

**The Status of Lesbian, Gay, Bisexual and
Transgender Rights in POLAND**
Submission to the Human Rights Council for the Universal Periodic Review
(1st session)

Introduction

This information is submitted by ILGA-Europe¹ and Campaign Against Homophobia Association in the framework of the Universal Periodic Review, to draw the attention of the Human Rights Council to human rights concerns affecting lesbian, gay, bisexual and transgender (LGBT) people in Poland.

This report is largely based on the “*Situation of bisexual and homosexual persons in Poland 2005 and 2006 Report*” produced by Campaign Against Homophobia and Lambda Warsaw Association in 2007, with the support of ILGA-Europe. The report is attached to this submission for detailed information.

Overview

In recent years, there has been a climate that increasingly threatens the basic rights and equality of lesbian, gay, bisexual, and transgender people in Poland. A series of events ranging from banning equality marches to the use by leading politicians of inflammatory or threatening language or hate speech, failure by police to provide adequate protection or even breaking up peaceful demonstrations, as well as violent demonstrations by homophobic groups. Several restrictions have been placed on the rights of the lesbian, gay, bisexual, and transgender community in Poland over the past number of years, which have been instigated and/or supported by members of the government led by Jaroslav Kaczynski and of the leading party in public statements. One such example was the government’s proposed legislation to censor all discussion of homosexuality in schools and other academic institutions presented in March 2007.

On 16 November 2007, a new government led by Donald Tusk of the Civic Platform Party was formed in Poland, after the Law and Justice Party led by Kaczynski was defeated at the legislative elections of 21 October. There are expectations placed on this newly-formed government to put an end to a pattern of acts and statements by members of the previous government that seemed intended to instigate violence, hatred and discrimination against LGBT people. The statement made by Tusk after its election that Poland would adhere to the EU Charter of Fundamental Rights – despite earlier decision of previous government to add an “opt-out” clause on the application of the Charter in Poland – is a step in the right direction, which we hope will be followed by a strong

¹ ILGA-Europe, the European Region of the International Lesbian and Gay Association, enjoys consultative status at Economic and Social Council of the United Nations (ECOSOC) and participative status at the Council of Europe. ILGA-Europe is a European NGO with more than 240 national and local lesbian, gay, bisexual and transgender (LGBT) member organisations in 47 European countries; it receives financial support from the European Commission.

commitment by the new government to protecting the rights of LGBT people on the ground.

Promotion and protection of LGBT rights on the ground – Implementation of international human rights obligations

1. Right to freedom of peaceful assembly and association (Article 21 of ICCPR)

In recent years, there have been several violations of the right to freedom of peaceful assembly of human rights defenders campaigning for equality and against discrimination based on sexual orientation in Poland. Equality marches and parades intended to provide a platform for a discussion about tolerance, anti-discrimination and respect for the rights of sexual minorities were banned in Warsaw (in June 2004 and May 2005) and in Poznan (November 2005). On 3 May 2007, the European Court of Human Rights (ECtHR) found that the ban on the equality march in Warsaw in 2005 was illegal and discriminatory (*Bączkowski and Others v. Poland*).² The former Minister of Foreign Affairs appealed the ECtHR's sentence but on September 25th 2007, the ECtHR has rejected the Polish Government's appeal.

Several UN special procedures³ have responded to cases of bans of peaceful demonstrations and public events organized by LGBT organisations. The Special Representative on the Situation of Human Rights Defenders has repeatedly expressed concerns that the banning of equality marches is based primarily on intolerance towards the LGBT community in Poland.⁴ The Special Representative has also raised concerns about the fact that homophobic statements made political figures – such as statements saying that “a parade would be ‘sexually obscene’ and offensive to other people’s religious feelings” or the “homosexuals try to infect others with their homosexuality, then the State must intervene in this violation of freedoms” – has contributed to this climate of intolerance⁵.

It is also of concern that in most cases, the bans were issued on grounds of security concerns or public order, despite the fact that security measures had been agreed to between municipalities and organizers of events. In this regard, we would like to recall that States should ensure that notions such as public order and morality, and public security is not used to restrict the exercise of the rights to freedom to peaceful assembly solely on the basis that it affirms diverse sexual orientations.

