



Opinion on the Government Bill Amending the Penal Code (Sejm Document No. 876)

On November 27, 2024, a government bill amending the Criminal Code (No. 876) was submitted to the Sejm. The bill primarily concerns the criminalization of so-called “hate speech” and represents yet another attempt to amend Articles 119, 256, and 257 of the Penal Code, reiterating the core content of earlier, similar proposals presented during previous parliamentary terms. Like its predecessors, this draft raises serious constitutional concerns.

At the outset, it should be noted that prior to its submission to the Speaker of the Sejm (*Marszałek Sejmu*), the draft was modified compared to its original version, which had been available on the Government Legislative Center's website since March of this year. The changes primarily involve, first, the removal of “gender identity” from the list of new “protected characteristics,” which, as will be discussed further, does not alter the drafters’ intent to destabilize the category of sex. Second, the scope of the amended provisions has been expanded to include situations where the protected characteristic was not the direct cause of the crime or even not a characteristic of the alleged victim of the crime at all.

I. Regulations to be amended, according to the bill.

According to the bill, the following provisions would be amended:

- Art. 53 § 2a – This provision contains a list of aggravating circumstances that the court takes into account in imposing the penalty;
- Art. 119 § 1 concerns violence or unlawful threats;
- Art. 256 § 1 concerns public propagation of fascist or other totalitarian political systems, or incitement to hatred; and
- Art. 257. concerns publicly insulting a group of people or an individual person.

II. Proposed amendments.

The bill provides for a number of changes to the provisions indicated above. Their current, binding wording, as well as the new wording proposed in the bill, are indicated below. The latter is in *italics* (changes, where allowed by the new bill’s wording of the provision, are shown in **bold**):



1) Art. 53 § 2a

Art. 53 § 2a. In particular, aggravating circumstances are:

6) Committing a crime motivated by hatred due to the victim's national, ethnic, racial, political, or religious affiliation, or because of the victim's irreligiousness;

Art. 53 § 2a. In particular, aggravating circumstances are:

*6) Committing a crime motivated by hatred **in connection with** national, ethnic, racial, political, or religious affiliation, or irreligiousness, **disability, age, sex or sexual orientation***

Amendments:

- a) replacing the part of the description of the perpetrator's motives that reads "due to his or her affiliation" with "in connection with his or her affiliation";
- b) removal of the word "victim" and the pronouns "his or her" (indicating in Polish that it is *the victim's* national, ethnic etc. characteristics); and
- c) an expansion of the list of possible motives accompanying the act's particulars.

2) Art. 119

Art. 119 § 1. Whoever uses violence or makes an unlawful threat against a group of persons or an individual because of his national, ethnic, racial, political, or religious affiliation, or because of his irreligiousness, shall be subject to the penalty of deprivation of liberty for a period from three months to five years.

*Art. 119 § 1. Whoever uses violence or makes an unlawful threat against a group of persons or an individual **in connection with** national, ethnic, racial, political, or religious affiliation, or irreligiousness, **disability, age, sex, or sexual orientation** shall be subject to the penalty of deprivation of liberty for a period from three months to five years.*

Amendments:

- a) replacing the part of the description of the perpetrator's motives that reads "because of his or her affiliation" with "in connection with his or her affiliation";
- b) removal of the pronoun "his or her"; and
- c) an expansion of the list of possible motives accompanying the act's particulars.



3) Art. 256

Whoever publicly propagates Nazi, communist, fascist, or other totalitarian political systems or incites hatred on grounds of national, ethnic, racial, or religious differences; or on grounds of irreligiousness shall be punished by deprivation of liberty for up to two years.

*Art. 256 § 1. Whoever publicly propagates Nazi, communist, fascist, or other totalitarian political systems or incites hatred on grounds of national, ethnic, racial, or religious differences; or on grounds of irreligiousness, **disability, age, sex, or sexual orientation**, shall be punished by deprivation of liberty for up to **three** years.*

Amendments:

An expansion of the list of motives accompanying the act's particulars.

4) Art. 257

Art. 257. Whoever publicly insults a group of people or an individual person because of his national, ethnic, racial, or religious affiliation, or because of his irreligiousness, or for such reasons violate the bodily integrity of another person, shall be subject to the penalty of deprivation of liberty for up to three years.

