



Warsaw, 10 August 2018

Dear Sir or Madame, Member of the Steering Committee of Human Rights,

The *Ordo Iuris* would like to submit to the Steering Committee of Human Rights its Comments on measures of implementation of the Recommendation CM/REC(2010)5 of the Committee of Ministers of the Council of Europe concerning Poland.

The *Ordo Iuris* Institute for Legal Culture is an independent legal organization incorporated as a foundation in Poland. It gathers academics and legal practitioners aimed at the promotion of a legal culture based on the respect for human dignity and rights. The *Ordo Iuris* pursues its objectives by means of research and other academic activity as well as advocacy and litigation.

The *Ordo Iuris* Institute is among the organizations that are consulted by the Polish Government within the legislative process. Third party interventions (including *amici curiae* briefs) by *Ordo Iuris* Institute have been accepted by Polish courts of all levels, including the Supreme Court of the Republic of Poland. The Institute has been also permitted by the President of the European Court of Human Rights to deliver third party interventions and allowed by the President of the European Committee of Social Rights to submit observations. The *Ordo Iuris* Institute submitted its opinions to the Venice Commission, the Secretary General of the Council of Europe, Commissioner for Human Rights, the Committee on Political Affairs and Democracy of the PACE and constitutional courts of numerous countries. The experts of the Institute are consulted and allowed to deliver interventions in matters of democracy and the rule of law i.a. by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe and by the Department of State of the United States of America. Moreover, *Ordo Iuris* Institute has ECOSOC consultative status with the United Nations.

We hope the Steering Committee of Human Rights will find our Comments supportive.

Director of the Ordo Iuris International Law Centre

**Comments on measures of implementation of the Recommendation CM/REC(2010)5
of the Committee of Ministers of the Council of Europe concerning Poland**

Recommendation CM/REC(2010)5 of the Committee of Ministers of the Council of Europe to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity¹ (hereinafter: “Recommendation” or “Recommendation of 2010”) include two parts: general recommendations preceded with the preamble and the appendix split into 12 thematic sections.

The preamble recognizes that Member States are required by law to intervene in the activities of private entities in order to ensure the protection against discrimination; it further stipulates that individuals who self-identify as members of LGBT groups have been for centuries subjected to “homophobia” and “transphobia” and that no cultural, traditional or religious values can be invoked to justify discrimination of individuals who are members of LGBT groups.

5 general recommendations have been formulated to Member States which are guided to:

1. examine existing legislative and other measures, keep them under review, and collect and analyze relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
2. ensure that such legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons, and to promote tolerance towards them;
3. ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;
4. rely in their legislation, policies and practices on the principles and measures contained in the appendix to the Recommendation;
5. ensure by appropriate means and action that this recommendation, including its appendix, is translated and disseminated as widely as possible.

¹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cf40a (access: 26.07.2018).

The appendix includes specific proposals grouped into 12 following categories: right to life, security and protection against violence; freedom of association; freedom of speech and freedom of assembly; right to respect for private and family life; employment; education; health; housing; sports; right to asylum; human rights protection structures and discrimination.

Main conclusions

The authorities of the Republic of Poland have implemented the provisions of Recommendation of 2010 in varying degrees, and namely:

1) they have implemented in full recommendations regarding the protection against discrimination on grounds of sexual orientation. The legislator has introduced legal provisions to protect persons who self-identify with LGBT groups against discrimination at the workplace (Article 11³, Article 18^{3a} (1), Article 94, point 2b and Article 18^{3d} of the Labor Code) and against discrimination regarding vocational training, the requirements to start up and run own business or hold an independent occupation, to join and be active in trade unions, employers' organizations and professional regulatory bodies, the criteria of access and the conditions of use of labor market instruments and services, social protection, healthcare, education and higher education and services, including access to housing, assets, the acquisition of rights and purchase of electricity, if they are traded publicly (Article 4 of Act of 3 December 2010 on the implementation of some regulations of the European Union regarding equal treatment).

2) they have implemented partially detailed recommendations regarding the adoption of additional measures to protect persons who self-identify with LGBT groups against acts motivated by hatred. It was concluded that Polish law does provide persons who self-identify with LGBT groups with the protection equal to safeguards available to other persons under those general provisions of criminal law which prohibit violence, insults or harassment targeting citizens or foreigners. Public authorities firmly condemn all acts of aggression against any citizen or any foreign person staying on the territory of the Republic of Poland.

3) they have suspended the implementation of those recommendations which were issued by the Committee of Ministers beyond the scope of its mandate, as granted under the Statute of the Council of Europe of 5 May 1949. this concerns recommendations intended to secure the privileged treatment for persons who self-identify with LGBT groups. In fact, the Committee of Ministers does not hold

powers to address to Member States legislative proposals which are otherwise not explicitly grounded in the European Convention on Human Rights.

General comments

Polish law ensures equal protection to all human beings and citizens, whatever their sexual orientation: it secures all the rights and freedoms whose protection is required under the discussed Recommendation. The Constitution of the Republic of Poland ensures to every human being, irrespective of their sexual orientation, the right to life (Article 38), personal freedom (Article 41), the right to the protection of privacy and family life (Article 47), the freedom to express opinions (Article 54(1)), the freedom of assembly (Article 57), the freedom of association (Article 58 (1)), and the right to asylum (Article 37(1)).

