
Janusz Jartyś¹

EUROPEANISATION AND INTERNATIONALISATION OF LGBT RIGHTS IN POLAND

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ABSTRACT: The development of the civil society in Poland post-1989 has put the LGBT movement on the map of the country's social landscape. As a corollary, it has also led to a greater social engagement of the non-heterosexual community striving for recognition of its demands. The establishment of the Campaign Against Homophobia (KPH) and the spread of the Internet in Poland have raised the Polish society's awareness of the LGBT movement and made it part of the country's political discourse. On the other hand, the perceived threat to the established conservative values of the Polish society has galvanised the opponents of the non-heterosexual community and its demands. The resulting dispute between the supporters and opponents of the LGBT movement and its professed ideas has placed the issue on the agenda of the Polish political parties.

1. CONTROVERSIES AROUND EUROPEAN LGBT REGULATIONS IN POLAND

The rights of non-heterosexual persons are an important part of the social discourse in Poland. The fault line runs within the society and among its political parties. Those advocating that European human rights standards should be used with regard to the LGBT community are usually

¹ Janusz Jartyś, Department of Political Science and European Studies, Institute of Political Science and European Studies, Faculty of Humanities, University of Szczecin, Poland, janujar.eu@gmail.com.

on the left side of the political scene. Sometimes, their demands are seized on by those in the centre of the political spectrum. Right-wing political parties are firmly opposed. For years, the dispute revolved around demands for legalisation of same-sex partnerships in Poland and manifestation of non-heterosexuality in the public sphere. Unlike in Western European countries, non-partisan consensus on the issue is far from being reached. For this reason, the Polish LGBT movement attaches particular importance to European human rights standards and their internationalisation in our country (Jartyś 2007)². International visibility of the problems faced by the Polish LGBT movement would mean that the rights of its members arising from Poland's membership of the EU are complied with, and that attempts to encroach on those rights are thwarted.

The problem of non-heterosexuals in Poland surfaced internationally during Poland's EU accession process when Ewa Haczyk, a spokeswoman for Jan Kułakowski, the then chief negotiator for Poland in its negotiations with the European Union, made the following homophobic statement: "*No citizen of the Union may be discriminated against because of sexual orientation, religious beliefs, etc. That's one thing. Homosexuals are another mat-*

² Even before the European Union was formed, the members states of the Communities took an interest in the social situation of the LGBT persons in the united Europe. As early as 1984, a commission was set up in the European Parliament with a view to preparing a report on discrimination against non-heterosexuals in the member states. This effort brought tangible results ten years later. In 1994, the Committee on Fundamental Freedoms and the Committee on Home Affairs in the European Parliament adopted the *Report on equal rights for lesbians and gays in the European Union*, which described the scale of discrimination against homosexuals in the member states. Reflecting these actions is Article 13 of the Amsterdam Treaty which provides as follows: "*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*" Apart the Treaty, the Council also adopted a directive in 2000 banning discrimination in the workplace. Of importance, too, are the provisions EU Charter of Fundamental Rights, first adopted during the Nice summit and later incorporated into the Treaty of Lisbon. Moreover, in December 2013, the European Parliament recommended that EU member states should recognise equality of heterosexual and same-sex couples.

ter, and this is regulated by national legislation. Their position within the Polish society will therefore depend on our legislators. So, no-one is going to force it upon us how we should treat them” (Raport 2002). Human rights organisations protested against inclusion in Poland’s EU Accession Treaty of a safeguard clause restricting applicability of human rights in the social sphere to Polish citizens. Following a protest campaign and a letter addressed to Leszek Miller, then Prime Minister of Poland, the clause was never adopted (Jartyś 2007). A similar problem arose in relation to Poland’s ratification of the Lisbon Treaty with its Charter of Fundamental Rights. The document, which enshrines a set of human rights into EU law, met with a number of objections in Poland. Among other things, the objections were to the EU’s influence Polish legislation relating to family matters. The message used in the public discourse was that, as soon as Poland ratifies all provisions of the Charter of Fundamental Rights, the country would have a future obligation to adopt regulations legalising same-sex partnerships. Other Charter objections were related to ownership and its different regulation across Poland, especially on some territories which were taken over from the then Germany after 1945. The Polish government was concerned that, when adopted, the Charter would allow German citizens to pursue claims against the Polish state relating to property they had left behind in Poland. Ultimately, Poland ratified the Charter of Fundamental Rights with limitations provided for in the British Protocol, as a result of which not all of the provisions of the Charter are applicable to Polish citizens. The controversies around the Charter of Fundamental Rights became an important aspect of the 2007 electoral campaign. Donald Tusk, then leader of the Civic Platform, failed to keep the promises to ratify the entire Charter. During his electoral debate with Jarosław Kaczyński, who was then Prime Minister, Tusk said the Charter of Fundamental Rights would be ratified without mentioning any limitations on it (Jartyś 2015). Using the matters of lifestyle as a pretext for Poland not to adopt all of the Charter of Fundamental Rights seems very problematic given the text of the Charter. Indeed, Article 9 of the Charter of Fundamental Rights provides as follows: “*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*” (Hambura, Muszyński 2001). Perhaps the fact that the

