

**Amicus curiae brief prepared by the  
Helsinki Foundation for Human Rights  
in the cases of  
Stanisław Bednarek and Others v. Poland  
Application No. 58207/14**

**EXECUTIVE SUMMARY**

- LGBTI persons in Poland are deprived of adequate legal protection against hate crimes and hate speech. Effective protection is not guaranteed by criminal law, nor can civil proceedings be regarded as an effective measure for seeking justice.
- Several attempts have been made to amend the criminal law to provide specific criminal law protection against hatred for non-heteronormative persons. However, the proposed changes have never been enacted.
- Results of studies on discrimination and violence against LGBTI persons conducted by the European Union Agency for Fundamental Rights show that the situation of non-heteronormative persons in Poland is more difficult than elsewhere in the EU.
- The absence of effective protection against hatred based on sexual orientation and gender identity in Poland should be treated as a systemic problem.
- In the case of *Bednarek and Others v. Poland*, the ECtHR has an opportunity to develop and strengthen the standard of protection against violence motivated by prejudice afforded to LGBTI persons.

**I. INTRODUCTION**

1. The Helsinki Foundation for Human Rights (“HFHR”) is a non-governmental organisation working in the field of human rights protection, whose statutory activities include, inter alia, dealing with issues related to the rights of LGBTI persons.

2. In the case of *Bednarek and Others v. Poland* the Applicants allege that they are victims of a breach of Article 3, 6, 13 and 14 of the Convention. They claim that the authorities did not investigate adequately their criminal complaints concerning the acts of violence allegedly motivated by hatred towards the LGBTI group to which they belonged. They underline that during the proceeding courts did not take into account the fact that the offences against them had been motivated by their sexual orientation.

3. In light of the scope of consent granted by the ECtHR, the amicus curiae does not refer directly to the case under review but presents instead the broader context of the situation. In particular, HFHR wants to turn attention to the effectiveness of the protection of LGBTI persons in Poland against acts motivated by prejudice. In addition we would like to discuss the attempts that have been made to reform the criminal law provisions so as to specifically criminalise hate crimes and hate speech based on sexual orientation and gender identity. Also, we would like to present the recommendations of international

bodies which have numerous times highlighted the need to provide special protection against acts motivated by prejudice against LGBTI persons in Poland.

## **II. STUDIES ON DISCRIMINATION AND VIOLENCE AGAINST LGBTI PERSONS IN POLAND**

4. The HFHR would like to draw the Court's attention to the results of a study published in 2020 by the European Union Agency for Fundamental Rights ("FRA"), which shows the scale of discrimination against LGBTI persons and their exposure to violence in the European Union Member States, including Poland. These results show that the situation of LGBTI persons in Poland is more difficult than elsewhere in the EU.

5. According to the FRA survey, 47% of non-heteronormative persons in Poland experienced discrimination in at least one of the spheres of life in at least one area of life in the year before the survey.<sup>1</sup> For the European Union as a whole, this figure was 42%.<sup>2</sup>

6. In the last 5 years, 15% of non-heteronormative persons in Poland experienced physical violence. This is the highest rate among all EU Member States (the average for the whole European Union is 11%). At the same time, 42% of LGBTI persons in Poland (38% in the EU) experienced harassment in the year before the survey.

7. Research shows that only 12% of LGBTI victims of physical or sexual attacks motivated by their gender identity or sexual orientation chose to report such attacks to the police (in the EU, 14%). In Poland, 38% of LGBTI victims said they did not report such incidents to the police because they believed that the police would not be able or willing to do anything about it anyway. Moreover, 36% of the surveyed felt that they did not trust the police, and the same percentage pointed to the fear of homophobic/transphobic reactions from police officers as the reason for not reporting homophobic attacks.

8. Notably, more than half of LGBTI persons in Poland often or always avoid certain locations for fear of being assaulted (the EU average is 33%). Compared to the EU average (61%), in Poland, considerably more persons avoid holding hands with their same-sex partner (83% of the respondents).

