the *Anticlerical Progress Party – Racja*. However, those parties have little chance for a mandate in the next Parliament. Besides, they are young, they lack funds and access to media, so their influence on voters is limited so far.

The draft has just left the Senate. Following the first reading, it was passed to the Senate Committees – the Legislation and the Rule of Law Committee and the Social Policy and Health Committee, which worked on it until August 2004 (common sittings on 10 February and 29 July) and adopted a few amendments. After a plenary debate during the second reading in the Senate, on 29/30 September and 14 October, the draft was deprived of many rights – for example the joint taxation would be possible only after concluding a notarised contract (because some people might abuse the bill, pretend to be homosexual and register only to gain material benefits – an opinion of a senator of Self-Defence), references to feelings and mutual care were deleted (because the only motive for registered partnership is sexual deviation – a senator of League of Polish Families), the partners would not be able to share the same surname and the act of registration would not be ceremonial<sup>18</sup> (because homosexuals should not endanger the status of family).

However, the project returned to the Senate Committees, which (sitting of 18 November 2004), restored many provisions, and adopted new, more precise regulations. Nevertheless, the Committees did not approve the article relating the custody of partner's child.

After the third and last reading in the Senate on 3 December, the project has been approved and passed to the Sejm.

The current version of the project gives a partner a status of a "close person/relative", relevant also in the light of procedural laws (civil or criminal); after registration in a registry office (without, however, ceremonial character, taking the vow or possibility of sharing the surname<sup>19</sup>), the partners may visit each other in hospital and decide on treatment in emergency, pick up correspondence; they have right to inherit from each other and demand alimony in case of poverty. The joint property will be available after concluding a notarised contract, but without possibility of joint taxation. The final version of the draft has been deprived of the obligation to mutual care and support, as well as any reference to common household or relations between partners – this shows the reluctance to provide registered partnerships with any notions of family life, even very discrete. Adoption is not allowed, a partner without parental rights cannot represent a child, although the draft does not forbid raising a partners' child together. A person living in registered partnership will not be able to marry.

Even though the project may seem disappointing to some LGBT circles, I think it is an accomplishment, that in such a hostile and unhealthy atmosphere it was not rejected in the first reading and passed to the Sejm<sup>20</sup>. It is another and a very important step towards better existence for sexual minorities, a step that may improve the tolerance of the society. Nevertheless, the draft is now in hands of the Deputies in Sejm – the outcome is difficult to predict.

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<sup>18</sup> About 300 workers of registry offices wrote protest letters to the Parliament against the bill on same-sex partnerships; however, the Polish Association of Registry Office Workers considered this an abuse of a post – the registry officials should not involve in political disputes.

<sup>19</sup> The possibility of sharing the same surname was restored before by the Senate Committees.

<sup>20</sup> However, if it has any chances to be adopted in Sejm, it should be done before the end of this tenure, as according to the political prognosis the new Parliament may be very conservative

The issue of same-sex partnership activated both sides of the dispute – LGBT NGOs organise information campaigns, right-wing politicians organise humiliating crusades and do not avoid violence.

The “Days of Culture for Tolerance”, organised in May 2004 Krakow by LGBT NGOs<sup>21</sup> and supported by the Plenipotentiary for Equal Status of Women and Men, included events, interdisciplinary seminars at the university, meetings, discussions, films. Those events were open for everybody. The most important was the March for Tolerance, the peaceful demonstration with participation of LGBT people, their friends and supporters, but also disable and everyone who wanted to express their disagreement to all kinds of discrimination. Antagonist – several conservative and religious organisations – sounded the alarm that a parade of naked deviants would profane the royal town. Yet the citizens did not see naked deviants, just ordinary people, young and old, men and women, homo- and heterosexual, even parents with children. Nonetheless, despite the police protection, eggs, bottles and stones flew over, and the march ended up with a regular fight of hooligans, led by local right-wing politicians, with the police; when the police could not control them any more, they chased anyone in view, no matter – a gay, a tourist, or a policeman.<sup>22</sup>

The issue of same-sex partnership is still very controversial in Poland. It raises again the question of whether this step is necessary to combat discrimination. However, the situation of sexual minorities in Poland is much sadder, when it comes to protection of standard, fundamental democratic rights, granted to every citizen in the Constitution and law, not to mention international documents – right to respect private life, right to freedom of thought and conscience, right of peaceful assembly, right to protection against aggression.

After riots in Krakow a few vandals was arrested and soon released; CAH accused some of the leaders of the riots of hampering legal demonstration and encouraging hate crimes. However, the prosecution always refuses to take up such cases, due to absence of witnesses or evidence (although the events were witnessed by hundreds of people and media) or lack of elements of crime (the Criminal Code only mentions crimes against ethnic, religious or national minorities).

The situation repeated itself in Poznań in November this year; in Warsaw the president of the town (Lech Kaczyński from *Law and Justice*) banned the “Parade of Equality” in June – official reasons being

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<sup>21</sup> The Campaign Against Homophobia was founded in 2001 and is a non-government organisation operating throughout Poland. Their main objectives are to publicise the discussion on the subject, increase social representation for all sexual minorities, shape tolerant attitudes, promote awareness of sexual and gender identification, creating and introducing anti-homophobic discourse into the public circulation. Together with ILGCN Polska (International Gay and Lesbian Association for Culture in Poland, created 4 years ago), they organise several actions, including political lobbying, education in schools, petitions, publishing materials; and what is very important, many of their actions are designed for the media. Each year there are more local divisions of CAH being created in bigger cities of Poland. In this way their activities can embrace almost the whole country.

<sup>22</sup> This incident brought about a public debate on tolerance, homosexuality, same-sex families and aggression. Suddenly gays and lesbians are shown on TV, popular magazines write about homosexuality – unthinkable a few years ago. Although the debates often lack objectivity and substantial arguments, I suppose it is some progress. Although the aggression of many people and the outcome of peaceful educational events were sad, still many people sympathised with the idea. Many people for the first time had a chance to know something more about homosexuality than awkward stereotypes.

avoiding riots and care for public morality. Kaczyński uphold his decision against the opinions of all human rights organisations and two repealing decisions of *wojewoda* (governor)<sup>23</sup>.

In December 2003 began a trial against a woman (leader of local association “Polish Family”) accused by CAH of a crime against reputation – infamy, as she wrote in a newspaper that homosexuals constitute a threat to family, and ‘someone suffering of this disease should be forbidden by law from becoming a teacher and raising children’. Prosecution refused to take up proceedings, because there was no social interest at risk, and the private charge was dismissed by court in Warsaw in November this year; CAH is going to appeal.

It seems the legal system – the police, prosecution, courts – does not perceive sexual minorities as a social group, whose interests and reputation could be harmed. Is it because “sexual orientation” is still missing from many important legal acts, or the judges and prosecutors just lack good will in interpretation of existing laws? There are opinions, that legal acts cannot force the society to be more tolerant. Maybe, but they can certainly help the minorities to extend their public space, life space, safer space – provided that they shall execute the rights imposed by law. As much as they need support and solidarity of other discriminated groups, their success, as of the most stigmatised group, would be a general success of tolerance and democracy, from which others would benefit.

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<sup>23</sup> He claimed that such assembly would constitute public demonstration of sexual issues and would offend religious feelings of other people.