Comments to the recommendations in the appendix

Right to life, security and protection against violence

- *Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity (I, p.1)*

Partially implemented. Whatever his or her sexual orientation, every human being enjoys equal rights in criminal court proceedings, including the right to report the suspected crime. Should the distinction contemplated in the Recommendation be introduced some victims would be more privileged in the proceedings than others. The court assesses evidence at hand in an objective manner, no matter the identity of the victim, and the State needs to safeguard the conditions of fair trial.

- *Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance (I, p. 2).*

Unimplemented. There are no legal grounds for granting in criminal law preferential protection to some persons because of their sexual orientation or gender identity. In the light of the equality principle, victims of violence motivated by sexual orientation or gender identity should be treated on a par with victims of violence driven by race, religion, worldviews or other factors. Furthermore, in line with general rules on punishment, and in particular in accordance with Article 53 (2) and Article 55 of the Criminal Code², the actual punishment should be determined solely with respect to the circumstances relating to the perpetrator. In this context, the distinction is made between subjective circumstances which refer to the personality of the perpetrator, and the objective ones, related to the illegal act in question.

- *Member states should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related “hate crimes” and other hate-motivated incidents are encouraged to report these crimes and incidents; for this purpose, member states should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses.(I, p. 3)*

Partially implemented. During training, judges and public officers acquire an extensive knowledge and skills needed to identify all types of crime and to provide all victims and witnesses of the crime with adequate assistance and care, whatever the specific motivations of the individual perpetrator.

- *Member states should take appropriate measures to ensure the safety and dignity of all persons in prison or in other ways deprived of their liberty, including lesbian, gay, bisexual and transgender persons, and in particular take protective measures against physical assault, rape and other forms of sexual abuse, whether committed by other inmates or staff; measures should be taken so as to adequately protect and respect the gender identity of transgender persons.(I, p.4)*

² Criminal Code Act of 6 June 1997 (Journal of Laws of 2017, item 2204, with amendments).

Partially implemented.

There are no data on cases of prisoners' discrimination due to their sexual orientation and gender identity. Though all persons in prison are equally protected against physical assault in the detention center, whatever any specific attributes of their profile.

- *Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual orientation or gender identity, and in particular on “hate crimes” and hate-motivated incidents related to sexual orientation or gender identity. (I, p.5)*

Partially implemented. Public authorities collect data on crimes committed on grounds of sexual orientation or gender identity; however, no data are gathered on the prevalence and the nature of those discrimination and intolerance incidents which bear no attributes of the prohibited act. Crime data are gathered by the police and the public prosecutor's offices: for the police, reports are collected centrally (the National Police Headquarters) and locally (the Warsaw Police Headquarters and other Regional Police Headquarters) by special coordination officers. In 2016, there were 12 reported cases of crimes committed on grounds of sexual orientation or gender identity in Poland³.

- *Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such “hate speech” should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court (I, p.6).*

Partially implemented. The Criminal Code does not explicitly sanction the so-called “hate speech”, but provides for the punishment for the acts of insult, including those targeted at LGBT persons. Pursuant to Article 212(1) anyone who unjustly accuses a person, a group of persons, an institution, a legal person or an organization unit without legal personality of conducts or assigns them attributes which could demean them in the eyes of the public or expose them to the loss of trust required for a

³ <http://hatecrime.osce.org/poland> (access: 26.07.2018).

particular position, occupation or type of activity, shall be liable to a fine or the restriction of liberty. Should the perpetrator commit an unlawful act using to that end the means of mass communication, they may also be liable to the deprivation of liberty lasting up to one year (2). The crime of insult is subject to private prosecution, and to public prosecution if this is required by vital social interest.

Hate crimes are a tiny percentage of all crimes⁴. The data of the General Public Prosecutor's Office reveal that homosexuals would become victims of crime very rarely; for instance, in 2014, public prosecutor's offices processed 1.365 cases where hate crimes were at stake, including five concerning homosexuals⁵.

- *Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination. (I, p.7)*

Implemented. Any statement which may in any way be understood as legitimizing hatred or discrimination against anybody is considered inadmissible in the public space. It should be noted that, if implemented, this recommended measure (which, due to its fuzzy criteria would be disproportionate in respect of other groups of persons who do not self-identify as LGBT people) could, in extreme cases, cause that individuals (e.g. Catholics, Orthodox, Muslims, Jews, some groups of Evangelical Protestants) who consider sexual behaviors which stem from unconventional sexual orientation as immoral be deprived of their freedom of expression. In this context, it should be highlighted that according to the case-law of the ECHR, the freedom of expression protects also the statements that “offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’ (*Stoll v. Switzerland*, §101; *Steel and Morris v. the United Kingdom*, §87; *A.B. v. Switzerland*, §58).

- *Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever*

⁴ Police statistics show that in 2015 there were 791 reported hate crimes, in 2016, the number fell to 765 and in 2017 to 726. However, they do not include cases opened by public prosecutor's offices, which claim that the number of hate crimes is actually higher.

⁵ <http://www.rp.pl/Spoleczenstwo/307269912-Ksenofobia-przed-homofobia.html> (access: 26.07.2018).

they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.(I, p.8)

Implemented. The European Convention on Human Rights does not provide for “the rights of lesbian, gay, bisexual and transgender persons”. Their rights are protected on a par with the rights of heterosexual individuals. Everybody, whatever their orientation, enjoys equal rights and freedoms, including the right to life, the freedom of expression, the freedoms of thought, conscience and religion or the freedom of association. Public authorities promote the respect for the rights of all people, without ignoring people who self-identify with LGBT groups or distinguishing between them and the others.