9. Almost 70% of LGBTI persons who took part in the study concluded that the level of intolerance and prejudice in Poland had increased over the last 5 years. Almost 90% of the respondents indicated that the main reason for this change was the negative stance and discourse by politicians.<sup>3</sup> Only 4% of LGBTI persons in Poland felt that the authorities were effectively tackling the manifestations of discrimination based on sexual orientation and gender identity.

---

<sup>1</sup> European Union Agency for Fundamental Rights, *EU LGBTI survey II. A long way to go for LGBTI equality. Country data – Poland*, 2020, [https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf). Unless otherwise stated, all other data in this chapter are taken from this source.

<sup>2</sup> European Union Agency for Fundamental Rights, *EU LGBTI survey II. A long way to go for LGBTI equality*, 2020, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbti-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf)

<sup>3</sup> European Union Agency for Fundamental Rights. *LGBTI survey II. A long way to go for LGBTI equality, LGBTI survey data explorer*, <https://fra.europa.eu/en/data-and-maps/2020/lgbti-survey-data-explorer>.

10. It is also worth noting the results of a public opinion survey conducted in Poland in 2019<sup>4</sup>, which show, among other things, that 25% of the respondents believe that homosexuality is abnormal and should not be tolerated, and more than half of the respondents considered that homosexuality is a deviation from the norm but should be tolerated. A vast majority of the respondents opposed same-sex marriages and civil partnerships (66% and 60%, respectively). 84% of the respondents were against the adoption of children by homosexual couples.

### **III. THE ABSENCE OF SPECIFIC PROTECTION OF LGBTI PERSONS AGAINST HATE CRIMES AND HATE SPEECH MOTIVATED BY PREJUDICE**

11. LGBTI persons in Poland are not guaranteed special protection against hate crimes or hate speech motivated by prejudice.

12. Polish criminal law defines hate crimes as acts committed solely on the basis of nationality, race, ethnic origin, political affiliation, religion or the lack of religious denomination.<sup>5</sup>

13. LGBTI persons who have experienced a verbal or physical attack are left to seek protection under general provisions of criminal law. Under the Criminal Code<sup>6</sup> (“CC”), the court, when imposing a penalty for an offence, should have regard to the perpetrator’s motivation. However, the above provision is of a general nature and does not explicitly require that homophobic or transphobic attitudes of the perpetrator be considered.

14. In addition, it should be noted that the offences of causing minor bodily harm (art. 157 § 2 of the Criminal Code), defamation (art. 212 CC), insult (art. 216 CC), violation of the physical integrity of a person (art. 217 CC) are offences prosecuted by private accusation. This means that a person aggrieved by such offences because of their sexual orientation bears much of the burden of prosecuting the case on their own as they must establish the identity of the perpetrator, gather evidence and prepare an indictment and argue the case in court. Under art. 488 of the Code of Criminal Procedure<sup>7</sup> (“CCP”), the police, at the request of the victim of such offences, should accept a verbal or written complaint and, if necessary, secure evidence and then send the complaint to the competent court. However, it should be noted that a study conducted by Campaign Against Homophobia in 2016 revealed that a majority of persons who decided to report diverse types of homophobic incidents to the police encountered attempts on the part of police officers to discourage them from making official reports or complaints.<sup>8</sup>

15. It should also be mentioned that prosecutors have the option to prosecute ex officio any offence prosecuted by private accusation. In such a case, the prosecution service takes

---

<sup>4</sup> Centrum Badań Opinii Społecznej, *Stosunek Polaków do związków homoseksualnych, Komunikat z Badań* (Attitudes of Poles towards homosexual relationships, a survey report), 2019, [https://www.cbos.pl/SPISKOM.POL/2019/K\\_090\\_19.PDF](https://www.cbos.pl/SPISKOM.POL/2019/K_090_19.PDF).

<sup>5</sup> Articles 119, 256, 257 of the Law of 6 June 1997 – Criminal Code (Journal of Laws of 2020, item 1444, as amended).