Moreover, where equality marches and prides took place, the police failed to provide adequate protection to participants on several occasions: in November 2004, the Equality Parade in Poznan was stopped when the police failed to protect the demonstrators from members of a right wing group known as the All Polish Youth who

2 The ECtHR judgment is available at www.ilga-europe.org/europe/guide/country_by_country/poland/european_court_of_human_rights_ban_on_lgbt_pride_in_warsaw_was_illegal_and_discriminatory

3 Among others, the Special Representative of Human Rights Defenders (Reports A/61/312, E/CN.4/2006/95/Add.1 and A/HRC/4/37/Add.1) and the Special Representative together with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

4 See the following reports of the Special Representative of Human Rights Defenders: Reports A/61/312, E/CN.4/2006/95/Add.1 and A/HRC/4/37/Add.1

5 Referenced in Special Representative's Report A/HRC/4/37/Add.1. Also see “Collection of homophobic statements in written media” compiled by Campaign against Homophobia available at www.ilga-europe.org/europe/guide/country_by_country/poland/collection_of_homophobic_statements_in_written_media

blocked the event; that same year, peaceful participants in the Krakow March for Tolerance became victims of physical attacks by extreme nationalist groups; in November 2005, demonstrators in Poznan were reportedly harassed and intimidated by members of the All Polish Youth. Not only does such harassment prevent peaceful demonstrators from carrying out their legitimate human rights activities, but failure to provide adequate protection against violence to persons exercising their right to freedom of peaceful assembly also constitutes a violation of article 21 of the ICCPR. In this context, we would like to recall that according to the Declaration on Human Rights Defenders, States have a responsibility for protecting defenders against violence and threats (art. 2 and 12).

2. **Right to equality and non-discrimination** (Article 26 of ICCPR; Article 2 of ICESCR)

In fulfillment of its obligations, Poland transposed the two European Union anti-discrimination directives Council Directives 2000/43 and 2000/78) into national law. As such, protection from discrimination on the grounds of race or ethnic origin is explicitly granted in employment as well as in areas such as social protection, social benefits, education, access to and provision of goods and services, including housing, as per EU Directive 2000/43. However, protection against other forms of discrimination outside employment is mainly regulated by means of general Constitutional provisions some of which are applicable only to Polish citizens, and field-specific provisions providing rights (for example) to social security, healthcare, etc.⁶ In theory, these provisions are directly enforceable against the state but in practice, Constitutional provisions are rarely invoked directly. There are no definitions of discrimination outside the employment context.⁷ A recent study conducted for the European Commission also concluded that there is little in the way of legal control of sexual orientation discrimination outside the employment context in Poland.⁸

This lack of legal clarity around the effective protection against discrimination based on sexual orientation, among other grounds, constitutes a serious limitation to the implementation of Article 26 of the ICCPR which recognizes that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”,⁹ as well as Article 2 (2) of the ICESCR stipulates that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind [...]” The current legislation in Poland does not guarantee to all persons equal and effective protection against discrimination, in particular in the enjoyment of economic and social rights. Moreover, the lack of protection against discrimination based on gender identity also constitutes a failure of the State to take all necessary legislative measures to guarantee equality before the law for everyone.¹⁰

The approval of a law providing protection against discrimination on the grounds listed in Article 13 of the European Union Treaty – which includes sexual orientation – in relation

6 The Constitution contains an equal treatment clause concerning access to health care services which specifically provides for special health care in the case of children, pregnant women, disabled people, mentally ill people and persons of advanced age, and provides the right to education without discrimination (Art. 70.).