*Art. 257. Whoever publicly insults a group of people or an individual person **in connection with** national, ethnic, racial, or religious affiliation, or **in connection with** irreligiousness, **disability, age, sex, or sexual orientation**, or for such reasons violate the bodily integrity of another person, shall be subject to the penalty of **a fine, restriction of liberty, or imprisonment for up to two years.***

Amendments:

- a) replacing the part of the description of the perpetrator's motives that reads "because of his or her affiliation" with "in connection with his or her affiliation";
- b) removal of the pronoun "his or her";
- c) expansion of the list of motives accompanying the act's particulars; and
- d) a change of possible sentences from imprisonment for up to three years to one of the following: a fine, or either restriction of liberty or imprisonment for up to two years.



III. Assessment of the proposed amendments.

Three of the four provisions that would be amended (articles 119, 256, and 257 of the Criminal Code) fall into the category of offenses against conventions – i.e., those for which the obligation for them to be transferred into the Polish legal order stems from those international conventions that have been ratified by Poland: the 1966 Convention on the Elimination of All Forms of Racial Discrimination, which was ratified in 1968; and the UN Covenant on Civil and Political Rights. **They do not foresee the need to introduce special forms of criminal law protection for social phenomena that constitute an element of self-identification among certain narrow social groups.**

This project raises numerous serious legal questions. At this point, let us list only the most important ones¹.

1) The bill is characterized by excessive, ideologically-inspired casuistry.

The document presents a peculiar approach to politics and society as viewed through the prism of competition between various identity groups. This translates into the questionable legislative technique adopted by the bill's authors of enumerating prohibited behaviors in great detail. "In such cases," the Office of Parliamentary Analyses pointed out in 2019, "doubts will always arise with regard to the list of prohibited behaviors, and from the perspective of the bill under review, concerning the reasons for omitting these particular motives rather than other ones. For example, since the bill provides for the introduction of a motive in the form of 'age,' what stands in the way of introducing further reprehensible motives such as 'work', 'education,' or 'wealth'?"²

It is therefore impossible not to agree with the National Council of the Judiciary, which in its opinion on a similar earlier bill stressed that it would be equally "possible and equally useful to isolate such sets of features that represent dissimilarities of nature as: the bald, the short-sighted, the deaf, etc., as well as dissimilarities arising from taste or habit, such as: alcoholism, promiscuity, gambling, cat ownership, etc. It is clear that these groups of

¹ The objections indicated below were previously presented in: R. Dorosiński, „Mowa nienawiści” – *koń trojański rewolucji kulturowej*, publ. Ordo Iuris Institute for Legal Culture, 2024.

² Office of Studies and Analyses of the Supreme Court, Opinion on the private member's bill proposing amendments to the law – Criminal Code, BSaII – 021 – 343/19.



people are also vulnerable to an act or omission which constitutes violence or an unlawful threat³.

2) The bill overturns the Criminal Code's current classification of crimes by neglecting the fact that articles 119, 256, and 257 of the Criminal Code (CC) criminalize behavior that poses a threat to state order and peace.

The bill under review, like all previous bill laws criminalizing “hate speech,” **completely ignores the Criminal Code's current division of crimes based on the type of good being protected, as well as the purpose** articles 119, 256, and 257 of the CC serve. The discrepancy that exists between the task fulfilled by these provisions and the intentions of the bill's authors was made remarkably clear in the opinion of the National Prosecutor on the bill dated July 4, 2016, which justifies citing it here *in extenso*:

“Article 119 of the CC is found in Chapter XVI, covering crimes against peace and humanity, as well as war crimes. Articles 256 and 257 of the CC are in Chapter XXXII, covering crimes against public order. **Thus, the main object protected by these laws is not the well-being of individuals belonging to certain groups.** The current form of articles 119, 256, and 257 of the CC is not, contrary to the bill's suggestion, the result of either oversight or ill-will on the part of the legislature, which was to wrongfully overlook various groups that are exposed to discrimination. The task that [these provisions] fulfill within the Criminal Code is not, in fact, to criminalize behavior to which a citizen may be exposed by virtue of any of the characteristics he or she might possess, but rather to criminalize behavior that, by its very nature, poses a threat to order and peace on a national scale.

It is an undeniable fact that people can be distinguished on the basis of dozens of various criteria. However, articles 119, 256, and 257 of the CC identify only those differentiating criteria that have historically been shown to be capable of spawning civil unrest, riots, crimes against humanity, or civil wars – since the purpose of these laws is to prevent these very outcomes.

(...) the currently accepted criteria (such as nationality, worldview, religion, or irreligion) generally refer to the realm of ideas, while the proposed criteria (age, sex, fitness, sexual orientation) generally refer to the realm of biology. (...) The exception is race, which

³ Opinion of the National Council of the Judiciary of January 31, 2020 on the private member's bill proposing amendments to the Law – Criminal Code (parliamentary print no. 138), no. WO-020-103/19.



belongs to both spheres, as it has been subjected to intense ideologization for several hundred years. (...)

