# Περιμένοντας τους Βαρβάρους

# LAW IN A TIME OF CONSTITUTIONAL CRISIS

## STUDIES OFFERED TO MIROSŁAW WYRZYKOWSKI

EDITED BY

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Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis
Studies Offered to Mirosław Wyrzykowski

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Wydawnictwo C.H.Beck Sp. z o.o.
ul. Bonifraterska 17, 00-203 Warszawa

Skład i łamanie: TimPrint, Warszawa
Druk i oprawa: *Elpil, Siedlce*

ISBN 978-83-8235-755-4

Professor Mirosław Wyrzykowski

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*Κωνσταντίνος Καβάφης*

## Περιμένοντας τους Βαρβάρους

— Τι περιμένουμε στην αγορά συναθροισμένοι;

Είναι οι βάρβαροι να φθάσουν σήμερα.

— Γιατί μέσα στην Σύγκλητο μια τέτοια απραξία;
Τι κάθοντ' οι Συγκλητικοί και δεν νομοθετούνε;

Γιατί οι βάρβαροι θα φθάσουν σήμερα.
Τι νόμους πια θα κάμουν οι Συγκλητικοί;
Οι βάρβαροι σαν έλθουν θα νομοθετήσουν.

— Γιατί ο αυτοκράτωρ μας τόσο πρωί σηκώθη,
και κάθεται στης πόλεως την πιο μεγάλη πύλη
στον θρόνο επάνω, επίσημος, φορώντας την κορώνα;

Γιατί οι βάρβαροι θα φθάσουν σήμερα.
Κι ο αυτοκράτωρ περιμένει να δεχθεί
τον αρχηγό τους. Μάλιστα ετοίμασε
για να τον δώσει μια περγαμηνή. Εκεί
τον έγραψε τίτλους πολλούς κι ονόματα.

— Γιατί οι δυο μας ύπατοι κ' οι πραίτορες εβγήκαν
σήμερα με τες κόκκινες, τες κεντημένες τόγες·
γιατί βραχιόλια φόρεσαν με τόσους αμεθύστους,
και δαχτυλίδια με λαμπρά, γυαλιστερά σμαράγδια·
γιατί να πιάσουν σήμερα πολύτιμα μπαστούνια
μ' ασήμια και μαλάματα έκτακτα σκαλιγμένα;

Γιατί οι βάρβαροι θα φθάσουν σήμερα·
και τέτοια πράγματα θαμπώνουν τους βαρβάρους.

— Γιατί κ' οι άξιοι ρήτορες δεν έρχονται σαν πάντα
να βγάλουνε τους λόγους τους, να πούνε τα δικά τους;

Γιατί οι βάρβαροι θα φθάσουν σήμερα·
κι αυτοί βαρυούντ᾽ ευφράδειες και δημηγορίες.

— Γιατί ν᾽ αρχίσει μονομιάς αυτή η ανησυχία
κ᾽ η σύγχυσις. (Τα πρόσωπα τι σοβαρά που εγίναν).
Γιατί αδειάζουν γρήγορα οι δρόμοι κ᾽ η πλατέες,
κι όλοι γυρνούν στα σπίτια τους πολύ συλλογισμένοι;

Γιατί ενύχτωσε κ᾽ οι βάρβαροι δεν ήλθαν.
Και μερικοί έφθασαν απ᾽ τα σύνορα,
και είπανε πως βάρβαροι πια δεν υπάρχουν.

Και τώρα τι θα γένουμε χωρίς βαρβάρους.
Οι άνθρωποι αυτοί ήσαν μια κάποια λύσις.

Text after Onasis Foundation *Cavafy Archive* (Γ. Π. Σαββίδη (ed.), *Τα ποιήματα* Α᾽ 1897–1918, Ίκαρος 1963) https://www.onassis.org/initiatives/cavafy-archive/.

*Constantine Cavafy*

## Waiting for the Barbarians

—What is it that we are waiting for, gathered in the square?

The barbarians are supposed to arrive today.

