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Reframing LGBT rights advocacy in the context of the rule of law backsliding. The case of Poland

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Abstract

Adopting the methods of institutional analysis and case law analysis, the paper answers how specific elements of rule of law backsliding impact advocacy for minorities' rights' recognition. The phenomenon is analysed in the case of Poland, a state that since 2015 has been experiencing directed erosion on rule of law standards. Between 2018 and 2020, governmental leaders in Poland targeted lesbian, gay, bisexual, and transgender (LGBT) people in the context of electoral campaigns. The paper discusses long-term legal, political, and social factors contributing to creating an environment where such anti-LGBT campaigns are possible. It further demonstrates that specific elements of rule of law backsliding, such as politically subordinating the Constitutional Tribunal and the office of the Prosecutor General, enable authorities to apply discriminatory legal instruments to limit the targeted minority's rights and also make resistance to it with legal means more complex. Against this backdrop, the paper argues that human rights defenders' immediate responses—private civil lawsuits, artistic projects, and monitoring of discriminatory actions of the authorities—were key for drawing domestic and international attention to anti-LGBT campaigns, which later led to the European Union's institutions concrete actions and an independent Commissioner for Human Rights' legal actions. Cumulatively, these actions contributed to reversing elements of the anti-LGBT campaign in Poland.

Keywords: human rights advocacy, rule of law backsliding, LGBT, discriminatory legalism, Poland

1 Introduction

Recent examples from Poland and Hungary demonstrate that the destruction of democratic standards, notably the rule of law, goes hand in hand with restrictions to specific rights and freedoms of individuals, including freedoms of assembly and expression, reproductive rights, and minority rights, among others (Sadurski, 2019a; 2020).¹ Through political or economic

¹ We are grateful to anonymous reviewers and journal editors for their comments on an earlier draft of this article. All errors remain ours.

pressures and capture of critical institutions, including media (Bátorfy & Urbán, 2020) authorities can circumscribe these rights and freedoms, and obstruct the operation of non-governmental organisations (NGOs), limiting their capacity to legally and narratively challenge these restrictions (Ploszka, 2020, Buyse, 2018). Furthermore, illiberal governments also hinder expansion of specific social groups' rights, making it a prominent policy and element of political identification.

This paper seeks to answer how specific elements of rule of law backsliding in Poland impact lesbian, gay, bisexual, and transgender rights advocacy and how LGBT rights defenders adapt to changing institutional, legal, and political context.

The paper uses institutional analysis and case law analysis. Institutional analysis is employed to discuss changes to the composition and functioning of key institutions: the Constitutional Tribunal, the merger of the Prosecutor General and the Minister of Justice offices, and changes to public media. To this end, applicable legislation, sources from international institutions (the Council of Europe's Venice Commission, the EU Court of Justice Advocate General, the Organisation for Security and Cooperation in Europe), and relevant academic literature are analysed. Furthermore, case law analysis demonstrates involvement of the aforementioned institutions—changed through rule of law backsliding processes—in legal actions that were a part of anti-LGBT campaign. The discussed case law emerges from Poland's Constitutional Tribunal and common courts, with references to European human rights courts' case law where relevant.

This paper first discusses the extent of legal recognition of LGBT rights in Poland and its legal and socio-political determinants. Second, it explains specific elements of rule of law backsliding since 2015 that made pushback against anti-LGBT campaign more complex. Third, it presents examples of LGBT rights advocacy in the changed institutional context. The final part concludes.

2 LGBT rights advocacy determinants

2.1 The national and European legal framework

Poland offers the lowest level of legal protection to LGBT rights among EU member states (ILGA-Europe, 2021; Godzisz & Knut, 2018). There is no specific protection from homophobic hate crime and hate speech, no legal recognition of same-sex relationships in form of civil union or marriage, no right of same-sex couples to be recognised jointly as parents of a child. Poland's accession to the EU in 2004 has not provoked policy change in this area (O'Dwyer, 2018; 2012). At the same time, other EU member states expanded protection to LGBT rights (Ayoub & Paternotte, 2019), and LGBT rights recognition progressed significantly in some prospective EU member states (Godzisz, 2019; Swimelar, 2017). Consequently, some argue that a 'Rainbow Curtain' divides Europe (Robinson, 2020).