II. Freedom of association

- *Member states should take appropriate measures to ensure, in accordance with Article 11 of the Convention, that the right to freedom of association can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, discriminatory administrative procedures, including excessive formalities for the registration and practical functioning of associations, should be prevented and removed; measures should also be taken to prevent the abuse of legal and administrative provisions, such as those related to restrictions based on public health, public morality and public order.(II, p.9)*

Implemented. Pursuant to Article 12 of its Constitution, Poland ensures freedom of creation and operation of trade unions, socio-occupational organization of farmers, societies, civil movements, other voluntary associations and foundations. Moreover, in accordance with Article 58 of the Constitution of the Republic of Poland, everybody enjoys the freedom of association, and decisions to decline registration of an association or to put a ban on its activities may only be taken by the court and solely if the objective pursued by such association or its activities are in conflict with the Constitution or the applicable legislation.

The Association Law Act⁶ of 7 April 1989 provides for swift and simple registration procedures. Each Polish citizen can establish an association provided that they meet some objective requirements: they

⁶ Journal of Laws of 2017 (Dz.U.), item 210, with amendments.

enjoy full legal capacity and full public rights. The registered association can be established by 7 individuals, and the ordinary association by 3 individuals. In order to establish a registered association, these individuals need to make a registration request to the National Court Register and obtain a positive court decision. For an ordinary association, the only requirement will be the entry into the relevant register made by the administrative authority within 7 days following the relevant request. The registration procedure is not in any manner conditioned upon sexual orientation or gender identity, and such factors are not examined during the decision-making process.

Similarly, the Foundations Act⁷ of 6 April 1984 allows for the establishment of the foundation without any specific formal requirements. Foundations can be set up by natural persons of any citizenship and place of residence or by legal entities, whether registered in Poland or abroad. The founding party makes a statement of will regarding the establishment of the foundation, in the form of notarial deed. The document needs to define the mission of the foundation and assets to be used for its realization. The foundation is entered into the National Court Register by virtue of the court decision.

The freedom of association can also be exercised by persons who self-identify with LGBT groups and who for many years already have been running their own organizations, and namely: the Campaign against Homophobia [*Kampania Przeciw Homofobii*], Lambda Association [*Stowarzyszenie Lambda*], Tolerado Association for LGBT Persons [*Stowarzyszenie na rzecz osób LGBT Tolerado*], Stonewall Group Association [*Stowarzyszenie Grupa Stonewall*], “Diversity Laboratory” Association [*Stowarzyszenie Pracownia Różnorodności*], Scientific Society for LGBT Psychology and Sexuology [*Stowarzyszenie Naukowe Psychologia i Seksuologia LGBT*] or Trans-Fusion Foundation [*Fundacja Trans-Fuzja*].

- *Access to public funding available for non-governmental organisations should be secured without discrimination on grounds of sexual orientation or gender identity.(II, p.10)*

Implemented. The legislation grants to every non-governmental organization the right to apply for co-financing from public purse and there are no pre-requirements which would condition such funding upon the sexual orientation of their leaders. For instance, pursuant to Article 5, paragraph 2 of the Act of 25 October 1991 on the Organization and Management of Cultural Activities⁸ non-

⁷ Journal of Laws of 2016 (Dz.U.), item 40, with amendments.

⁸ Journal of Laws of 2017 (Dz.U.), item 862, with amendments.

governmental organizations which run cultural activities are entitled to receive special purpose subsidies from the State budget, i.e. from the envelope managed by the minister competent for culture and protection of national heritage, to cover their State-sponsored initiatives, including special purpose grants to finance and co-finance investment spending.

- *Member states should take appropriate measures to effectively protect defenders of human rights of lesbian, gay, bisexual and transgender persons against hostility and aggression to which they may be exposed, including when allegedly committed by state agents, in order to enable them to freely carry out their activities in accordance with the Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities(II, p.11).*

Implemented. The provisions of the Criminal Code⁹ ensure protection against hostility and aggression to everyone, whatever their sexual orientation and gender identity. Will be liable to punishment all perpetrators who: cause serious bodily harm (Article 156 of the Criminal Code), minor bodily harm (Article 157 of the Criminal Code), threaten to commit a crime causing prejudice to another person (Article 190 of the Criminal Code), commit stalking (Article 190a of the Criminal Code), or insult (Article 216 of the Criminal Code).

- *Member states should ensure that non-governmental organisations defending the human rights of lesbian, gay, bisexual and transgender persons are appropriately consulted on the adoption and implementation of measures that may have an impact on the human rights of these persons. (II, p.12)*

Implemented. All bills submitted by the government and by MPs are available on the Internet. Before being sent to the parliament, government bills are open for consultation at legislacja.rcl.gov.pl. After the submission to the parliament, government and parliamentary bills can also be accessed at <http://sejm.gov.pl/Sejm8.nsf/proces.xsp>). Each non-governmental organization, including any LGBT organization, can take part in public consultation on an equal footing.

⁹ Journal of Laws of 1997 (Dz.U) No 88, item 553 with amendments.

III. Freedom of expression and peaceful assembly

- *Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.(III, p. 13)*

Implemented. According to Article 54 of the Constitution, everybody enjoys the freedom to express their opinion, and to acquire and disseminate information. Thus, persons who self-identify with LGBT groups have the right to voice their opinion and to receive and communicate information on topics related to their orientation or identity. Polish LGBT organizations can, without being hampered by public authorities, run promotional activities, distribute leaflets and brochures, record videos etc.