7 Human European consultancy and Migration Policy Group, “Comparative analyses on national measures to combat discrimination outside employment and occupation”, Study carried out for the European Commission, December 2006. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

8 Ibid, p. 60.

9 Similar provisions are included in article 14 of the European Convention on Human Rights.

10 See the Yogyakarta Principles (Principle 20) at <http://www.yogyakartaprinciples.org/>

to education, social protection, access to goods and services and health care would guarantee the effective implementation of the principle of non discrimination as enshrined by the ICCPR. We strongly recommend that the State considers the adoption of a horizontal anti-discrimination law with a view to levelling up and ensuring equal substantive and procedural protection against discrimination with regard to all grounds of discrimination, including sexual orientation and gender identity.¹¹

3. Right to education (article 13 of ICESCR) and right to freedom of expression (article 19 of ICCPR)

The Polish Constitution contains a general equal treatment clause which provides the right to education without discrimination (Art. 70.). Yet, the right of everyone to education without discrimination on the basis of, and taking into account, their sexual orientation and gender identity has been severely challenged by Polish government officials over the past couple of years.

In June 2006, Mr Miroslav Sieltaycki was dismissed from his position as Director of the National In-Service Training Centre by the Minister for Education, Roman Giertych. It is reported that the reason for his dismissal was due to Mr Sieltaycki's involvement in the publication and dissemination of the Council of Europe's handbook entitled, "COMPASS: a Manual on Human Rights Education with Young People".¹²

In the spring of 2007, a legislative proposal aimed at "punishing anyone who promotes homosexuality or any other deviance of a sexual nature in education establishments" was announced by the Polish Deputy Prime Minister and Minister of Education Roman Giertych. The draft law included: dismissal, fines and imprisonment for teachers, school principals, lesbian and gay organisations and educators who do not comply with it; for instance, school administrators who allow gay rights groups to speak with pupils would be sanctioned, and health educators advocating for safer sex practices would be barred from entering schools. On 15 March 2007, the deputy Minister, Miroslaw Orzechowski, also announced that "teachers who reveal their homosexuality will be fired from work" under this legislation.

Such a proposal would seriously impede equal access to education and equal treatment of students, staff and teachers within the school system, without discrimination on grounds of sexual orientation, and would also violate the right to freedom of speech and access to information (article 19 of ICCPR). The European Commission also recognised that this proposed legislation would lead to a clear violation of the European Union anti-discrimination legislation and provisions (Directive 2000/78 on equal treatment in employment and of Article 13 of the Treaty)¹³. The draft law was strongly criticized by the European Parliament and the legislative proposal is closely monitored by the European Commission. At the moment, given the recent election of a new government, it is not clear what the fate of the draft law will be.

11 In November 2007, the HRC issued concluding observations in its review of Austria which address similar issues. (CCPR/C/AUT/CO/4/CRP.1)

12 On 27 June 2006, the Special Representative on human rights defenders and the Special Rapporteur on the right to education sent an allegation letter concerning this case expressing concern that "that his dismissal may be an attempt to prevent the dissemination in Poland of educational material that promotes universal human rights and respect for diversity".

13 "[...] were such a bill ever to be drafted, it would lead to the stigmatisation of a category of people on the grounds of sexual orientation, and for that reason it is unacceptable from the point of view of European law" (English translation). Speech of European Commissioner Vladimir Spidla before the European Parliament (18/04/07) on the « Draft declaration on homophobia in Europe and more specifically in Poland » (EMPL/G/4/GB)

The Government of Poland needs to “take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity”. The Government shall also “ensure that education is directed to the development of each student and responds to the needs of students of all sexual orientations and gender identities”.¹⁴

4. Right to security of the person (Article 20 of ICCPR)

Hate crimes

Reporting of violence and crime motivated by homophobia in Poland is highly problematic. The recent survey carried out by KPH and Lambda Warsaw Association found that as many as 85% of cases of physical violence were not reported to the police. (see attached report). Based on the report “Situation of bisexual and homosexual persons in Poland 2005 and 2006”, there are reasons to believe that the under-reporting of acts of physical violence is largely due to lack of trust in the police (e.g. fear of not being treated seriously, of harassment, and lack of effectiveness).

for public authorities to take would be to ensure effective training and awareness-raising of the police forces, in particular to challenge stereotypes against LGBT people, and to bring police forces to treat crimes motivated by homophobia as serious crimes.

¹⁴ See The Yogyakarta Principles (Principle 16)