Poland's Constitution of 2 April 1997 does not provide specific guarantees against discrimination based on gender identity or sexual orientation bias. Article 32.2 of the Constitution entails that 'no one shall be discriminated against in political, social or economic life for any reason whatsoever.' Polish legislation affords protection against discrimination on the grounds of sexual orientation only in the area of employment, even though the Council of Europe's European Commission Against Racism and Intolerance (ECRI) has repeatedly re-

commended authorities in Poland to adjust Anti-Discrimination Act to add gender identity as a protected characteristic (ECRI, 2015; 2018). Poland's criminal hate crime and hate speech laws lack sexual orientation and gender identity as protected characteristics (Godzisz & Rawłuszko, 2019). Consequently, no law explicitly requires penalty enhancements for crimes motivated by anti-LGBT bias.

Family law falls within the competence of EU member states and within the wide margin of appreciation that the European Convention on Human Rights grants to national authorities of its signatories. EU member states are free to determine whether to introduce civil partnerships or same-sex marriage. No EU institution, including the Court of Justice of the European Union (CJEU), requires member states to adopt provisions regulating same-sex unions. Therefore, the regulation of these matters varies significantly across the bloc, from some of the most progressive states in the world in this regard (Denmark, the Netherlands) to states where the legislature rejects legalisation of same-sex partnerships in any form (Poland, Bulgaria, Latvia, Lithuania, Romania, Slovakia).

Poland does legally recognise any form of same-sex relationships.² In 2016, the Supreme Court decided in the resolution I KZP 20/15 that same-sex relationships are legally considered cohabiting in criminal law matters. Consequently, same-sex partners have the right to refuse to testify and a number of other rights granted to the accused's family. However, state institutions do not issue a marriage eligibility certificate under the Civil Status Act to a Polish citizen wishing to conclude a same-sex marriage abroad. While no constitutional ban on same-sex marriage has been introduced, there is a heated doctrinal debate whether Article 18 of the Constitution, which protects marriage as a union between a man and a woman, excludes introducing marriage between people of the same sex (Łętowska & Woleński, 2013; Szydło, 2017).

Gender reassignment is legal in Poland, but there is no comprehensive bill regulating it. To change the sex and name on a person's birth certificate and national identification number, a transgender person must take legal action against the parents, the spouse, and children, when relevant (Bartnik et al., 2020).

2.2 Attitudes towards LGBT rights

Homophobia is widespread in Poland. However, acceptance levels of LGBT people and support for certain LGBT rights have been increasing in Poland in the last decade. According to a Pew Research Centre report, 47 per cent of Poles considered that homosexuality should be accepted by society (a seven percentage points increase from 2012); 42 per cent opposed it (Pew Research Center, 2020). The Eurobarometer Survey on the Social Acceptance of LGBTIQ

² The ECtHR in case from another state in the Council of Europe, Russia, found that lack of legal recognition of same-sex relationships in any form violates ECHR. In 2021, in *Fedotova and Others v. Russia* (applications nos. 40792/10, 30538/14, and 43439/14) the ECtHR held, unanimously, that there had been a violation of Article 8 (right to respect for private and family life) of the Convention in Russia, where the notice of marriage of the applicants, who are same-sex couples, was refused. The ECtHR held that Russia had an obligation to ensure respect for the applicants' private and family life by providing a legal framework allowing them to have their relationships acknowledged and protected under domestic law.

People in the EU (2019) demonstrates a gradual acceptance of LGBT visibility in Poland, even though Poles declare personal discomfort with lesbian and gay couples in the public sphere. However, most Poles are reluctant to grant LGBT persons certain rights: a significant percentage of respondents are against same-sex marriage. According to the Eurobarometer, 49 per cent of Poles agreed with the statement 'gay, lesbian and bisexual people should have the same rights as heterosexual people' (a 12 percentage points increase since 2015), while 45 per cent disagreed. Half of the respondents contested that 'same-sex marriages should be allowed throughout Europe,' while 45 per cent supported this idea. Moreover, most Poles disagreed with recognising the status of non-binary people in official state documents, for example birth certificates or passports. 53 per cent of respondents were against introducing an option in public documents to indicate that a person identifies as neither female nor male. 29 per cent of respondents agreed with this proposal.

Studies demonstrate a correlation between political party preferences and attitudes towards specific LGBT rights recognition in Poland. In the cited Pew Research Centre Report, the right-wing Law and Justice (*Prawo i Sprawiedliwość*, PiS) party supporters were 23 percentage points less likely to say that homosexuality should be accepted by society than those who hold unfavourable views against PiS. According to a study based on data collected in 2019, most Poles do not support legalising same-sex partnerships, although the voters of left-wing parties and those declaring left-wing political views were more likely to accept the idea of legal recognition of same-sex unions. The study demonstrated that Poles with right-wing views, notably PiS voters, strongly reject the idea of legalising same-sex partnerships in any form (Tomczak, Iwański & Zawadzka-Witt, 2021).