Charter was not adopted fully was a condition for the ratification of the Lisbon Treaty by Lech Kaczyński, the then President of Poland. On the other hand, the Civic Platform did nothing whatsoever to adopt all of the Charter later when Bronisław Komorowski, a politician from the party's own ranks, became the head of state. As such, then, whatever demands the Polish LGBT community put forward, they were only paid lip service in 2007–2015 when the power in Poland was in the hands of the coalition government formed by the Civic Platform and the Polish Peasants Party (PSL). Even though attempts were made to introduce subsequent civil partnership bills to the parliament, they were defeated each and every time. The reason was the lack of political will among parliamentarians from the ruling coalition, caused by differences of opinion and absence during voting. Even though they were using the concept of equality for the LGBT community for their own ends, those ruling Poland over the last decade have not changed their mental attitude towards European human rights standards in relation to non-heterosexuals.

Legal framework is another thing that has not changed. Indeed, in the period under consideration, Poland put forward proposals internationally for stricter regulation. Addressing the problem with Polish ratification of the Charter of Fundamental Rights at an informal meeting of EU's education ministers, Roman Giertych, then Deputy Prime Minister, Minister of National Education, and a member of the League of Polish Families (LPR) in the cabinet of Jarosław Kaczyński, presented a vision of the "Great Charter of Nations" containing a set of guiding values for the European Union. Among his proposals were a total ban on abortion and homosexual propaganda. Deputy Prime Minister Giertych showed a draft of his Great Charter of Nations at a part of the meeting that was closed to the press. He then made the following statement: "*We call for a Europe-wide ban on abortion and homosexual propaganda in order to protect life. In our view, discussing the European constitution is moot until we have had a discussion of fundamental values*" (Starzyńska-Rosiecka, *Giertych za stworzeniem Wielkiej Karty Praw Narodów*). The remarks in Heidelberg by the Polish government's representative attracted widespread criticism

from the European press and politicians. Among others, they were addressed by Doris Pack, the then chair of the European Parliament's Committee on Culture and Education. Speaking for *Der Spiegel*, she said: "If we hold tolerance as an important value, then we need to abide by it ourselves and not profess fundamentalist principles which we cannot subscribe to. What an outrage!" (*Minister wywołał skandal*). Notably, the scathing response to what then current Polish Deputy Prime Minister and Minister of Education said came from an MEP for CDU, a party that openly professes Christian and democratic values. Following the wave of criticism and the uproar caused by Giertych's proposal, a discussion ensued among the Polish political class, too, because it was not quite certain whether the call reflected the position of the Polish government. The issue was addressed by Prime Minister Jarosław Kaczyński during his press conference on 5 March 2007. The head of the Polish government said that Deputy Prime Minister's words were not the position of the Council of Ministers. Kaczyński also made a point of saying that Deputy Prime Minister did not consult him about the Heidelberg statement. Kaczyński added, however, that he was a supporter of a ban on the form of abortion available in Poland, and that he was opposed to homosexual propaganda, especially in schools. By distancing himself from Giertych's absurd statement which made Poland the subject of ridicule in Western Europe, Kaczyński was in a damage limitation mode for his government, which the European public opinion perceived as eurosceptic and unwilling to accept European social values.