It is a fact, after all, that if one part of the population attacks another, it usually invokes certain ideas or ideologies rather than biological facts that apply equally to all human beings. Criteria of a biological nature do not provoke intense collective antagonism, as can easily be shown by everyday examples. If a 25-year-old commits violence against a 60-year-old, there may not be the slightest risk that most 60-year-olds will start committing violence against 25-year-olds in retaliation. If a person of a heterosexual orientation directs threats against people of a homosexual orientation or vice versa, there will be no outbreak of riots or mutual mass persecution between heterosexuals and homosexuals because of it. It is also extremely unlikely that there will ever be an armed conflict in the history of mankind because of the sex of the warring populations.”⁴

3) The bill expands the scope of application of the amended regulations to include situations where:

- **the protected characteristic was not the direct cause of the crime, or even**
- **would not have been a characteristic of the victim of the alleged crime at all.**

In the current, applicable wording of the amended legislation, national, ethnic, racial, political, or religious affiliation, or irreligiousness are indicated as the direct cause and the reason for the crime, which is expressed in the phrase “because of.” The bill envisages replacing the description of the perpetrator’s motive as being “because of his or her affiliation” with the term “in connection with his or her affiliation,” which suggests a more general connection that is not always the direct cause.

As a consequence of such an amendment, it is possible that the offenses under articles 119(1), 256(1), and 257, which can now only be committed purposefully and with direct intent, can also be committed unintentionally.

Committing the offense purposefully and with direct intent means, as the Supreme Court emphasized in the context of Article 256, that “the perpetrator will only be liable for the indicated act if, being aware of the significance of the content of his statement, he or she

⁴ First Deputy Prosecutor General National Prosecutor, Position on the bill of 20.07.2016 from print 878, Warszawa, 11.08.2016, pp. 5-7.



intends it to provoke or strengthen negative reactions against differences in nationality, ethnicity, race, religion, or on the basis of irreligion in the persons it reaches”⁵. The Court of Appeals in Warsaw explained it similarly, pointing out in the context of Article 257 that “the perpetrator must both be aware of certain characteristics of the victim (race, nationality, religion, or irreligion) and desire to violate the victim's dignity precisely and primarily because of them. (...) The *raison d'être* of criminalization here, after all, is to combat intentional hostility of a racist, nationalist, or religious nature.”⁶

The proposed amendment will, if enacted, lead to a situation where conviction under Article 119 § 1, Article 256 § 1, or Article 257 will be significantly easier. This is because it will not be necessary to prove that the protected characteristic was the reason for the alleged crime. This introduces *de facto* a logic of preferential treatment for those social groups that possess a protected characteristic. According to these criteria, for example, insulting a person of a different race or sexual orientation even when race or sexual orientation was not the reason for the insult would be punishable, under Article 257 of the CC, by up to two years' imprisonment, but insulting a mother of a large family would not be punishable at all under this provision.

The above comments also apply to the proposed amendments to Article 53 § 2a(6) of the CC. It has already been noted that: “Determining the perpetrator’s motivation o is extremely difficult and complex. The legislator should therefore avoid introducing motivational elements or making the scope of the offender's criminal responsibility dependent on circumstances of this nature. (...) [I]n jurisprudential practice, the perpetrator’s characteristics (especially motivation) are rarely accurately established. In the case of the circumstance in question, it can be easy to draw an erroneous conclusion about the perpetrator’s motivation from the mere fact that the victim belongs to a particular group, while the reason for directing the act against a person may be entirely different.”⁷

Changing the words “because of” to “in connection with” will only exacerbate these difficulties. Indeed, it should be emphasized that the bill provides for the deletion of the word “victim” and the pronoun “his or her” from Article 53 § 2a(6) of the CC, leading to a

⁵ Supreme Court ruling of 19.04.2023, II NSNk 12/23, OSNKN 2023/2, item 8.

⁶ Judgment of the Administrative Court in Warsaw of 20.04.2015, [II AKa 26/15](#).

⁷ M. Budyn-Kulik [in:] *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el. 2024, Art. 53.



situation where the protected characteristic need not refer to the victim at all. Judges will therefore be obliged to treat as aggravating circumstances for the defendant the mere fact of the presence in the case of an unspecified “connection” with any of the protected characteristics. Such a connection, which cannot be ruled out, could consist in, for example, the subject of the dispute that led to the alleged act.