2.3 LGBT rights expansion postulates

Poland was one of the European outliers in de-criminalising of adult consensual same-sex behaviours in 1932. However, in the communist period after 1945, the social stigmatisation of same-sex relationships and the surveillance of homosexual men by security forces compelled sexual minorities to live in the shadows (Basiuk & Burszta, 2020). Gays' and lesbians' open activism emerged only at the end of the 1980s (Szulc, 2018). In post-1989 democratic Poland, the human rights movement for the expansion of LGBT rights developed. Since the country acceded to the EU in 2004 the LGBT community has increasingly phrased its postulates in the language of European law (Struzik, 2020, p. 271), which was made possible due to developments in CJEU and ECtHR jurisprudence. Comparisons with LGBT rights protection standards in other EU member states have become common in public discourse due to grassroots civil society organisations and initiatives, including transnational LGBT rights organisations.

Polish LGBT activists' leading demands have been increasing LGBT visibility, fighting prejudice, exercising the freedom of assembly, improving protection from hate crime and hate speech by amendments to criminal law,³ legalising civil partnerships and equal mar-

³ Criminal law amendments have been one of the main postulates of a NGO, *Kampania Przeciwko Homofobii* ('Campaign Against Homophobia'), founded in 2001 (See *Kampania przeciwko Homofobii*, 2010).

riage for same-sex couples (a postulate since 2013),⁴ granting same-sex couples a right to be legally recognised as co-parents of a child, and introducing a comprehensive regulation of gender reassignment.⁵ There are also essential postulates in administrative law, such as making it possible to transcribe foreign birth certificates of children born to same-sex couples with Polish citizenship into the birth register in Poland. In 2018, the Supreme Administrative Court allowed it on the grounds of protecting children's right to Polish citizenship, but no relevant legislation on the national level followed (Mazurczak, 2018). There is a demand that administrative organs issue marriage eligibility certificates under the Civil Status Act to a person wishing to conclude a same-sex marriage abroad. In 2014 and 2016, complaints were lodged to the ECtHR in which the applicants argue that their rights were infringed because state institutions refused to issue such certificates (*Szypuła v Poland*, Appl. no. 78030/14 and *Urbanik and Alonso Rodriguez v Poland*, Appl. no. 23669/16). Civil society organisations, initiatives, and activists steadily advanced those postulates, making LGBT rights expansion a part of public debate in Poland.

2.4 Political context

Consecutive governments after 1989 have not expanded LGBT rights protection despite lobbying from LGBT advocacy initiatives, human rights NGOs, and international human rights monitoring bodies' recommendations. For example, the centre-right Civic Platform party (*Platforma Obywatelska*, PO) governing from 2007 to 2015, refused to support bills on amending hate speech laws or introducing registered civil partnerships for same-sex and heterosexual couples (Jartyś, 2016; 2015).

Since 2015 anti-LGBT sentiment has translated into government policy. In May 2015, the PiS-affiliated candidate Andrzej Duda won the presidential election. In October 2015, PiS won the general elections and formed the United Right (*Zjednoczona Prawica*, ZP) coalition government. PiS chairman Jarosław Kaczyński described a bill on gender recognition of transgender people that had been passed in parliament in 2015 as 'a quirk and attack on the family.' During the campaign Kaczyński promised that his party's government would not change social mores in Poland.⁶ The newly inaugurated President Duda vetoed the bill.⁷

ZP has implemented illiberal policies including taking control of key institutions and rousing antagonism against specific vulnerable groups, first refugees and immigrants

⁴ A NGO, *Miłość Nie Wyklucza* ('Love Does Not Exclude') has campaigned for civil partnerships and equal marriage for LGBT in Poland since 2013. In 2020, Left party MPs tabled the first proposal to legalise same-sex marriage. The Sejm (lower house) rejected the proposal.

⁵ Case *Y. v Poland*, application no. 74131/14 (pending before the ECtHR) (see Helsinki Foundation for Human Rights, 2020).