- *Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.(III, p.14).*

Implemented. Pursuant to Article 57 of the Constitution, everyone is granted the freedom of peaceful assembly and the right to participate in such assemblies. This constitutional rule is further detailed in the provisions of the Act on Assemblies¹⁰ of 24 July 2015 which gives to all individuals of age the right to organize public demonstrations, rallies and marches, irrespective of the sexual orientation of organizers or participants.

- *Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly. (III, p.15)*

Implemented. Disturbances to a lawful assembly are considered a crime: according to Article 260 of the Criminal Code, anyone who, either by force or by unlawful threat, foils the organization of a

¹⁰ Journal of Laws of 2018 (Dz.U.), item 408, with amendments.

lawfully held gathering, assembly or march or who causes the dispersal of such gathering, assembly or march, shall be liable to a fine, the restriction of liberty or imprisonment lasting up to 2 years.

- *Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.(III, p.16).*

Implemented. Disturbances to a lawful assembly are considered a crime: according to Article 260 of the Criminal Code, anyone who, either by force or by unlawful threat, foils the organization of a lawfully held gathering, assembly or march or who causes the dispersal of such gathering, assembly or march, shall be liable to a fine, the restriction of liberty or imprisonment lasting up to 2 years.

The disturbance to gatherings may also be qualified as a crime of insult. One public prosecutor's office initiated the proceedings in the insult case concerning the participants of the Rainbow Families Rally, held in July 2017 in Sopot. The event brought together persons who self-identify with LGBT group and who at some point had made a decision to found a family. It met with resistance from nationalist organizations which registered their own gathering and protested against the rally, addressing offensive expressions to its participants. The organizers of the rally reported the suspected crime and the public prosecutor refused to open the case, underlining that insults are subject to private prosecution. The decision was appealed to a superior prosecutor's office, and arguments were put forward that the situation of the kind required that social interest be taken into account. The superior prosecutor's office considered the appeal as justified, repealed the previous decision to decline the opening of proceedings and ordered the case to be processed¹¹.

- *Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.(III, p.17)*

Partially implemented. Public authorities condemn any unlawful State's interference into the rights of individuals or groups of individuals, without specific reference being made to LGBT groups. For

¹¹ <http://www.lex.pl/czytaj/-/artykul/warto-zawiadamiac-o-przestepstwach-motywowanych-homofobia> (access: 27.07.2018).

instance, in 2018, the Polish Minister of Interior, Joachim Brudziński, condemned all manifestations of crime motivated by hatred on national, ethnic, racial or confessional grounds¹².

IV. Right to respect for private and family life

- *Member states should ensure that any discriminatory legislation criminalising same-sex sexual acts between consenting adults, including any differences with respect to the age of consent for same-sex sexual acts and heterosexual acts, are repealed; they should also take appropriate measures to ensure that criminal law provisions which, because of their wording, may lead to a discriminatory application are either repealed, amended or applied in a manner which is compatible with the principle of non-discrimination. (IV, p.18).*

Implemented. In Poland, voluntary homosexual acts between adults are not subject to punishment. The age limit for such voluntary sexual relations is the same as for all persons and is established at 15 years (Article 200 of the Criminal Code).

- *Member states should ensure that personal data referring to a person's sexual orientation or gender identity are not collected, stored or otherwise used by public institutions including in particular within law enforcement structures, except where this is necessary for the performance of specific, lawful and legitimate purposes; existing records which do not comply with these principles should be destroyed.(IV, p.19).*

Implemented. No legal provision provides for the obligation to gather and store data on sexual orientation or gender identity except for when this is required to achieve legal and justified goals, e.g. in court proceedings where sexual orientation constitutes an important circumstance, of relevance for the outcome of the case. Apart from this, data on sexual orientation or gender identity are not collected, stored or otherwise used by public institutions.

- *Prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements.(IV, p.20).*

¹² <https://www.mswia.gov.pl/pl/aktualnosci/16972.Komunikat-MSWiA.html> (access: 27.07.2018).

Not applicable. The provisions of Polish law do not specifically provide for any prior conditions for the recognition of sex reassignments, and therefore the legislator would not proceed to any regular compliance reviews.

Poland is bound by the provisions of the Convention which does not impose on State Parties any obligations regarding sex reassignment procedures. Therefore, Poland submits that the decision to set a legal framework for the so-called sex reassignment procedure is left to the Member State under the margin of discretion which they enjoy. This possibility is granted under the case-law of the Court (judgments of the ECHR of 17 October 1986 in the case *Rees v. The United Kingdom*, of 27 September 1990 in the case *Cossey v. The United Kingdom*, of 20 March 1997, in the case *X,Y,Z v. The United Kingdom*, and of 30 July 1998 in the case *Sheffield and Horsham v. The United Kingdom*).

- *Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.*(IV, p.21).

Partially implemented. The recommendation has not been fully implemented by the legislator for reasons detailed above. However, the pre-requirements for the reassignment of the registered sex have been defined in the judgments of common courts. Courts have admitted that the so-called “gender adjustments” can be requested by way of opening the proceedings against parents based on Article 189 of the Civil Proceedings Code¹³. In order to have the sex registered in the birth certificate reassigned, the person concerned needs to be supervised for 2 years by a specialized medical doctor, undergo a surgical procedure and follow the hormonal therapy¹⁴. The subjective, psychological feeling of belonging to a given sex alone is not sufficient for the court to decide on sex reassignment¹⁵. The whole procedure is not prompt but is available to everybody and is transparent.

- *Member states should take all necessary measures to ensure that, once gender reassignment has been completed and legally recognised in accordance with paragraphs 20 and 21 above,*

¹³ Journal of Laws of 2018 (Dz.U), item 155, with amendments.