<sup>6</sup> Article 53 § 2 of the Criminal Code.

<sup>7</sup> Journal of Laws of 2021, item 534, as amended.

<sup>8</sup> Campaign Against Homophobia, *Hate no more: Report on Poland. Homophobic and transphobic hate crimes and the judiciary*, 2016, p.31, [https://kph.org.pl/wp-content/uploads/2016/08/hnm-raport-pl-  
www.pdf](https://kph.org.pl/wp-content/uploads/2016/08/hnm-raport-pl-<br/>www.pdf).

over the burden of conducting the entire proceedings. However, the criminal procedure does not specify the grounds for such a decision of the prosecutor, indicating in general that such a course of action is taken if an important public interest so requires (art. 60 CCP). It should be noted at this point that in Poland, the prosecution service is a hierarchical structure headed by the Prosecutor General, who is also the Minister of Justice. Legislation passed in 2016<sup>9</sup> authorised the Prosecutor General/Minister of Justice to act as a direct superior of prosecutors of organisational units of the prosecution service and to issue binding orders to other prosecutors<sup>10</sup>. In this context, it should be noted that the current Prosecutor General/Minister of Justice has taken many actions against the LGBTIs' right to equal treatment. An example of the anti-LGBTI attitude of the Minister of Justice is a case concerning the dismissal of an employee of a major furniture shop chain who, on an internal employees' forum, commented on an article describing the company's efforts to promote LGBTI equality by calling homosexuality an "abomination" and quoting the passages from the Bible which stated that gay people would be punished by death. The Minister of Justice found the dismissal of the employee "absolutely scandalous" and instructed the prosecution to immediately investigate the case.<sup>11</sup> As a result, in 2020 the prosecution service brought an indictment against a manager of the store.<sup>12</sup> She was accused of the offence of religious discrimination (restriction of rights based on religious affiliation). What is more, the Ministry of Justice financially supports projects targeting LGBTI persons. The Ministry financed a long-term project entitled *Prevention of crimes related to violation of freedom of conscience committed under the influence of the LGBT ideology* from a fund that should be used, among other things, as a source of financing of assistance for crime victims.<sup>13</sup> Consequently, it is reasonable to assume that actions of the leadership of the prosecution service may have the effect of making prosecutors afraid of exercising the option of taking over cases of offences committed against LGBTI persons prosecuted by private accusation.

16. At the same time, the lack of specific provisions that would criminalise homo- and transphobic hate speech means that, based on the existing legislation, it is not possible to hold authors of statements inciting hatred or insulting a group of people on the grounds of sexual orientation or gender identity criminally liable in a situation where it is not possible to identify a specific person who is directly harmed by a given statement. This applies in particular to general and generic statements insulting, for example, an entire

---

<sup>9</sup> Act of 28 January 2016 Law on the Public Prosecution Service (uniform text: Journal of Laws of 2021, item 66).

<sup>10</sup> Article 13 (1) and (2) of Law on the Public Prosecution Service.

<sup>11</sup> OKO.Press, *IKEA zwolniła za słowa o zabijaniu gejów. Zbigniew Ziobro i Piotr Duda oburzeni. Nie znają Kodeksu pracy?* (Zbigniew Ziobro and Piotr Duda outraged because IKEA fired a worker for statements about killing gays. Do they not know the Labour Code?), <https://oko.press/ikea-zwolnila-za-slowa-o-zabijaniu-gejow-zbigniew-ziobro-i-piotr-duda-oburzeni-nie-znaja-kodeksu-pracy/>.

<sup>12</sup> District Prosecutor's Office Warszawa-Praga in Warsaw, *Akt oskarżenia w sprawie ograniczenia praw pracowniczych ze względu na wyznanie* (Indictment for restricting workers' rights on grounds of religion), <https://warszawapraga.po.gov.pl/aktualnoci-szczegoly/items/akt-oskarzenia-w-sprawie-ograniczenia-praw-pracowniczych-ze-wzgledu-na-wyznanie.html>.