⁶ Kaczyński o osobach transseksualnych: Nie ma zgody na dziwactwa [Kaczyński on transgender people: There is no consent for quirks], *Dziennik Polska The Times*, 2 October 2015, <https://polskatimes.pl/kaczynski-o-osobach-transseksualnych-nie-ma-zgody-na-dziwactwa/ar/9021443>

⁷ Ustawa o uzgodnieniu płci – do ponownego rozpatrzenia [Bill on gender recognition – for reconsideration], *Prezydent. pl*, 2 October 2015, <https://www.prezydent.pl/prawo/ustawy/zawetowane/art,1,ustawa--o-uzgodnieniu-plci---do-ponownego-rozpatrzenia.html>

(Krzyżanowski, 2018), then focusing on fighting with ‘gender and LGBT ideologies’ as part of backlash against achieved levels of sex equality and LGBT rights (Gwiazda, 2020; Korolczuk, 2020; Kováts, 2018). Government rhetoric has framed LGBT ideology as a threat to the sovereign nation bound by shared values derived principally from Roman Catholic morality, a danger to traditional family and culture (Mole, Golec de Zavala & Ardag, 2021). Resistance to LGBT rights has been presented as a marker of religious, cultural, and political identity, a form of practising patriotism (Gressgård & Smoczy, 2020).

The governing parties’ leaders made acceptance of LGBT rights the new, central axis of political cleavage in the context of elections to the European Parliament, general elections, and presidential elections in 2018–2020. PiS and the United Poland (*Solidarna Polska*) party moved toward an extreme position against LGBT rights to mobilise their core base to vote (Szczygielska, 2019). The main opposition party, the Civic Coalition (*Koalicja Obywatelska*), has been slowly shifting its position towards greater support for LGBT rights, though the pro-LGBT stance of 2020 presidential candidate Rafał Trzaskowski is an important exception. However, PiS rhetoric used Trzaskowski’s stance against homophobia and open—yet cautious—support to some LGBT rights to vilify him among conservative voters (Zagórski & Bértoa, 2020).

In Poland between 2018 and 2020, ‘LGBT ideology’ became the subject to an unprecedented smear campaign by politicians and state apparatuses, including government-controlled public media, significant parts of the Roman Catholic Church leadership and clergy as well as pro-government organisations that demand pushback on women’s and LGBT rights. Moreover, since March 2019, local authorities in Poland have adopted non-binding, declaratory resolutions to support traditional families and to protect children and youth from LGBT ideology (Korolczuk, 2020).

3 The rule of law backsliding in Poland

PiS’s official political program for the 2015 parliamentary campaign did not include changes to the state’s constitutional arrangements. Nevertheless, the United Right government, dominated by PiS representatives, has implemented a radical ‘anti-constitutional’ (Ziółkowski, 2019) plan to subordinate independent institutions. The post-2015 constitutional crisis in Poland stems from systemic capture of most constitutional organs and institutions that otherwise would provide checks and balances on political power: the Constitutional Tribunal (CT or ‘Tribunał’), the National Council of the Judiciary (NCJ), the prosecution service, the civil service, and public media (Kelemen-Pech, 2019; Pech, Wachowiec & Mazur, 2021; Sadurski, 2019a; Wyrzykowski, 2019; Ziółkowski, 2020).

The process, similar to changes introduced in Hungary after 2010 (Drinóczi & Bień-Kacała, 2019; Holesch & Kyriazi, 2021), is more than the sum of its parts. Considering the legal amendments, personnel changes, and changes in roles assigned and performed by institutions, it aims to reconstruct Poland’s constitutional model without formally changing the Constitution of 2 April 1997. Rule of backsliding is understood as ‘the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party’ (Pech & Scheppele, 2017).

This paper argues that three key elements of rule of law backsliding in Poland after 2015—(1) the capture of the Constitutional Tribunal, (2) the political merger of the Prosecutor General and the Minister of Justice, and (3) direct political control of public media—were crucial in conducting the anti-LGBT campaign in 2018–2020.

3.1 Constitutional Tribunal

Immediately after winning elections, the United Right transformed the Constitutional Tribunal into a loyal helper. Three persons were appointed to the Tribunal in violation of Constitutional norms. Other new judges were linked to the ruling party. In 2015–2016, the government passed legislation that aimed to ‘neutralise’ the Tribunal. In December 2016, based on a new law, the new President of the Tribunal was appointed (Koncewicz, 2018). Since then, the Tribunal *de facto* has not acted as a genuine check and balance in cases where the governing majority’s political interests are at stake. It has become the ‘government’s enabler’ (Sadurski, 2019b, p. 79), confirming or facilitating the governing majority’s policies. Consequently, the Polish legal system lacks an independent, effective, centralised constitutional judicial review of legislation (Venice Commission, 2016). Transformation of the Tribunal into a loyalist supporter of the ruling majority and the sweeping changes to the judiciary prompted the European Commission’s activation of Article 7 TEU procedure against Poland in December 2017.