¹⁴ M. Filar, *Transseksualizm jako problem prawny*, in: *Przegląd Sądowy*: 1/1996, p. 77.

¹⁵ M. Safjan, *Glosa do postanowienia Sądu Najwyższego z 22 marca 1991, III CRN 28/91*, in *Przegląd Sądowy*, 1993, no. 2, pp. 87-88. M. Boratyńska, [in:] *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami*, ed. by M. Safjan, pp. 454 and 458.

the right of transgender persons to marry a person of the sex opposite to their reassigned sex is effectively guaranteed. (IV, p.22).

Partially implemented. In Poland, the right to contract marriage is decided upon the registered sex criterion.

- *Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights. (IV, p.23).*

Implemented. Polish legislation ensures that the provisions which define the rights and obligations in cohabitation relations apply in a non-discriminatory way to both same-sex couples and different sex couples. At the same time, as we know, different treatment is not the same as unequal (discriminatory) treatment and "not always (...) different treatment is about inequality and discrimination. Assessment of this differentiation of the situation of entities always results from determining whether this difference can be attributed to a legitimate character."¹⁶ For instance, the Polish Supreme Court recognized that the person who has stayed in a homosexual relation with the late tenant enjoys the right of preference when contracting the tenancy agreement after the death of the latter, based on Article 691 of the Civil Code (resolution of the Supreme Court of 28 November 2012, Ref. No. III CZP 65/12). The differentiation between the two-and same-sex relationships is unjustified in this situation.

- *Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation (IV, p.24).*

Not applicable. Polish legislation does not recognise the institution of a registered partnership or any other analogous one.

- *Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex*

¹⁶ Judgment of the Supreme Court of May 5, 2010, reference number I PK 201/09.

couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.(IV, p.25).

Partially implemented. The normalization of certain legal consequences of sharing life, including the same-sex household is, as the Supreme Court¹⁷ recalled, admissible and practically implemented, as evidenced by a number of regulations treating same and different-sex couples in a similar manner. For example, people living in a same-sex relationship may, among other things, obtain information about a partner's health status¹⁸ and access to a patient's medical record¹⁹, enter into a tenant's lease²⁰, make a testament in which they will be referred mutually inheritance²¹, receive remuneration for work²² and parcels at the place of residence and post office²³, run a joint bank account²⁴, indicate the second partner as a person whose insurance company will pay compensation in the case of death²⁵. In addition, with a relation to property between persons living together is subject to evaluation through the prism of the provisions applicable to these relationships.

- *Taking into account that the child's best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states*

¹⁷ Opinion of the Supreme Court on the parliamentary draft laws on "partnerships" and "provisions introducing the law on partnerships", 10 May 2012.

¹⁸ Article 31 paragraph 2 of the Act of 5 December 1996 on the professions of a doctor and dentist states: "2. The doctor may provide the information referred to in paragraph. 1, to other persons with the consent of the patient or his legal representative. "Mentioned paragraph 1 reads: 1. The physician is obliged to provide the patient or his statutory representative with accessible information about his / her health, diagnosis, proposed and possible diagnostic, therapeutic methods, foreseeable consequences of their use or omission, results of treatment and prognosis. "

¹⁹ Article 18 para. 3 of the Act on Health Care Establishments from 1991 provides that the facility provides documentation to the person authorized by the patient.

²⁰ Article 691 § 1 of the Civil Code ((Dz.U.) - Journal of Laws of 1964, No 16 item 93, with amendments.

²¹ Articles 931-933 of the Civil Code. It is sometimes claimed that the testament does not exhaust the expectations of same-sex relationships because the institution of a reserved (Article 991 of the CC) guarantees to unauthorized persons in the testament a half of what would have been if the will had not been made. However, the retainer institution is a universal institution that is equally valid for all testators. Even if you take into account the necessity of transferring a reserved item, by making a testament, you can give your partner a greater part of your property than is usually left by the spouses.

²² Based on Article. 98 of the Civil Code) in conj. with article 300 of the Labor Code (Dz.U.) Journal of Laws of 1974, No 24, item. 141 with amendments) , an employee may authorize another person to receive remuneration by granting a power of attorney for this purpose.

²³ Article 37 paragraph 2 of the Act of November 23, 2012 Postal Law ((Dz.U) Journal of Laws of 2012, item 1529) : Pursuant to this provision, a postal order may be delivered with the effect of delivery 1) to the addressee, 2) to the statutory representative of the addressee or authorized representative on the basis of a power of attorney granted on general terms or on the basis of postal authorization, 3) to an adult residing together with the addressee (in the facility) postal declaration, after making a statement in writing together with the addressee).

²⁴ Article 51 of the Banking Act ((Dz.U.) Journal of Laws of 1997, No 140, item 939 with amendments) allows for conducting joint account.

²⁵ Article 831 § 1 of the Civil Code

should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity.(IV, p.26).

Implemented. It should be underlined that according to the fundamental principle of the Polish family law, decisions regarding parental responsibility or guardianship should be primarily guided by the best interests of the child whose well-being is best ensured in a family based on a marriage between a woman and a man. This principle is also reflected in the adoption procedure where the right to common adoption is granted solely to married couples (Article 115 of the Family and Guardianship Code²⁶, hereinafter “the FGC”). This provision should be understood as excluding the possibility of a child being adopted by a homosexual couple or by a different sex couple living in cohabitation, precisely in the child’s best interests.