<sup>13</sup> Fundacja Strażnik Pamięci, *Przeciwdziałanie przestępstwom dotyczącym naruszenia wolności sumienia popełnianym pod wpływem ideologii LGBT* (Tackling crimes concerning violations of freedom of conscience committed under the influence of the LGBT ideology) <https://straznikpamieci.pl/projekt-prawna-obrona-wolnosci-sumienia>.

group of gay people.<sup>14</sup> For this reason, the HFHR considers that the measures of criminal law currently existing in Poland do not guarantee adequate protection of non-heteronormative persons against acts motivated by prejudice.

17. A similar point applies to the civil action for the protection of personal interests (*dobra osobiste*), which may serve as a means of protecting the rights of LGBTI persons. According to the currently prevailing line of case law, in order to successfully claim a violation of personal rights in relation to a statement that violates dignity, including on discriminatory grounds, it is necessary to show that the statement (or act) in question referred specifically to an individual rather than generally to the entire community that this individual is a member of.<sup>15</sup> This applies not only to LGBTI persons but also to members of other vulnerable groups. For this reason, in 2021 the Warsaw Regional Court dismissed the civil action brought by 16 LGBTI persons against a well-known pro-life activist who publicly called gay people “perverts” during a televised interview. An additional reason for dismissing the claims of LGBTI persons was, in the court's opinion, the fact that they did not prove their homosexual orientation, by means of appropriate medical documentation as the court was not satisfied with testimonies of the claimants or their publicly known statements about their sexual orientation.<sup>16</sup> In 2020, the Gdańsk Regional Court made a similar judgment in a case brought by an organisation acting for LGBTI persons against a foundation representing the pro-life movement. The foundation organised an action, part of which involved driving around Poland's largest cities in vans covered with degrading slogans against LGBTI persons, equating homosexuality with paedophilia. The court dismissed the action of the LGBT organisation in this case.<sup>17</sup>

18. In this context, one should refer to the observations made by the Ombudsman, who stated that “[a] review of judicial decisions – also those made in civil matters – allows us to conclude that courts grant legal protection to statements with elements of homophobic hate speech as they consider such statements made in the exercise of freedom of speech, but do not afford the same protection to statements critical of public persons using hate speech.”<sup>18</sup>

---

<sup>14</sup> Rzecznik Praw Obywatelskich, *Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich* (The legal situation of non-heterosexual and transgender persons in Poland. International standard for the protection of human rights of LGBT persons and the state of its implementation from the perspective of the Ombudsman), p. 27, [https://www.rpo.gov.pl/sites/default/files/Sytuacja\\_prawna\\_raport\\_ZRT.pdf](https://www.rpo.gov.pl/sites/default/files/Sytuacja_prawna_raport_ZRT.pdf).

<sup>15</sup>Ibidem, p. 29.

<sup>16</sup> Judgment of the Warsaw Regional Court of 12 January 2021, case no. XXV C 2147/18, the judgment can be appealed. See also: OKO.press, *Chcesz skarżyć Kaję Godek? Udowodnij, jakiej jesteś orientacji. „Sąd naruszył moją godność”* (Want to sue Kaja Godek? Prove your orientation. “The court violated my dignity”) <https://oko.press/sad-oddala-pozew-przeciwko-godek/>.

<sup>17</sup> Judgment of the Gdańsk Regional Court of 15 July 2020, case no. I C 1134/19. This judgment was overturned on formal grounds by the Gdańsk Court of Appeal (judgment of 11 May 2021, case no. I ACa 2014/21) and the case will be re-examined by the court of first instance. However, the same court had earlier granted injunctive relief during the proceedings and temporarily banned the display of certain slogans and graphics.

<sup>18</sup> Rzecznik Praw Obywatelskich, *Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce. Międzynarodowy standard ochrony praw człowieka osób LGBT i stan jego przestrzegania z perspektywy Rzecznika Praw Obywatelskich* (The legal situation of non-heterosexual and transgender persons in Poland.