First, capturing the Tribunal made it possible that the provisions regulating new institutional arrangements after 2015, e.g., organisation of prosecutor service (case no. K 19/16) or civil service (case K 6/16) are still binding legal norms. Even though the Commissioner for Human Rights filed several motions to the Tribunal, arguing those changes are unconstitutional, the Tribunal has not invalidated any of them.⁸ Second, the ruling majority used the new Tribunal to legitimise changes to the state’s institutional framework. For instance, a judgment of 20 June 2017 (case no. K 5/17) was a pretext to introduce amendments to the National Council for the Judiciary. Third, the Tribunal affects the binding norms and how ordinary courts are applying the law. When a politically sensitive case is pending, or even when the common court has decided it, then the governing majority-controlled institution (e.g., Marshal of Sejm, Prosecutor General) initiates a case before the Tribunal to influence the pending or decided case.⁹ The Prosecutor General/Minister of Justice employed this strategy to undermine the finality of the ordinary courts’ rulings relating to the anti-LGBT campaign.

⁸ In December 2018 the Constitutional Tribunal discontinued the case no. K 19/16 and in November 2019 – the case no. K 6/16.

⁹ The case of Mariusz Kamiński was discontinued after interpretation provided by the Tribunal in a case initiated by the Marshal of Sejm (judgment of 17 July 2018, case no. K 9/17), despite the fact that the Supreme Court based their decisions on a different interpretation of the binding law (resolution of 31 May 2017, case no I KZP 4/17). In 2020 the Constitutional Tribunal ruled that the Supreme Court resolution (Resolution of the Civil, Criminal and Labour & Social Insurance Chambers of the Supreme Court of 23 January 2020, case no. BSA I-4110-1/20) dealing with implementation of the CJEU ruling (joined Cases C-585/18, C-624/18, and C-625/18) is incompatible with the Constitution despite the Tribunal’s apparent lack of powers to do so (decision of 20 April 2020, case U 2/20).

3.2 Prosecutor General

The Prosecutor General (PG) and the Minister of Justice (MoJ) office merger was introduced in March 2016. As a result, a politician, a Member of Parliament, appointed as the MoJ, is entitled to decide on any aspect of any current, past, or future criminal investigation. The PG was granted powers to transfer, appoint, and promote prosecutors (Makana & Allsop, 2019; Szeroczyńska, 2017). The MoJ was granted new powers regarding the administration of ordinary courts. In such an institutional regime, an active politician is entitled to influence any decision of the prosecutor service and indirectly influence the courts' work. As a consequence, cases concerning the ruling coalition's members or associates' accountability may not reach the court, whereas the political opponents may be dealing with criminal charges for years without being sentenced by the court.

The Venice Commission found that the MoJ and PG offices merger 'creates a potential for misuse and political manipulation of the prosecutorial service, which is unacceptable in a state governed by the rule of law' (Venice Commission, 2017, para. 111) and concluded that the two offices should be separated; if not, the competence to intervene in individual cases should be excluded. The Venice Commission concluded that such an accumulation of powers for one person has negative consequences for the judiciary's independence and separation of powers. The Polish government did not reply to the Venice Commission's opinion. The CJEU Advocate General found that the fact that a member of the government wears 'a double hat' produces 'an unholy alliance between two institutional bodies which should function separately' (Opinion of Advocate General Bobek of 20 May 2021, Cases C-748/19 and C-754/19, para. 188).

3.3 Public media

In December 2015, Poland's media law was amended to allow the government both to appoint public media management and to name Jacek Kurski, the acting deputy minister of culture, as the head of Polish public television (TVP). International organisations criticised the changes (OSCE, 2015). Since 2016, the newly established National Media Council (*Rada Mediów Narodowych*), appointed mostly with loyal politicians of the ruling party, has been tasked with powers of oversight of public media, which in the light of the Constitution were reserved a constitutional body, the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji, KRRiTV*) (Sadurski, 2019a, p. 139). Thus, public media can disseminate biased narratives, presenting them as objective information, without any fear of an independent monitoring body.

After mass dismissals of journalists from the public broadcaster (Otwinowski, 2016), TVP's main news programme effectively became a propaganda outlet for the government (Chapman, 2017). The government has also attempted to exert control over private media. In 2020, a state-controlled oil company bought the majority of regional media; and in 2021 a draft amendment targeting the biggest private broadcaster was proposed.