The introduction of this type of abstract, unspecified “link” to protected characteristics is likewise envisaged in the case of Article 119 § 1 and Article 257.

4) The bill ignores the fact that there are a number of criminal and non-criminal measures already in place to protect everyone – regardless of any characteristics or self-identifications of one kind or another – from violence, incitement to violence, threats, insults, and defamatory statements.

The explanatory memorandum to the bill argues that, as the law stands now, it supposedly fails to provide sufficient protection for all minority groups that are particularly vulnerable to discrimination, prejudice, and violence.

Meanwhile:

- The legislation in effect today guarantees equal protection to all citizens. For this reason, the argument is formulated based on subjective terms such as “sufficient” protection or “particularly” vulnerable groups.
- The Polish legal order is not based on a hierarchy of classes or social groups and on granting some of them a greater level of protection than others, however. There are already numerous laws - both criminal ones as well as others – limiting freedom of expression and protecting everyone – regardless of any characteristic, inclination, or self-identification – from threats, defamation, insult (including offensive and vulgar statements), or violence.

The following should be mentioned in order to provide a general idea: the possibility of defense against defamation (Article 212 of the CC) or insult (216 of the CC). Criminal threats (Article 190 of the CC) and violation of bodily integrity (Article 217 of the CC) are criminalized. In civil law, on the other hand, liability for compensation for damage caused is provided for by articles 415 and 24 of the CC, in conjunction with articles 445 and 448. It is also impossible not to recall the civil law’s protection of personal property, which includes the possibility of demanding, among other things, the



elimination of the consequences of an infringement, or payment of compensation or damages (when property damage has been caused).

5) The bill introduces discriminatory solutions.

The explanatory memorandum to the bill insinuates that the constitutional prohibition of discrimination on any grounds is not yet fully implemented.

Meanwhile:

- Art. 32 of the Constitution⁸ prohibits discrimination on any ground and covers all Polish citizens without exception. Selecting several particular grounds, singling them out by means of an act of Parliament, and treating them in a special way does not express equal treatment, but rather its denial.
- Polish legislation conforms to all international agreements and conventions that are binding upon Poland. Poland has also fulfilled all of its obligations under EU law, as was mentioned by the Polish government⁹ as well as the Ombudsman during the tenure of the current Minister of Justice, Adam Bodnar. An analysis that was published during his tenure states that “the Republic of Poland has, for the most part, correctly implemented the European Union’s directives in the area of equal treatment within its national order”¹⁰.
- This allegation, which has been made implicitly, is unequivocally false – so much so that its entire justification, which was attached to the 2024 bill, is limited to citing Polish and foreign laws prohibiting discrimination, without providing literally *any* evidence indicating that there is less protection against discrimination for the listed groups relative to all others.

As an aside, it is worth mentioning that the explanatory memorandum to the bill claims that the “necessity” of changes to the Criminal Code is supposed to emerge from

1. 8 Art. 32 sec. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social, or economic life for any reason whatsoever.

9 *The comments of the Government of the Republic of Poland to the Commissioner for Human Rights of the Council of Europe’s Memorandum on the stigmatisation of LGBTI people in Poland*, 28.10.2020, <https://rm.coe.int/commhdh-govrep-2020-11-en/1680a091dc>

10 Maciej Kułak, Analysis of the correctness of implementation of European Union directives in the field of equal treatment to the Polish legal order. Expert opinion commissioned by the Office of the Ombudsman, 04.01.2021, www.rpo.gov.pl/pl/content/m-kulak-analiza-poprawnosci-implementowania-dyrektywy-rownosciowej.



suggestions and recommendations issued by international and European organizations. The recommendations of (a) four monitoring bodies¹¹, b) the Committee of Ministers of the Council of Europe, (c) the European Commission against Racism and Intolerance, and (d) the Fundamental Rights Agency are cited. None of these bodies have the authority to oblige member states to change their laws, however; their recommendations have no binding force. It is therefore not true that the suggestions and recommendations issued by these bodies entail the criminalization of “hate speech” (which, by the way, is also indicated by the very name of these acts being formulated as “suggestions” and “recommendations”).

6) The project aims to destabilize the concept of sex.

The current version of the bill, unlike the earlier version from March 2024, does not include “gender identity” in the list of newly-introduced protected characteristics (disability, age, sex, and sexual orientation). “This concept,” the explanatory memorandum notes, “raises interpretive doubts that were likewise raised during public consultations.”

By deleting this term from the bill, however, its authors have not abandoned their intention to redefine the basic legal concept of “sex.” Indeed, they write in the justification:

It seems that, in principle, the very phrase “in connection with sex” rather than “because of sex” should lead to an interpretation in the spirit of the Convention on preventing and combating violence against women and domestic violence.