19. It is further worth emphasising that bringing a civil action for the protection of personal interests involves the necessity to conduct a formal dispute before a court. Such a dispute involves, *inter alia*, the obligation to observe the rules of evidence and to prove one's arguments in accordance with the principles of the distribution of the burden of proof. In addition, there is the rule that the filing of a lawsuit, as well as an appeal against an unfavourable resolution of such a lawsuit, involves the necessity to pay appropriate fees. If the claimant loses the dispute, they must reckon with the necessity to pay the costs of the proceedings to the other party. As a result, it should be recognised that civil proceedings concerning violations of personal rights cannot be considered an effective remedy to protect the rights of LGBTI persons.

#### **IV. ATTEMPTS TO REFORM CRIMINAL LAWS ON HATE CRIMES AGAINST LGBTI PERSONS**

20. Several attempts have been made to reform the criminal law provisions so as to specifically criminalise hate crimes and hate speech based on sexual orientation and gender identity, but the proposed changes have never been enacted.

21. To the HFHR's knowledge, the first proposal to amend the criminal law aimed at prohibiting hate crimes and hate speech motivated by homophobia and transphobia was submitted to the Sejm in 2011.<sup>19</sup> It envisaged adding gender identity and sexual orientation, but also sex, age and disability to the catalogue of legally protected characteristics. In a position statement submitted at that time, the Government did not take an unequivocally positive or negative stance towards the proposed amendments, indicating that they require careful analysis at the stage of the legislative process. Importantly, the Government then noted that the adoption of the proposed amendment could result in "an increase in State Treasury expenditure resulting from the need to provide adequate staffing for the prosecution service and law enforcement agencies, as well as the need for the State Treasury to cover other procedural expenses".<sup>20</sup> The increasing expenditure would result from the fact that some of the acts hitherto prosecuted by private accusation would constitute offences prosecuted *ex officio*. On the other hand, a generally positive assessment of the draft was presented by the Prosecutor General, who pointed out that the then-existing "protection of persons belonging to the social groups referred to in the proposal [i.e. LGBTI persons, persons with disabilities, the elderly] against discriminatory behaviour is insufficient, impeded or even impossible."<sup>21</sup> It should be stressed that between 2010 and 2016 the Prosecutor General was an independent body separated from the Government.

---

International standard for the protection of human rights of LGBT persons and the state of its implementation from the perspective of the Ombudsman), p. 34.

<sup>19</sup> The Sejm of the 6th Term, parliamentary paper no. 4253, *Parliamentary proposal of a law amending the Criminal Code*, <https://orka.sejm.gov.pl/Druki6ka.nsf/0/426E6F5F4F91E685C125789D00302F25?OpenDocument>.

<sup>20</sup> Government's position statement on parliamentary paper no. 4253, <https://orka.sejm.gov.pl/Druki6ka.nsf/0/D504B4BC4A8A70AAC12578FE003773E2?OpenDocument>.

<sup>21</sup> Prosecutor General's position statement on parliamentary paper no. 4253, [https://orka.sejm.gov.pl/Druki6ka.nsf/0/4352CBA5783F2974C12578AF0046FD74/\\$file/4253-002.pdf](https://orka.sejm.gov.pl/Druki6ka.nsf/0/4352CBA5783F2974C12578AF0046FD74/$file/4253-002.pdf).