In 2019, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) analysed the TVP's role in spreading anti-LGBT narratives in the context of parliamentary elections. The monitoring pointed out instances of homophobic speech in some contestants' campaign messages, which 'provoked a sense of threat and elicited negative emotions towards the LGBTI community' (OSCE-ODIHR, 2020a, p. 12). ODIHR observed several cases of

‘inflammatory political language against the LGBTI community.’ Finally, TVP1 and TVP Info aired a 30-minute film entitled ‘Invasion,’ which targeted the LGBT community and portrayed it as a threat to Polish culture and identity. The ODIHR asserted that the film was ‘echoing a primary campaign message of PiS’ (OSCE-ODIHR, 2020a, p. 19).¹⁰

The OSCE’s presidential elections monitoring in 2020 found that the public broadcaster ‘failed in its legal duty to provide impartial coverage, which could offset the editorial bias of the private media. Instead, TVP acted as a campaign vehicle for the incumbent’ (OSCE-ODIHR, 2020b, p. 3). Furthermore, ‘some reporting was charged with xenophobic and anti-Semitic undertones’ (ibid., p. 20). It was also emphasised that President Duda and his campaign ‘made some oblique though often explicit negative references to the LGBTI community, implying an ideology juxtaposed to what they perceive as traditional Polish values’ (ibid., p. 14). As a result, the ODIHR noted ‘instances of intolerant rhetoric, particularly by the incumbent’s campaign and the public broadcaster, that was xenophobic, homophobic, and anti-Semitic.’ ODIHR underscored that the lack of transparency and procedures of appointing and dismissing its senior management ‘could make TVP content more susceptible to government pressure’ (ibid., p. 18). TVP replied to the ODIHR 2020 report that ‘conclusions regarding the work of journalists of Telewizja Polska included in the preliminary evaluation of the elections prepared by the OSCE are biased and harmful’ (TVP, 2020).

4 Battle for (law and) justice? Remedies against the anti-LGBT campaign

4.1 The Prosecutor General’s anti-LGBT politics: discriminatory legalism in practice

The PG has statutory powers to intervene in almost all cases, not only in criminal ones. The institutional arrangements allow the MoJ/PG to direct the prosecution service’s work. A case in point is the so-called ‘printer from Łódź’ case, concerning a situation when the owner of a printing company refused to print promotional materials for an LGBT activist. The printer was accused of committing a petty offense: intentionally refusing to perform a service without reasonable cause (Article 138 of the Petty Offences Code). In July 2016, the District Court for Łódź-Widzew issued a penal order against the printer and imposed a fine. The defendant appealed. In March 2017, a court found the printer guilty of committing the petty offense, but refrained from imposing a penalty. On 26 May 2017, the Regional Court in Łódź upheld the printer’s conviction, and the Supreme Court rejected the cassation filed by the PG, so the case became final (Helsinki Foundation for Human Rights, 2017).

However, the PG subsequently brought a case before the Constitutional Tribunal, arguing that Article 138 of the Petty Offences Code violates the Constitution (the principle of proportionality). The Tribunal ruled that the provision (1) does not aim to protect against discrimination since usually penalties are low, (2) does not have preventive nor educational

¹⁰ In June 2020, the court issued an interim measure and ordered the film’s removal from YouTube. The Campaign Against Homophobia (KPH) initiated the case, arguing that the film violated personal rights. The Commissioner for Human Rights supported the NGO’s claim.

values, and (3) does not perform a repressive function. In the Tribunal's reasoning, Article 138 was inadequate to the assumed goals and violated Article 2 of the Constitution (Constitutional Tribunal judgment of 26 June 2019, case K 16/17). After the Tribunal's decision, the Appellate Court that had discontinued the case reopened it. The Supreme Court underlined that the PG brought the case to the Tribunal because he had 'certainty of quick judgment,' which was a 'temptation impossible to refuse' (Ambroziak, 2020).

The prosecution service has presented charges in numerous cases concerning the LGBT community. For instance, criminal charges of violating religious feelings (Article 196 of the Criminal Code) were presented against a furniture company manager for firing an employee who had called homosexuality an 'abomination' and quoted excerpts from the Bible referring to death as the fate awaiting homosexuals on the company's intranet. The case is pending (Ambroziak, 2020a). Criminal proceedings on violating 'religious feelings' were also conducted against LGBT rights activists for distributing stickers with an image of Virgin Mary with rainbow halo. The activists were acquitted by court in February 2021 (Szymczak, 2021). By contrast, no charges were presented against Bishop Jędraszewski who described the LGBT community as 'a rainbow plague' (Taraneck, 2019). Spontaneous protests in August 2020 against the detention of LGBT activists resulted in numerous arrests (Ptak & Gocłowski, 2020). The National Prevention Mechanism report showed disproportionate use of coercive measures and revealed a systemic problem with access to a lawyer after being arrested by the police (The Commissioner for Human Rights Office, 2020).