Nevertheless, in the Convention on preventing and combating violence against women and domestic violence, also known as the **Istanbul Convention**, the notion of sex or rather *gender*, is understood as a social construct¹² rather than as an objective, biological reality.

Adopting such an understanding of gender would essentially mean that an individual's own declaration pertaining to his or her self-identification with a particular gender – i.e. his or her “gender identity” – takes precedence over his or her objectively-existing sex (biologically speaking), and thus leads to certain normative effects. To put it more simply: a man's declaration that he identifies with the female gender is supposed to result in him

11 These are treaty-monitoring bodies which were **created** separately for each of the ten UN conventions. They are intended to monitor implementation and examine compliance with the standards developed by national governments. They do not have the power to issue legally binding decisions, do not have the right to interfere in the internal affairs of the states-parties to the Convention, and are not authorized to issue legally binding interpretations of the Convention. Nonetheless, in practice they often exceed their authority.

12 Article 3 of the Convention defines gender as “the socially-constructed roles, behaviours, activities, and attributes that a given society considers appropriate for women and men”.



being granted those special rights that apply to women (and *vice versa*). For example, a male convict may declare that he identifies as a woman and should therefore be incarcerated in a women's prison for that reason alone. Alternatively, an athlete who declares that he identifies as a woman can participate in competitions that are dedicated, by design, only to women.

The bill's authors clearly state in the justification that they intend to destabilize the concept of sex by giving it the above meaning:

The term "in connection with sex" is broader, as it also includes actions for which sex is the context. In this sense, it is no longer just about behavior that is, for example, insulting because the other person is a woman (or a man), but also all other behavior for which the question of sex is relevant, regardless of which sex is involved.

If this bill is adopted, a consequence would be that a person who expresses opposition to allowing men claiming to be women into women's changing rooms (e.g. at swimming pools), restrooms, or shelters; or placing criminals convicted of rape in the same cell with a woman, could be subject to criminal liability.

7) The bill jeopardizes the freedom of expression guaranteed by Article 54 (1) of the Polish Constitution.

The assessment of this project cannot overlook its social context as well as the unquestionable fact of the controversy raised by the openly-expressed demands of LGBT organizations, many of which run counter to the basic norms on which the functioning of the family has been based, and even counter to such a basic category of human existence as biologically-determined human sexuality. Among the dozens of radical demands formulated by these organizations¹³ are those concerning the institutionalization of same-sex unions, redefinition of marriage, adoption of children by same-sex couples, access by such couples to methods of artificial insemination or surrogacy (*de facto* meaning purchasing a child), the possibility of legally "changing" one's sex based solely on a declaration by the person concerned, or the possibility of allowing irreversibly-mutilating operations to "change" sex in children.

¹³ Cf. the list of demands of the International Lesbian and Gay Association (ILGA), which constitutes a detailed articulation of the "LGBT movement's" political agenda broken down into specific types of legal solutions that are being pushed. It is available at <https://rainbowmap.ilga-europe.org/about/>.



The experience of those countries that have introduced legislation similar to that proposed in this bill demonstrates that the consequence is to radically limit the discussion of issues related to sexuality, marriage, family, and childrearing, and to eliminate perfectly legitimate views from the public debate. For example:

- Finland's Attorney General has filed a complaint against a member of the Finnish parliament (Päivi Räsänen, a former Minister of the Interior and chairwoman of the Christian Democratic party), accusing her of “inciting intolerance and hatred” against those with homosexual tendencies. She was alleged to have done this, first, by addressing via Twitter the leaders of the Evangelical Lutheran Church of Finland, of which she is an active member, and asking about the church’s official patronage of the 2019 LGBT Pride parade. This was accompanied by a photo of a passage from the Bible.¹⁴
- Madrid authorities have banned a bus from the city's roads because its exterior bore the words, “Boys have penises and girls have vaginas. Don't let yourself be fooled. If you were born a man, you are a man. If you are a woman, you will continue to be one.” This bus, which was circulating around the Spanish capital, was a response by the conservative *Hazte Oír* organization to a campaign by an LGBT organization that made use of the slogan: “There are girls with penises and boys with vaginas.” The court dismissed the charge, which had been repeated by LGBT activists and politicians, that the owners of the bus had committed a “hate crime.” It did, however, agree with the accusation that the vehicle was spreading hatred (referring to a “hate bus”) and upheld the ban on the bus being allowed on the streets¹⁵.