- *Taking into account that the child’s best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity.(IV, p.27).*

Implemented. Pursuant to Article 114¹ § 1 of the FGC , the adoption is open to persons with full legal capacity provided that their personal aptitudes allow to assume that they will be able to duly perform the responsibilities of the adoptive parent, they hold a positive qualifying opinion and have undergone a certified training organized by the adoption center. Polish law does not exclude the possibility of the child’s adoption by a person who self-identifies with LGBT groups.

- *Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation.(IV, p.28).*

Implemented. The Infertility Treatment Act of 25 June 2015²⁷ does not explicitly prohibit the use of the in vitro procedure by single women. Therefore, it can be recognized that the in vitro treatment is available to every woman, irrespective of her sexual orientation.

Yet, it should be highlighted that the solution which allows for a child to be artificially conceived by a single woman and which deprives such child of the right to build and nurture the bonds with the

²⁶ Journal of Laws of 2017 (Dz.U), item 682, with amendments.

²⁷ Journal of Laws 2015 (Dz.U), item 1087, with amendments.

father raises some serious reservations: legal (limitation of the child's right to identity and of the protection of family life), social (promotion of a deficient family model with only one parent) and ethical (rupture of the natural link between marriage and procreation).

V. Employment

- *Member states should ensure the establishment and implementation of appropriate measures which provide effective protection against discrimination on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector. These measures should cover conditions for access to employment and promotion, dismissals, pay and other working conditions, including the prevention, combating and punishment of harassment and other forms of victimisation.*(V, p.29).

Implemented. Polish legislation ensures the protection of workers against discrimination on grounds of sexual orientation.

Firstly, any form of discrimination in employment on grounds of sexual orientation, whether direct or indirect, is considered unacceptable by virtue of law (Article 11³ of the Civil Code²⁸).

Secondly, the law provides for the obligation to treat equally all workers, whatever their sexual orientation, with respect to the conclusion and termination of the employment relation, employment conditions, promotion and access to training aimed at upgrading professional qualifications (Article 18^{3a} § 1 of the Labor Code).

Thirdly, the employer is legally bound to prevent discrimination in employment on grounds of sexual orientation (Article 94(2b) of the Labor Code).

The employer who violates the equal treatment principle in their relations with employees is civilly liable. The employee is entitled to a compensation, at least equal to the applicable minimum wage (Article 18^{3d} of the Labor Code).

²⁸ Journal of Laws of 2018 (Dz.U), item 917, with amendments.

- *Particular attention should be paid to providing effective protection of the right to privacy of transgender individuals in the context of employment, in particular regarding employment applications, to avoid any irrelevant disclosure of their gender history or their former name to the employer and other employees.(V, p.30).*

Unimplemented. No legal provisions prove that any “particular attention” is paid to this issue in the legislation. However, it should be highlighted that information on the past registered sex is protected against unnecessary disclosure under general national legislation and the EU legislation on personal data protection.

VI. Education

- *Taking into due account the over-riding interests of the child, member states should take appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.(VI, p.31).*

Implemented. The Polish Education Law Act²⁹ ensures a safe and healthy environment for learning, upbringing and care at schools and in education centers (see Article 1 (14), Article 3, (3-4), Article 10(1.1), Article 27, Article 55 (1.6), Article 57 (2.2), Article 68(1.6), Article 98, paragraph 1, points 4 and 7, Article 102, (1.3,6,12), Article 107, Article 108a, Article 123, Article 125, Article 126, Article 171 of the Education Law Act of 14 December 2016, Journal of Laws of 2018, item 996, hereinafter “the ELA”), for promoting among children and the youth the knowledge on safety issues and for shaping adequate behavior patterns in case of risks, including those related to the use of ICT technologies and to emergencies (see Article 1(21), Article 27, Article 55(2.5), Article 108a of the ELA). Furthermore, it should be noted that the Act for Procedures Applicable in Cases of Minors

²⁹ Journal of Laws (Dz.U.) 1991, No 95, item 425 with amendments.

(Journal of Laws of 2018, item 969) defines measures to be deployed to prevent and combat juvenile demoralization and delinquency.

It should also be underlined that pedagogical supervision of schools and education centers covers in particular the respect of the child's rights and the pupil's rights and the dissemination of knowledge on such rights (see Article 55, paragraph 2, point 5 of the ELA).

- *Taking into due account the over-riding interests of the child, appropriate measures should be taken to this effect at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity. Furthermore, member states may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children.*(VI, p. 32).

Not applicable. No provision of the European Convention on Human Rights imposes on Member States the obligation to promote in schooling any classes on sexual orientation or gender identity. However, according to the Education Law Act, schools and some centers are required to provide education and prevention courses with educational contents and activities addressed to pupils and prevention contents and activities addressed to pupils, teachers and parents, tuned to pupils' needs and developed based on the diagnosis of needs and issues prevalent in a given school community (Article 26 of the ELA). In practice, such programs promote the values of respect and responsibility for every human being and define the rules regarding personal safety and mutual help.

VII. Health

- *Member states should take appropriate legislative and other measures to ensure that the highest attainable standard of health can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, they should take into account the specific needs of lesbian, gay, bisexual and transgender persons in the development of*

national health plans including suicide prevention measures, health surveys, medical curricula, training courses and materials, and when monitoring and evaluating the quality of health-care services.(VII, p. 33).

Partially implemented. Everyone, whatever their sexual orientation, has the right to have their health protected and to enjoy equal access to healthcare services financed from public purse (Article 68 of the Constitution of the Republic of Poland). Still, the methodology used in healthcare planning does not foresee solutions to address specific healthcare needs of persons who self-identify with LGBT groups.