In our view, these developments warrant can be best described as the use of discriminatory legalism (Weyland, 2013) in the anti-LGBT campaign. Discretionary use of the law for political purposes ('For my friends, everything; for my enemies, the law!') may not only cause a chilling effect among those who criticise public authorities but also promote an authoritarian narrative targeting social groups and describing them as 'enemies.' It is the 'weapon used against anyone who does not share the point of view of populist politicians' (Demczuk 2020, p. 133). As Weyland found, 'with the government controlling all avenues of appeal and avoiding blatant violations of formal rules, those targeted find few chances for domestic recourse or the gathering of international support' (Weyland 2013, p. 23). To avoid discriminatory legalism becoming a tool of oppression, the Venice Commission's recommended the depoliticisation of the prosecutorial system.

Allowing politicians to influence the criminal justice system can create an environment of legal harassment. It is not decisive in this context that many judges and courts remain independent from the executive since even pending pre-trial criminal cases may cause harm to individuals. Seeking justice in such an environment is time- and money-consuming. And the lack of viable legal remedies increases the chilling effect resulting from ongoing criminal investigations and enables further attacks on the LGBT community.

4.2 Local resolutions discriminatory to LGBT individuals

In March 2019, Polish local councils started adopting the non-legally binding Charter of the Rights of the Family, elaborated by a legal think tank, Institute for Legal Culture *Ordo Iuris* (*Ordo Iuris*, 2020), and other declaratory acts against 'LGBT ideology.' TVP Info initially reported on the resolutions as establishing 'LGBT free' zones, later changing the description to 'LGBT-ideology free' zones (Erling, 2020).

Private pro-government media, subsidised by public funds through state-owned companies advertising, promoted the 'LGBT free' message. In July 2019, the publisher of the right-wing *Gazeta Polska* newspaper planned to attach to each printing a sticker showing a circular field filled with rainbow colours crossed out with two black stripes, encircled by the inscription 'LGBT free zone.' An LGBT activist, Bart Staszewski, filed civil lawsuits against the publisher on personal rights' infringement grounds and applied for an injunction that would prohibit the newspaper's distribution. The court decided that a sticker's publication with the slogan 'LGBT free zone' may have far-reaching effects, such as excluding the applicant and other persons belonging to the LGBT community from the public space, further harassment, and discrimination. 'It is therefore unacceptable to cause a situation where a certain part of society, due to its belonging to social groups [...], becomes a victim of repression in the form of reluctance, aggression, or deprivation of the right to use public space freely', the Warsaw court ruled (Regional Court in Warsaw, 24 July 2019, Case no. IV Co 130/19, *Bartosz Staszewski v. Niezależne Wydawnictwo Polskie sp. z o.o.*).

The claimant was represented by lawyers from the 'Free Courts' (*Wolne Sądy*) initiative, who have been active in rule of law defence since July 2017 through communication campaigns and legal actions.¹¹ This is but one example of cooperation between rule of law and LGBT rights' defenders. In the past, the question of LGBT rights in Poland had been discussed in terms of minority rights. However, the anti-LGBT campaign occurred during the long-term rule of law crisis and after vicious campaigns against government critics and specific professional and social groups: judges, attorneys, doctors, teachers, persons with disabilities (Freedom House, 2020). Consequently, media critical of the government framed attacks against LGBT as part of dismantling constitutional democracy norms and a concern for all pro-democracy Poles.

LGBT rights defenders responded to anti-LGBT resolutions with artistic and monitoring projects. Bart Staszewski posted 'LGBT-free zone' signs in several towns and photographed non-heterosexual people living there in front of the signs. He posted the portraits online, attracting attention from the European Parliament's lawmakers, some of whom initially wrongly assumed that the signs were official. Other LGBT activists created an interactive online 'Atlas of Hate,' depicting areas of Poland that the creators say have adopted anti-LGBT resolutions.¹² They were nominated for the European Parliament's 2020 Sakharov Prize. Several local municipalities, helped by Ordo Iuris and the Polish League Against Defamation, sued Staszewski and the 'Atlas of Hate' creators.¹³

Although legal remedies at the international level are limited to mechanisms under the Council of Europe (application to the European Court of Human Rights) or the United Nations (application to the Human Rights Committee), 'international support' can be found among more general diplomatic tools, including refusal of funding. Polish LGBT activists exposed and publicised anti-LGBT resolutions, which were then covered in international

¹¹ See <https://wolnesady.org/en/>

¹² The Atlas of Hate is available at <https://atlasnienawisci.pl/>

¹³ In March 2021, a court in Nowy Sącz acquitted B. Staszewski in a case initiated under Article 97 of the Infractions Code, Article 45.1.10 of the Road Traffic Act, i.e., the arbitrary placing of any signs, inscriptions, or symbols on the road. In April 2021, Mielec court acquitted him in another case concerning a petty offense of damaging a road sign. Several cases against Staszewski and the 'Atlas of Hate' creators are pending before courts in Poland as of submitting the paper.