14 A. Teivainen, *Finnish MP charged with ethnic agitation over remarks about homosexuals*, Helsinki Times, 30.04.2021, <https://www.helsinkitimes.fi/finland/finland-news/domestic/19147-finnish-mp-charged-with-ethnic-agitation-over-remarks-about-homosexuals.html>; *When a tweet can land you in jail: Criminal charges brought against Finnish MP*, ADF International, 30.04.2021, <https://adfinternational.org/when-a-tweet-can-land-you-in-jail-criminal-charges-brought-against-finnish-mp/>.

15 P. Canto, *Boys do have penises: Spanish group runs anti-transgender message*, El Pais, 28.02.2017, https://english.elpais.com/elpais/2017/02/28/inenglish/1488280784_946152.html; G. Hedgecoe, *Anti-transgender bus loses Spanish legal battle*, The Irish Times, 3.03.2017, <https://www.irishtimes.com/news/world/europe/anti-transgender-bus-loses-spanish-legal-battle-1.2997025>.



- Norwegian feminist Christina Ellingsen is under investigation for her statement to a man (an LGBT activist, who is also the plaintiff) who identifies as a lesbian, pointing out that he cannot be a mother. She faces three years in prison¹⁶.

It is disturbing that the following examples are already considered to be "hate speech" on the basis of "sexual orientation" or (sex understood as) "gender identity":

- Critical opinions directed toward LGBT organizations and the political and social demands they propagate.

Example: YouTube removed the program *Wierzę* [English: *I Believe*], which had been published on wSensie.tv's Internet TV channel, that was dedicated to the relationship (or contradiction) between the Catholic Church's teachings and the LGBT movement's demands¹⁷. This was because the program was allegedly "spreading hate speech".

- Affirming the understanding of the family in accordance with the Polish Constitution.
Example: The adoption by some local governments of the Local Government Charter on the Rights of Families, a document which affirms marriage and family on the basis of the Polish Constitution's certified values and regulations (without any mention of "LGBT") – is regarded by LGBT activists as an expression of "hatred"¹⁸.
- Presenting science-based information on sex and family.
Example: a biology teacher at a public high school in Spain was suspended for teaching that there are only two sexes, male and female, which was said to be a manifestation of "homophobia"¹⁹.

16 G. Gluck, *Norwegian Feminist Facing Up To Three Years In Prison Over Tweets*, Reduxx. Feminist news and opinion, 25.05.2022, <https://reduxx.info/norwegian-feminist-facing-up-to-three-year-prison-sentence-over-tweets/>.

17 *Centrum Monitoringu Wolności Prasy ws. cenzury w serwisie YouTube*, Do Rzeczy, 3.08.2019, <https://dorzeczy.pl/kraj/110025/centrum-monitoringu-wolnosc-prasy-ws-cenzury-w-serwisie-youtube.html>.

18 *Prorodzinne samorzady walczą o dobre imię. Ordo Iuris pozywa działaczy LGBT*, Ordo Iuris, 9.04.2020, <https://ordoiuris.pl/rodzina-i-malzenstwo/prorodzinne-samorzady-walczą-o-dobre-imie-ordo-iuris-pozywa-działaczy-lgbt>.

19 *Hiszpania: Nauczyciel biologii zawieszony za mówienie, że istnieją tylko dwie płcie: męska i żeńska*, Interia, 7.07.2021, <https://wydarzenia.interia.pl/swiat/news-hiszpania-nauczyciel-biologii-zawieszony-za-mowienie-ze-istn>, nId,5344038.



Example: Prof. Ewa Budzyńska was accused of homophobia and reprimanded by the Disciplinary Committee of the University of Silesia for defining the family as the basic and natural cell of society, based on the union of a man and a woman²⁰.

Example: "U.S. studies show that homosexuals are more likely to suffer from mental illness and sexually-transmitted diseases than heterosexuals. This is due to the fact that they change sexual partners very often and lead very promiscuous sex lives." This text has been deemed by Amnesty International not to be false (which would require presentation of data), but to be "hate speech," which requires no evidence whatsoever²¹.

Moreover, it is significant to recognize, in the context of "hate speech" – as already stated in the 2012 bill to amend the Penal Code – that "the most prominent of the new threats . . . from which criminal law should protect" is "the phenomenon of homophobia"²². In 2024 Krzysztof Śmiszek, who was already Deputy Minister of Justice, assured us that changes to "laws to combat hate speech and crimes motivated by homophobia and transphobia are a priority for us."²³ This is regardless of the fact that the term "homophobia" includes opinions that constitute a perfectly legitimate voice in the public debate. For example, "modern homophobia," according to LGBT activists, includes:

- "perceiving LGBT political demands as unjustified"²⁴;
- believing that there is no discrimination against gays and lesbians²⁵; and
- a conviction that homosexuals act indecently and commit sin²⁶.