- *Appropriate measures should be taken in order to avoid the classification of homosexuality as an illness, in accordance with the standards of the World Health Organisation.(VII, p. 34).*

Partially implemented.

The debate on the medical nature of homosexuality is still ongoing; for those reasons, the absolute prohibition of medical classifications which go against research findings at hand would infringe the freedom of speech and the freedom of scientific inquiry. Hence, there are no reasons or no legal grounds to restrict fair scientific debate on the nature of homosexuality. In fact, any specific legal measures taken in order to avoid the classification of homosexuality as an illness would mean an unacceptable interference of public authorities in the freedom of expression, protected under Article 10 of the European Convention on Human Rights. Such interference could not be justified by any of the values which, under Article 10(2) of the European Convention on Human Rights, could otherwise underpin the restrictions to the freedom of speech - whether these are the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the reputation, and whether this is done to prevent the disclosure of information received in confidence or to maintain the authority and impartiality of the judiciary. None of these require censorship to be put on public debate on homosexuality.

- *Member states should take appropriate measures to ensure that transgender persons have effective access to appropriate gender reassignment services, including psychological, endocrinological and surgical expertise in the field of transgender health care, without being subject to unreasonable requirements; no person should be subjected to gender reassignment procedures without his or her consent.(VII, p. 35).*

Partially implemented.

The authorities have not implemented measures ensuring access to healthcare services related to sex reassignment; such healthcare services are available as an out-of-pocket option (i.e. without reimbursement from the National Health Fund). Moreover, according to Polish legislation any medical procedure requires the voluntary consent of the patient (Article 16 of the Act on Patients' Rights and the Commissioner for Patients' Rights³⁰). In exceptional circumstances, i.e. if emergency medical assistance is needed or if due to their health condition or age, the patient is unable to give their consent and their legal representative or effective caretaker cannot be reached, or if the patient's life is in danger or there is a risk of severe bodily harm or a severe deterioration of the patient's health, the doctor may initiate the procedure without such consent. It is beyond any doubt that healthcare services related to sex reassignment do not fall into this category of procedures. Therefore, formally speaking, they cannot be provided without the patient's consent.

- *Member states should take appropriate legislative and other measures to ensure that any decisions limiting the costs covered by health insurance for gender reassignment procedures should be lawful, objective and proportionate.* (VIII, p.36).

Unimplemented. The recommendation has not been implemented because the level of social assistance, including the right for the reimbursement of healthcare provisions, is established under the margin of discretion available to Member States. The European Convention on Human Rights is not conclusive about the types of social (healthcare) benefits that Member States should provide to their citizens.

VIII. Housing

- *Measures should be taken to ensure that access to adequate housing can be effectively and equally enjoyed by all persons, without discrimination on grounds of sexual orientation or gender identity; such measures should in particular seek to provide protection against*

³⁰ Journal of Laws of 2009 (Dz.U), No. 52, item 417, Act of 6 November 2008 on Patients' Rights and the Commissioner for Patients' Rights, <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20090520417/U/D20090417Lj.pdf>, accessed on: 22 June 2018.

discriminatory evictions, and to guarantee equal rights to acquire and retain ownership of land and other property. (VIII, p.37).

Implemented. All tenants, whatever their sexual orientation, are granted protection under the Act of 21 June 2001 on the Protection of Tenants' Rights, Communal Housing Resources and Amendments to the Civil Code (Journal of Laws of 2016(Dz.U), item 1610, with amendments).

- *Appropriate attention should be paid to the risks of homelessness faced by lesbian, gay, bisexual and transgender persons, including young persons and children who may be particularly vulnerable to social exclusion, including from their own families; in this respect, the relevant social services should be provided on the basis of an objective assessment of the needs of every individual, without discrimination.(VIII, p.38).*

Unimplemented. The European Convention on Human Rights imposes no obligation with respect to social policy, and in particular it does not provide for any obligations of the States in the area of combatting homelessness. Such measures are implemented under the relevant margin of discretion. There is no empirical evidence to support the claim that persons who self-identify with LGBT groups are particularly vulnerable to homelessness.

IX. Sports

- *Homophobia, transphobia and discrimination on grounds of sexual orientation or gender identity in sports are, like racism and other forms of discrimination, unacceptable and should be combated.(IX, p.39).*

Unimplemented. Combatting discrimination on grounds of sexual orientation in sports is not governed by Polish law.

- *Sport activities and facilities should be open to all without discrimination on grounds of sexual orientation or gender identity; in particular, effective measures should be taken to prevent, counteract and punish the use of discriminatory insults with reference to sexual orientation or gender identity during and in connection with sports events. (IX, p. 40).*

Implemented. Polish legislation does not make the practice of sport and access to sport facilities dependent on sexual orientation. Insults of all kind, including insults which refer to sexual orientation or gender identity are considered a crime, are subject to private prosecution and are punishable with a fine, the restriction of liberty, and if they have been made via the means of mass communication, with the deprivation of liberty up to one year (Article 216 §1, 2 and 5 of the Civil Code). The court may award a payment for the benefit of the wronged person, the Polish Red Cross or for another social works designated by such wronged person (Article 216 §4 of the Civil Code).

- *Member states should encourage dialogue with and support sports associations and fan clubs in developing awareness-raising activities regarding discrimination against lesbian, gay, bisexual and transgender persons in sport and in condemning manifestations of intolerance towards them.(IX, p. 41).*

Not applicable. The European Convention on Human Rights does not impose on Member States any obligation with respect to awareness raising initiatives in sports associations and fan clubs.