media and provoked condemnation from the European Commission's President. The President of the EC said that 'LGBTQI-free zones are humanity-free zones' that 'have no place in our Union' (State of the Union, 2020). EU institutions answered with legal and political actions. In December 2019, the European Parliament (EP) adopted a resolution on public discrimination and hate speech against LGBT people, including 'LGBT free zones' (European Parliament, 2019). In July 2020, the EC decided to withhold EU funds to some Polish communities that adopted anti-LGBT resolutions to ensure that the funds will be spent following the EU values (European Commission, 2020). On 11 March 2021, the EP adopted a resolution declaring the EU a LGBTI Freedom Zone (European Parliament, 2021) and called on the EC to assess whether the creation of anti-LGBT zones amounts to a violation of freedom of movement and residence in the EU. On 7 July 2021, the EC launched EU law infringement proceedings against Poland for failing 'to fully and appropriately respond to its inquiry regarding the nature and impact of the so-called "LGBT-ideology free zones" resolutions adopted by several Polish regions and municipalities' (European Commission, 2021).

In addition to EU-level actions, the French Region of Loire decided to suspend the economic cooperation with the Polish region of Lesser Poland (*Małopolska*) because of resolutions discriminatory to LGBT adopted there (Pankowska, 2020). In September 2020, ambassadors from 50 countries urged the Polish authorities to end discrimination against sexual minorities. Norway announced that funds from the European Economic Area Financial Mechanism (EEA Funds) would not be awarded to municipalities that adopted resolutions discriminating against LGBT (Stortinget, 2020). From March 2021, some local municipalities in Poland, including villages of Nowa Dęba and Kraśnik and the city Przemyśl (Kulczycka, 2021), withdrew the resolutions discriminatory against LGBT, citing the risk of not receiving funds and reputational concerns (Tilles, 2020).

EU and international pressure was supplemented by the Commissioner for Human Rights. In December 2019, the Commissioner challenged the first six local anti-LGBT resolutions in courts, arguing they violate the principle of legality, discriminate, and limit the rights and freedoms of community residents (Sześciło, 2019), and are incompatible with EU law. In 2020, regional administrative courts found some of the resolutions discriminatory and invalidated them. However, some administrative courts rejected the motions on formal grounds, arguing they lack jurisdiction because the resolutions do not concern public administration issues. In July 2021, the Supreme Administrative Court overruled those rejections and ordered them to hear the cases on merits (Supreme Administrative Court rulings of 2 July 2021, cases no. III OSK3682/21 and no. III OSK 3353/21). At time of submission, 92 municipalities in Poland retain anti-LGBT resolutions (Kampania Przeciwko Homofobii, 2021).

Conclusions

This article demonstrated that a system with weakened rule of law standards allows the government to translate a political agenda against a minority into state policy. It demonstrated that specific elements of rule of law backsliding in Poland after 2015 profoundly impacted LGBT rights advocacy.

First, the politically subordinated Constitutional Tribunal ensures that new laws (e.g., the merger of the offices of Prosecutor General and Minister of Justice) remain binding. The Tribunal's interpretation of constitutional and statutory norms allows the executive to challenge cases heard and decided by ordinary or administrative courts.

Second, the amalgamation of the prosecutor's service and political leadership significantly affects the law's execution. Specific norms are implemented to serve an anti-LGBT rights function. Authorities use legal means in a discriminatory way to harass or discourage LGBT defenders. In this context, the independence of courts is fundamental to challenge the executive's actions. However, it is difficult to separate judicially the political and legal links in the prosecutors' actions at the pre-trial stage. Nevertheless, independent courts remained the last resort for human rights protection during the anti-LGBT campaign.

Third, the government-controlled public media attempted to secure public support for the anti-LGBT campaign, including through promotion of homophobic views and presenting them as objective facts.

The paper found that when institutions that check the government and verify constitutionality, legality, and factuality are politically captured, arbiter becomes enabler. The public prosecutor enforces the law to implement a particular political agenda and public media outlets attack instead of informing.

In this context, grassroots efforts by human rights defenders and actions by the Commissioner for Human Rights were crucial to push back against some national and local authorities' anti-LGBT actions. In an environment characterised by rapid dismantling of rule of law, including executive aggrandisement and subjugating key institutions to a political agenda, it remains possible to counter some anti-LGBT rights actions with recourse to legal means as long as independent courts endure.

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