20 *Postępowanie przeciwko profesor za wykłady o rodzinie – Ordo Iuris interweniuje*, Ordo Iuris, 10.01.2020, <https://ordoiuris.pl/edukacja/postepowanie-przeciwko-profesor-za-wykłady-o-rodzinie-ordo-iuris-interweniuje>; *Komisja Dyscyplinarna niejednomysłna w sprawie prof. Budzyńskiej*, Ordo Iuris, 26.03.2021, <https://ordoiuris.pl/edukacja/komisja-dyscyplinarna-niejednomyslna-w-sprawie-prof-budzynskiej>.

21 *Wszyscy ludzie rodzą się wolni i równi. Pakiet materiałów edukacji praw człowieka*, Amnesty International, Warszawa 2017, s. 50.

22 The private member's bill of March 7, 2012 amending the Criminal Code Act, print no. 340.

23 *Meeting between Deputy Minister Krzysztof Śmiszek and French ambassador for LGBT+ rights Jean-Marc Berthon*, Ministerstwo Sprawiedliwości, 4.04.2024,

<https://www.gov.pl/web/sprawiedliwosc/spotkanie-wiceministra-krzysztofa-smiszka-z-francuskim-ambasadorem-ds-praw-osob-lgbt-jean-markiem-berthonem>.

24 M. Winiewski et al., *Mowa nienawiści, mowa pogardy. Raport z badań przemocy werbalnej wobec grup mniejszościowych*, Warszawa 2017, p. 22.

25 Ibid.

26 Ibid, p. 21.



Let us note that a similar phenomenon – the elimination from the public space of opinions expressed by public figures, representatives of social organizations, or citizens manifesting their views – cannot be found in relation to such categories (or groups) as disability or age. When someone mocks someone else's disability or behaves in a vulgar manner toward an elderly person, no stance is being taken, apart from mere rudeness, on a socially relevant issue. The demands made by those organizations that are working on behalf of people with disabilities generally enjoy widespread support, and their implementation is hampered mainly by state budget constraints. The situation is similar in the case of the elderly. What's more, these organizations do not accuse others of "hatred" and do not demand criminal liability for supporters of, for example, raising the retirement age or lowering pensions. This is because there is no civilizational dispute between, for instance, the able-bodied and those with disabilities, or between the young and the old.

8) The social situation does not justify special treatment for the proposed characteristics.

The justification for the bill maintains that "LGBT persons"²⁷, women, the elderly, and the disabled are subject to "mistreatment," "negative behavior," "acts of unfair and hurtful behavior," and "violent behavior".

However:

- Inappropriate, negative, or unfair behavior can affect anyone and can be associated with virtually any characteristic. This is well known to people who are homeless, ill (e.g., mentally ill or suffering from AIDS), or addicted to alcohol or drugs, as well as those with problems in their appearance, who are poor, and so on. All of this is overlooked by the bill's authors, who arbitrarily choose the characteristics that suit them.
- Countering and responding to inappropriate, negative, or unjust behavior falls primarily within the domain of education, upbringing, ethical principles, and individual responsibility. Not all inappropriate, negative, or unjust behavior needs to be criminalized.

²⁷ Who is someone like this "LGBT person," anyway? After all, all of these "orientations" are opposed to each other (lesbians are women, gays are men), and their "identities" are contradictory. Analogously, can we talk about "CMHB persons" (simultaneously Christian, Muslim, Hindu, and Buddhist)?



- The bill is about expanding the list of “protected characteristics” to include sexual orientation and, in practice, gender identity. Combining them with traits of such a fundamentally different nature²⁸ as sex, age, and disability is aimed at:
 - ✓ winning allies (women's organizations and the disabled community) in lobbying for changes to the criminal code;
 - ✓ hiding the bill's ideological nature behind positive associations related to the protection of women, the elderly, and the disabled; and
 - ✓ recognizing them as characteristics that, like sex, age, or disability, are beyond one's control.
- The social situation of people with homosexual tendencies or disturbed gender identities is in many respects better than in Western European countries: research by the Fundamental Rights Agency shows that Poland ranks among the last in Europe when it comes to respondents at schools experiencing negative comments or behavior directed against them due to belonging to one of the groups defined as “LGBTI”. Similarly, Poland is the country with the lowest incidence of ridicule, name-calling, teasing, or threats due to one's belonging to “LGBTI” groups. Poland also ranks below the EU-28 average when it comes to the level of unemployment among those who identify with “LGBTI” groups (3 percent vs. 5 percent across the EU) as well as access to medical services (only 2 percent experienced difficulties, with the EU-28 average being 3 percent.)²⁹