X. Right to seek asylum

- *In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.(X, p. 42).*

Partially implemented. The refugee status can be granted in Poland when there are well-grounded fears that the person concerned may be persecuted on grounds of their sexual orientation (Article 13 (1) in connection with Article 14 (2) of the Act of 13 June 2003 on Granting the Protection to Foreigners on the Territory of the Republic of Poland³¹). However, persecutions on grounds of gender identity will not be sufficient to obtain such status. Moreover, in case of asylum proceedings, the asylum seeker status can only be granted when the vital interest of the State is at stake (Article 90(1) of the said Act).

³¹ Journal of Laws of 2018 (Dz.U), item 1109, with amendments.

- *Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity. (X, p. 43).*

Implemented. Pursuant to Article 15 of the said Act, any foreigner who does not meet the requirements applicable for the refugee status is granted the complementary protection when the return to the country of origin could expose them to the risk of serious harm due to: 1) death penalty or execution; 2) torture, inhumane or degrading treatment or punishment; 3) serious and individual threat to life or health caused by the widespread use of violence against civil populations in an international or internal military conflict, and when, considering such risk, the foreigner cannot or does not wish to use the protection of their country of origin.

- *Asylum seekers should be protected from any discriminatory policies or practices on grounds of sexual orientation or gender identity; in particular, appropriate measures should be taken to prevent risks of physical violence, including sexual abuse, verbal aggression or other forms of harassment against asylum seekers deprived of their liberty, and to ensure their access to information relevant to their particular situation.(X, p. 44).*

Implemented. Under criminal law, asylum seekers enjoy the same level of protection against unlawful acts of violence as Polish citizens.

XI. National human rights structures

- *Member states should ensure that national human rights structures are clearly mandated to address discrimination on grounds of sexual orientation or gender identity; in particular, they should be able to make recommendations on legislation and policies, raise awareness amongst the general public, as well as – as far as national law so provides – examine individual complaints regarding both the private and public sector and initiate or participate in court proceedings. (XI, p. 45).*

Implemented. According to Polish law, all people shall be treated equally, irrespective of their sexual orientation (Article 32 of the Constitution of the Republic of Poland). Two institutions are appointed to act as guardians of the equal treatment principle.

1. The Polish Commissioner for Human Rights whose assistance may be requested based on Article 80 of the Constitution of the Republic of Poland. Pursuant to the Act of 15 July 1987 on the Commissioner for Human Rights³², the Commissioner may examine cases on site, refer to the agency, organization or institution whose activity has been found to have caused an infringement of human and civil rights and freedoms; move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanor; demand that disciplinary proceedings be instituted or official sanctions be imposed; and present to the relevant agencies, organizations and institutions opinions and conclusions aimed at ensuring the effective protection of human and civil rights and freedoms and at facilitating the procedures that such cases may involve (Articles 14-16).

2. The Government Plenipotentiary for Equal Treatment was established by the Act of 3 December 2010 on the Implementation of some Regulations of the European Union regarding Equal Treatment³³. The Plenipotentiary is, among all, tasked to counteract discrimination on grounds of sexual orientation. Moreover, the mandate includes actions aiming at eliminating the violations of the equal treatment principle or at mitigating the consequences of such violations, the monitoring of the compliance with the equal treatment principle, the promotion, dissemination and popularization of equal treatment issues, and the initiation and implementation of programs which advance the equal treatment principle and counteract its violations (Articles 20-21 of the said Act).

XII. Discrimination on multiple grounds

- *Member states are encouraged to take measures to ensure that legal provisions in national law prohibiting or preventing discrimination also protect against discrimination on multiple grounds, including on grounds of sexual orientation or gender identity; national human rights structures should have a broad mandate to enable them to tackle such issues. (XII, p. 46).*

³² Journal of Laws of 2017 (Dz.U), item 958, with amendments.

³³ Journal of Laws of 2016 (Dz.U), item 1219 , with amendments.

Partially implemented. Both human rights protection bodies – the Commissioner for Human Rights and the Government Plenipotentiary for Equal Treatment – have been given a wide mandate to address discrimination issues.

The Commissioner may:

- acting upon the request of wronged citizens and foreigners, apply for the case or its part to be examined by competent authorities, in particular supervision authorities, the public prosecutor's office, and state, professional or social control bodies (Article 12 (2) of the CHR Act);
- examine each case on site, even without prior notification (Article 13 (1.1) of the CHR Act);
- request for explanations or the presentation of files of each case conducted by supreme and central state administration bodies, government bodies, bodies of cooperative social, professional and socio-professional organizations and the bodies of organization units with legal personality as well as local government bodies and local government organization units (Article 13 (1.2) of the CHR Act);
- having examined the case, the Commissioner may refer to the agency, organization or institution whose activity has been found to have caused an infringement of the liberties and rights of the human and the citizen (Article 14 (2) of the CHR Act).

The Plenipotentiary may:

- request competent bodies to issue or to amend legal acts on issues in their area of responsibility (Article 21 (2.2) of the Equal Treatment Act);
- upon the consent of the President of the Council of Ministers, submit for the examination of the Council, his or her own drafts of government documents from their area of responsibility, including proposals of programs for the advancement of the equal treatment principle and counteracting discrimination (Article 21(4) of the Equal Treatment Act);
- initiate, implement, coordinate or monitor programs for the advancement of the equal treatment principle and the prevention of its infringements, in cooperation with competent ministers (Article 21 (5) of the Equal Treatment Act).