2. FREEDOM OF ASSEMBLY FOR LGBT IN POLAND AND ITS INTERNATIONAL DIMENSION

The controversies surrounding Poland and the LGBT movement, as analysed above, also extend to freedom of assembly. In autumn 2005, the Equality March moving through the streets of Poznań was dispersed by the police. First, Ryszard Grobelny, then Mayor of Poznań, did not give his consent for the march; after that, the march

was stopped by Wielkopolska Governor, a member of the Democratic Left Alliance (SLD). The events in Poznań galvanised international public opinion. More than 100 people demonstrated in front of the Polish embassy in Berlin, demanding that Poland respects the rights of the LGBT community. Volker Beck, a Green Party member in the German Bundestag, who took part in the manifestation, reminded that each member state of the European Union had a fundamental obligation to protect each and every minority. He also said he would submit a petition to German Chancellor Angela Merkel and Foreign Minister Frank Steinmeier concerning treatment of non-heterosexual persons in Poland and demanding that the issue be raised during a visit of the head of the German government in Warsaw on 2 December 2005. Michael Kramer, another Green Party member, stated that what happened in Poland reminded him of the darkest pages in the German history, and assured the Polish gay community of the Germans' support and solidarity. A group of participants in the demonstration held up posters reading "Urlaub in Polen? Nein, danke. Solidarność z polskimi gejami!" (Jartyś 2007). The events in Poznań resulted in a court case, too. Poznań Administrative Court ruled that Poznań Mayor's ban on the Equality March, later upheld by Wielkopolska Governor, was incompatible with Polish law and European regulations. Krystyna Gęsicka, the presiding judge, stressed that, when deciding on a potential ban of any manifestation, local government authorities should take into account international conventions ratified by Poland, including especially the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights. In its statement of grounds, the judgment criticised Poznań Mayor's arguments underlying his refusal to allow the Equality March. Grobelny claimed it was not possible to ensure safety of the organizers and participants in the manifestation. The court held that, in claiming so, Poznań Mayor broke the law because ensuring safety whenever the constitutional right of freedom of assembly is exercised is a fundamental duty of any local government authority in a democratic state (Jartyś).

International reverberations of the Poznań events in 2005 and the Poznań Administrative Court's judgment helped to delineate clearly the limits to the freedom to demonstration in Poland as a EU member state.

Firstly, internationalisation of the problem raised its visibility, and made it impossible to sweep the issue under the rug as an internal state policy affair. Indeed, it turned out that human rights in the UE are not a value in its own right but they are also the subject of international law. For the Polish political elites of the time, this was also a signal that, as far as the LGBT rights were concerned, they had to operate within the European human rights standards. Secondly, Poznań Administrative Court's judgment made it clear that local government authorities were subject to law and public scrutiny, and that the public would not be fooled by the ostensible considerations of safety for participants in LGBT manifestations or alleged violations of traffic laws. Thirdly, internationalisation of the problems which the Polish LGBT movement was faced with triggered a debate over legal boundaries of the freedom of manifestation in Poland. In its wake, Prof. Andrzej Zoll, the then Ombudsman, filed a request with the Polish Constitutional Tribunal asking about the limits to the freedom of assembly in Poland. Among the questions he asked was one concerning traffic regulations and whether they could be relied on by local government authorities to disallow manifestations on legal grounds, which is how then Mayor of Warsaw, Lech Kaczyński, justified his ban on the Equality March in June 2005. According to the Ombudsman, this could be in violation of the constitutional right of freedom of assembly (Constitution of the Republic of Poland). In response to the Ombudsman's enquiry, the Constitutional Tribunal fast-tracked the case and heard it on 18 January 2006, with Prof. Ewa Łętowska, Poland's first Ombudsman, presiding over the hearing. In its ruling, the Constitutional Tribunal held that freedom of assembly in Poland cannot be subject to restriction. The essence of freedom in a democratic country is that individuals should decide by themselves when they want to use such freedom. The Tribunal also held that local government authorities should only be notified of any planned rallies or marches, and must then take every available precaution to make sure the marchers are safe (Kozyra 2006). Also, democratically elected authorities cannot establish the standards of what is moral and choose which manifested beliefs are right and which are not (Constitutional Tribunal rulings). Two fundamental issues are worth considering when analysing the Constitutional Tribunal's ruling on freedom of assembly in