22. As many as three proposed amendments<sup>22</sup>, comparable, or very similar, to the 2011 proposal, were tabled in the Sejm in 2012. Notably, the Government took a negative stance towards the proposed measures at the stage of parliamentary works, pointing to, among other things, difficulties in defining such notions as “sexual orientation” or “gender identity.” The Government stressed that “[a] relevant issue in the context of the intended extension of the motives for discriminatory acts, in particular one that would include gender, gender identity or sexual orientation, may be problems with the interpretation of the scope of the constituent elements of the offences set out in the amended legislation. The source of such concepts as gender, gender identity and sexual orientation are in fact instruments of international law, which may give rise to problems of universal restatement of their content in the context of a prohibition arising from the provisions of domestic criminal law.”<sup>23</sup> In his comments on one of the proposals, the Prosecutor General noted that it “aims to enhance the criminal law protection of the dignity and personal inviolability of persons on the grounds of sex, gender identity, age, disability or sexual orientation”, but noted that the use of the concept of “gender identity” may violate the standards of clarity of criminal law.<sup>24</sup> Another relevant proposal was submitted by Sejm deputies in 2014.<sup>25</sup> However, also in this case, the Government’s assessment of the amendment was negative.<sup>26</sup> None of the discussed proposals was adopted and legislative work on them ended with referrals to parliamentary committees after their first reading in the Sejm.

23. Proposals seeking to guarantee legal protection against hate crimes committed against LGBTI persons have also been tabled in the Sejm of the 8th Term. A proposal submitted in 2016<sup>27</sup> was defeated at its first reading in the Sejm, while a proposal submitted in 2018 was sent to the first reading but never went to vote<sup>28</sup>. One of the arguments raised in the position statements submitted to the Sejm on this proposal,

---

<sup>22</sup> Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 7th Term, parliamentary paper no. 340, <https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=340>; Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 7th Term, parliamentary paper no. 383, <https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=D212A5750803BB4AC12579F900300667>; Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 7th Term, parliamentary paper no. 1078, <https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=FFF40D49D8014150C1257B0A00363700>.

<sup>23</sup> Government’s position statement on parliamentary paper no. 383, <https://orka.sejm.gov.pl/Druki7ka.nsf/0/2AB2AC6864B5DD72C1257A67004A6F74/%24File/383-s.pdf>.

<sup>24</sup> Prosecutor General’s position statement on parliamentary paper no. 340, <https://orka.sejm.gov.pl/Druki7ka.nsf/0/0FDAF39CDF30F8ABC12579F90058F975/%24File/340-001.PDF>.

<sup>25</sup> Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 7th Term, parliamentary paper no. 2357, <https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2357>.

<sup>26</sup> Government’s position statement on parliamentary paper no. 2357, <https://www.sejm.gov.pl/sejm7.nsf/druk.xsp?documentId=540F798558839E90C1257D1000210273>.

<sup>27</sup> Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 8th Term, parliamentary paper no. 878, <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?documentId=F8E907EAD05C3F95C1258037003977B7>.

<sup>28</sup> Deputy-sponsored proposal of a law amending the Criminal Code, the Sejm of the 8th Term, parliamentary paper no. 2301, <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?documentId=52971D10D3720785C1258241003E717B>.

including those drafted by the Government<sup>29</sup> and the National Council of the Judiciary<sup>30</sup>, emphasised that the changes sought were unnecessary given the sufficient protection against offences motivated by prejudice against LGBTI persons afforded under criminal and civil law.

24. During the present parliamentary term, an opposition party tabled in 2019 a similar proposal, which now awaits consideration.<sup>31</sup> The Government<sup>32</sup> and the Prosecutor General<sup>33</sup> reiterated their positions that any amendments to the Criminal Code were unnecessary. However, one should note the position taken by the National Council of the Judiciary, which seems to have wanted to vigorously emphasise its opposition to any extension of legal protection against hate crimes for LGBTI persons, persons with disabilities or persons singled out on the basis of age. The Council argued as follows: “In the Council’s view, it would be equally possible, and equally useful, to distinguish such sets of natural distinctions, such as the bald, the short-sighted, the deaf, etc., as well as distinctions of predilection or habit, such as alcoholics, promiscuous persons, gamblers, cat owners, etc. It is obvious that groups of such persons are also exposed to acts or omissions constituting violence or unlawful threats.”<sup>34</sup>

25. The above review of legislative developments shows that the introduction of specific criminal law protection against offences motivated by prejudice has never been high on the agenda of those in power. However, initially, bodies such as the Prosecutor General recognised the need for, and relevance of, such changes. In recent years, on the other hand, proposals aimed at broadening the definition of hate crimes have met with staunch opposition from the government and associated institutions.