IV. “Hate crimes”

The bill's explanatory memorandum provides a rationale for the concept of “hate crimes,” which is particularly relevant in the context of the proposed amendment to Article 53 § 2a(6) of the CC. It is worth quoting the key passage here:

Crimes such as threats, physical assaults, destruction of property, and even murder motivated by intolerance toward certain groups in society are described

²⁸ While age, sex, and disability are objective in nature, and represent a certain factual condition, “gender identity” and “psychosexual orientation”

- a) cannot be grasped without a prior declaration by the person concerned relating to his or her own sexual preference or gender identity; such declarations sometimes vary over time, and are therefore subjective in nature (they are not defined by objective, verifiable criteria); and
- b) are at least partially defined and expressed by action. Action, in turn, is subject to evaluation and valuation - unlike, for example, skin color or sex.

²⁹ Cf. R. Dorosiński, *Sytuacja społeczna osób o skłonnościach homoseksualnych lub doświadczających zaburzeń tożsamości płciowej w Polsce*, Ordo Iuris Institute for Legal Culture, 2021.



as hate crimes or bias crimes. Hate crimes can therefore include any offense directed against a person because of his or her perceived characteristics. An important element that distinguishes hate crimes from other crimes is motivation based on prejudice. Another characteristic feature of hate crimes is that the impact of the crime extends beyond the actual victims. These crimes affect the entire group with which the victim identifies, and can lead to a social divide between the victimized group and society at large. Hate crimes therefore pose a special threat to society, and thus should not be treated like ordinary crimes.

The above argumentation is flawed for the following reasons:

First of all, crimes such as “threats, physical assaults, destruction of property, and even murder” are *always* motivated by some kind of prejudice, hostility, or hatred toward the victim. In this sense, “motivation based on prejudice” is not a “distinguishing element.” Rather, it is *the* norm and standard.

Secondly, an attempt is therefore being made to persuade us that the “distinguishing element” is a motivation stemming not from “mere” prejudice, but from prejudice “toward certain groups.” This, in turn, is nothing more than another manifestation of the consistent privileging of selectively-chosen “specific groups” of identity. Meanwhile, the sick, homeless, alcoholics, obese, poor, and many other groups are experiencing a similar situation. The crimes committed against them also “have an impact on the entire group with which the victim identifies, and can lead to a social divide between the victimized group and society at large”.

Third, the creation of a new category of crime in the form of a “hate crime” actually creates a hierarchy of social groups - a ranking of sorts in which people from selected groups are ranked higher, and those who belong to several of them are ranked highest. For example, if a person who identifies as homosexual and who is also a homeless person as well as the father of a family is beaten, the perpetrator of the first of these crimes would receive a harsher sentence simply because of the victim's sexual orientation.

Finally, the aggravating circumstances listed in Article 53 § 2 of the CC30 which are taken into account by the court in imposing punishment are mostly objective in nature (previous

30 Article 53 § 2a. Aggravating circumstances are, in particular:

- 1) a previous criminal record for an intentional crime or similar unintentional crime;
- 2) taking advantage of the helplessness, disability, illness, or advanced age of the victim;



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criminal record, taking advantage of the victim's situation, alcohol consumption, interaction with a minor) or relate to the perpetrator's modus operandi (leading to humiliation and is premeditated, while exhibiting particular cruelty). The legislator links the perpetrator's motivation to the victim's characteristics only in the case of his or her national, ethnic, racial, political, or religious affiliation, or irreligiousness. The rationale in favor of such a restriction is laid out above.

V. Conclusion

The above considerations determine the negative assessment of the draft from document no. 876 and the necessity to discontinue it entirely.

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- 3) a course of action leading to the victim's humiliation or anguish;
 - 4) the commission of a premeditated crime;
 - 5) the commission of a crime as a result of a motivation deserving special condemnation;
 - 6) the commission of a crime motivated by hatred because of the victim's national, ethnic, racial, political, or religious affiliation, or because of the victim's irreligiousness;
 - 7) acting with particular cruelty;
 - 8) committing a crime while under the influence of alcohol or another intoxicant, if this condition was a factor leading to the commission of the crime or significantly increasing its consequences; and
 - 9) the commission of a crime in cooperation with a minor, or making use of his or her participation.