Poland. Firstly, the speed with which the Tribunal considered the Ombudsman's request had as its underlying reasons the internationalisation of the problem of LGBT assemblies and the reaction of European politicians and part of the general public. Secondly, it will be remembered that the atmosphere around the LGBT movement was particularly unfavourable at the time, with Law and Justice (PIS), a party long known for its aversion to the LGBT movement and its public demands, taking over the helm as Poland's government. Importantly, the autumn 2005 election resulted in Lech Kaczyński, notorious for his bans on LGBT manifestations while in office as Mayor of Warsaw, became the President of Poland. Thirdly, the verdict of the Constitutional Tribunal, which found that freedom of assembly in Poland is permanent, has become a milestone in the consolidation of democracy in Poland. Paradoxically, the Tribunal's freedom-of-assembly verdict, itself a consequence of internationalising the problem of the LGBT movement in Poland, is now used by all social groups. Indeed, had it not been for this determination of rules regarding freedom of manifestation in Poland, thousands could not have gathered subsequently protesting against Poland's ratification of ACTA or during annual Independence Marches. Fourthly, and lastly, marches and parades by non-heterosexuals in Poland and the problem of their organisation found their way to the European court system (*Zakaz Kaczyńskiego przed Trybunałem*). The Helsinki Foundation for Human Rights filed a complaint with the European Court of Human Rights concerning the ban on the Warsaw Equality Parade in June 2005 (Siedlecka 2007). In early 2007, the European Court of Human Rights held that Lech Kaczyński's ban on the Equality Parade in the summer of 2005 was illegal. Kaczyński violated the right of to freedom of assembly, and he also abused the freedom of expression when he said that the parade was a "promotion of homosexuality". Both the applicants and the Campaign Against Homophobia organisation (KPH) welcomed the judgment (*Bączkowski i wszyscy przeciw Polsce 1:0*).

Problems involved in the organisation of Equality Parades in 2004–2005 gave rise to the European Parliament's resolution of 14 June 2005 which singled out Poland as a country with rampant homophobia (Zadura 2006). The resolution was controversial, not least because it was supported by votes of some left-leaning Polish MEPs. Accusations were subsequently

floated during political debates that the action was against the interests of Poland in the European Parliament, and showed a lack of national solidarity. However, it was exactly because of these steps that the Equality Parade in 2006 could proceed peacefully along the streets of Warsaw, and Thomas Urban, a German correspondent for “Sueddeutsche Zeitung”, could report that: “The authorities in Warsaw proved that are serious about the values of the European Union. There were no clashes with nationalists and hooligans, and the police showed efficiency in action” (*Sueddeutsche Zeitung chwali polskie władze*). When the Law and Justice party was in power in 2005–2007, issues concerning the LGBT rights in Poland would attract comments from European politicians on a number of other occasions. These issues had to be addressed by Polish politicians, too, on their foreign trips. During the Warsaw Equality Parade in June 2006, Claudia Roht, who was then chair of the German Greens, had this to say: “This is a great celebration of democracy. Gays in Poland can always count on their European friends.” (Miesnik 2006). During the same march, a Swedish conservative politician Christofer Fllejner criticised the statements by Polish politicians by saying: “I knew Poland as a tolerant country. That’s why I am surprised to hear Wojciech Wierzejski inciting intolerance against minorities. This is plain stupidity, not conservatism” (Dubrowska, Fusiecki, Machajski 2006). Renate Kuenast, a member of the Bundestag, reminded of the European values: “The European Union is more than an economic community. It is built on common values, one of which the principle of freedom and social solidarity. That’s why we are here to support the rights of gays and lesbians” (Dubrowska, Fusiecki, Machajski). Lastly, speaking to the Irish National Forum on Europe during his visit to Ireland on 20 January 2007, President Kaczyński had to explain his negative attitude towards LGBT people. He said he was not a homophobe and that there were people affected by homosexuality among his friends. It is one thing, he said, to believe these people are entitled to all rights or can be promoted, but it’s quite another thing to believe that what we call a homosexual culture is to be a simple alternative to a heterosexual culture. According to Kaczyński, homosexuality was presented freely and treated as one of many choices. “That’s what am against” (...). He stressed that homosexuality has been a trend and is here to stay. “I am not going to fight it in a sense

of forcing people to be treated for it” (*Prezydent w Dublinie: Jestem za karą śmierci*).

The internationalisation of the problems of non-heterosexual people in Poland intensified the backlash against the governing the Law and Justice party in 2005–2007. It became an important element of the social climate with its demands for political change in the country. Following early election in 2007, the power went to the liberal-conservative Civic Platform which decided against social confrontation in this regard, despite its reserved attitude to LGBT demands. Paradoxically, 2005–2007 in Poland was a period which made the LGBT demands louder and which slowly transformed public awareness. In 2011, on the back of this social change, Polish *Sejm*, for the first time in the history of the country’s parliamentarism, saw Robert Biedroń, a long-time LGBT activist and an open homosexual, and Anna Grodzka, the first transgender person in Europe to do so, became members of parliament. The event resounded globally, as did Robert Biedroń’s later victory in local government elections in 2014 when he took the office of Mayor of Słupsk.

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