## **V. THE STANCE OF INTERNATIONAL INSTITUTIONS ON THE LACK OF CRIMINAL LAW PROTECTION OF LGBTI PERSONS FROM HATE CRIMES**

26. It is worth noting that many international institutions have called on Poland to amend its criminal laws and provide special protection against acts motivated by prejudice against LGBTI persons.

27. In 2015, the European Commission against Racism and Intolerance<sup>35</sup> (“ECRI”), pointed to the need to recognise sexual orientation and gender identity as characteristics legally protected by criminal law. The ECRI stressed that “the Criminal Code does not

---

<sup>29</sup> Government’s position statement on parliamentary paper no. 2301, <https://orka.sejm.gov.pl/Druki8ka.nsf/0/5DBB1437088CA248C12582B90045B4BA/%24File/2301-s.pdf>.

<sup>30</sup> National Council of the Judiciary’s position statement on parliamentary paper no. 2301, <https://orka.sejm.gov.pl/Druki8ka.nsf/0/6A9FB506F7B158AAC1258294002D9C22/%24File/2301-003.pdf>.

<sup>31</sup>The Sejm of the 9th Term, parliamentary paper no. 138 <https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=138>.

<sup>32</sup> Government’s position statement on parliamentary paper no. 138, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/E924B09453C654DFC125857000430679/%24File/138-s.pdf>

<sup>33</sup> Prosecutor General’s position statement on parliamentary paper no. 138, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/95DE34FF6CAD6E76C12584FC00407AFA/%24File/138-003.pdf>.

<sup>34</sup> National Council of the Judiciary’s position statement on parliamentary paper no. 138, p. 2, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/B1041E56A848D2CBC1258505004B020E/%24File/138-004.pdf>

<sup>35</sup> European Commission against Racism and Intolerance, *Report on Poland (fifth monitoring cycle) adopted on 20 March 2015*, <https://rm.coe.int/fifth-report-on-poland/16808b59a0>.



explicitly prohibit incitement to violence, hatred and discrimination, or public insults and defamation, or the making of threats, on grounds of sexual orientation or gender identity. Homo/transphobic violence is present in schools, while homosexuality is still seen by a large section of the population as a disease and transgender persons are subject to certain instances of discrimination in access to healthcare.”<sup>36</sup>

28. Similar recommendations were formulated by the UN Human Rights Committee<sup>37</sup> in 2016. As the Committee emphasised, it “is concerned about the reported increase in the number of incidents of violence, hate speech and discrimination based on race, nationality, ethnicity, religion and sexual orientation and the insufficient response by the authorities to such incidents. The Committee is also concerned that the [Criminal] Code does not refer to a disability, age, sexual orientation or gender identity as grounds for hate crimes (arts. 2, 3, 18, 20, 26 and 27 [of the International Covenant on Civil and Political Rights]).”<sup>38</sup> To address this shortcoming, the Committee recommended amending criminal law and called for the effective investigation and prosecution of prejudice-related crimes.

29. Similar recommendations were made, inter alia, within the framework of the Universal Periodic Review by the UN Human Rights Council<sup>39</sup> in 2017. It is noteworthy that the Government has highlighted the recommendations calling for the extension of criminal law protection for LGBTI persons from hate crimes and has not made any reservations in this regard. However, in 2018, the Ministry of Justice responded to a question from a non-governmental organisation by stating that the implementation of the recommendations under the 3rd Cycle of the UN Universal Periodic Review, which envisaged the expansion of the catalogue of hate crimes by adding those related to sexual orientation, gender identity, age, gender and disability, is not among the most urgent and relevant social needs, justice system needs and recommendations of international organisations, and for this reason, no work on their implementation was carried out.<sup>40</sup>

30. Notably, the Ombudsman has repeatedly advocated for the need to introduce special protection against hate crimes for non-heteronormative persons under the aegis of domestic law. An appropriate amendment of criminal law is one of the key Ombudsman’s postulates in this area.<sup>41</sup> On this occasion, the Ombudsman made the following observations: “Complaints received by the Ombudsman, as well as data from other sources, confirm the ineffectiveness of the national system of legal protection for this social group. Although the international standard for the protection of the human rights of LGBT persons has been progressively developing, also owing to the case law of the

---

<sup>36</sup> Ibid., p. 10.

<sup>37</sup> Human Rights Committee, *Concluding observations on the seventh periodic report of Poland*, 23 November 2016, CCPR/C/POL/CO/7, <https://digitallibrary.un.org/record/1317457>.

<sup>38</sup> Human Rights Committee, *Concluding observations on the seventh periodic report of Poland*, 23 November 2016, CCPR/C/POL/CO/7, p.3.

<sup>39</sup> UN Human Rights Council, Universal Periodic Review of Poland, 3rd Cycle, Thematic list of recommendations, May 2017 [https://lib.ohchr.org/HRBodies/UPR/Documents/Session27/PL/UPR27\\_Poland\\_ThematicList\\_of\\_Recommendations\\_E\\_2.docx](https://lib.ohchr.org/HRBodies/UPR/Documents/Session27/PL/UPR27_Poland_ThematicList_of_Recommendations_E_2.docx).

<sup>40</sup> Letter from the Ministry of Justice to the Polish Society of Anti-Discrimination Law dated 2 March 2018, ref. DL-IV-082-1/18, <https://www.facebook.com/StowarzyszeniePTPA/posts/1594655180650653>.

<sup>41</sup> Letter from the Ombudsman to the Minister of Justice dated 14 May 2020, ref. XI.503.3.2020.MA, p. 2, <https://bip.brpo.gov.pl/sites/default/files/Do%20MS%20ws%20sytuacji%20LGBTI,%2014.05.2020.pdf>

European Court of Human Rights and the Court of Justice of the European Union, the level of implementation of this standard in the laws and practice of its application in Poland has remained unchanged for years.”<sup>42</sup>

31. In this context, it should be pointed out that, according to the Rainbow Europe ranking prepared by ILGA Europe in 2021, 28 out of 49 European countries covered by the ranking provided for specific protection against hate crimes based on sexual orientation in their legislation.<sup>43</sup> Hate speech against gay persons is criminalised by 32 out of 49 European countries<sup>44</sup>. These figures show that the majority of countries located in Europe are in favour of affording this group special protection against crimes committed on discriminatory grounds.

## VI. CONCLUSIONS

32. With the above considerations in mind, we would like to present the following conclusions:

- In the case of *Bednarek and Others v. Poland*, the ECtHR has an opportunity to develop and strengthen the standard of protection against violence motivated by prejudice afforded to LGBTI persons.
- Currently, LGBTI persons in Poland are deprived of effective legal protection against hate crimes and hate speech. Effective protection is not guaranteed by criminal law, nor can civil proceedings be regarded as an effective measure for seeking justice.
- Several attempts have been made to amend the criminal law to provide specific criminal law protection against hatred for non-heteronormative persons. However, this issue has never been considered important enough by those in power to bring about changes in legislation.
- The absence of effective protection against hatred based on sexual orientation and gender identity in Poland should be treated as a systemic problem.
- The Court's judgment in the present case will be of significant importance not only for the Applicants, but also for all LGBTI persons in Poland and Europe who seek protection from violence and hatred.

---

<sup>42</sup> Letter from the Ombudsman to the Minister of Justice dated 14 May 2020, ref. XI.503.3.2020.MA, p. 1, <https://bip.brpo.gov.pl/sites/default/files/Do%20MS%20ws%20sytuacji%20LGBTI.%2014.05.2020.pdf>.

<sup>43</sup> ILGA Europe, *The 2021 Rainbow Europe Map*, <https://www.rainbow-europe.org/#0/8693/0>.

<sup>44</sup> Ibidem.