—Why is there such great idleness inside Senate house?
Why are the Senators sitting there, not passing any laws?

Because the barbarians will arrive today.
Why should the Senators still be making laws?
The barbarians, when they come, will legislate.

—Why is it that our Emperor awoke so early today,
and has taken his position at the greatest of the city's gates
sitting on his throne, in solemn state, and wearing the crown?

Because the barbarians will arrive today.
And the emperor is waiting to receive
their leader. Indeed he is prepared
to present him with a parchment scroll. In it
he's conferred on him many titles and honorifics.

—Why is it that our consuls and our praetors have come out today
wearing their scarlet togas with their rich embroidery,
why have they donned their armlets with all their amethysts,
and rings with their magnificent, glistening emeralds;
why is it that they're carrying such precious staves today,
maces chased exquisitely with silver and with gold?

Because the barbarians will arrive today;
and things like that bedazzle the barbarians.

—Why do our worthy orators not come today as usual
to deliver their addresses, each to say his piece?

*Constantine Cavafy, Waiting for the Barbarians*

Because the barbarians will arrive today;
and they're bored by eloquence and public speaking.

—Why is it that such uneasiness has seized us all at once,
and such confusion? (How serious the faces have become.)
Why is it that the streets and squares are emptying so quickly,
and everyone's returning home in such deep contemplation?

Because night has fallen and the barbarians haven't come.
And some people have arrived from the borderlands,
and said there are no barbarians any more.

And now what's to become of us without barbarians.
Those people were a solution of a sort.

Translated by Daniel Mendelsohn
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# Preface

How does one preface a book dedicated to a champion of the theory and practice of human rights, our mentor, friend, and advisor, Prof. Mirosław Wyrzykowski, to whom Pleiades of constitutional lawyers have already made their elegant and learned offerings?

Instead of a meticulous presentation of the *cursus honorum* and of the *opera* of our Honorand (they both speak for themselves, on the following pages there follow his short *vita* and a list of publications), let us explain briefly the choice of title of the book, taken from the celebrated poem of Cavafy. *Waiting for the Barbarians* is a book by which we pay our respects to Mirosław Wyrzykowski, but it is probably even more prominently a way to honour constitutional culture as such, the culture that the Honorand transpires, but which he has also been a great inspiration.

Until recently, we seemed to inhabit the best of all possible historical worlds. Developments after the Second World War, including the adoption of the *Universal Declaration of Human Rights*, brought about the stable development of democracy, recently labelled as 'liberal'. This need for an adjective seems curious now, some time ago we thought that unadulterated democracy was the only real one, and that epithets describing it would only limit its true meaning and dim its values. Post-war democracies secured the prosperity of the civic community, while also protecting the rights of minorities. The European Community, now an *ever closer* Union, was established to guarantee stable and peaceful exchange, not just in economic terms, but above all political and cultural intensive cooperation. Only certain sceptics, sometimes, frowned on by a majority, criticised the democratic deficit of the European Union. Even when their Cassandran pleas materialised in the rejection of the European Constitution by some of the traditionally most pro-European nations, it did not really draw any decisive actions.

We have languished in prosperity, in false feelings of security. The rise of populist movements has taken us by surprise. There is no clear recipe of how to deal with them. This security resembles Cavafy's idle luxury in which the new Romans lived, not really caring for the preservation of their achievements.

We are no longer expecting modern barbarians: they have already arrived, and in some cases, like Hungary and Poland, have already taken over. They have started their own legislation. The constitutionalists, the liberal politicians have tolled the alarum bells. European courts, especially the Court of Justice and even, eventually, the European Commission, have taken significant steps. Remedies have come late, but they have been adopted. However, we remain unsure as to whether they will prove effective, especially as barbarians tend to neglect any rules.

However, all these measures are but a cure for the symptoms. They do not really address the core of the problem: why and how have we let the barbarians in. The elitism of the establishment, these parchments of honours, the togas embroidered with higher culture, and honorific titles have simply been disregarded by the voters. They have

expressed a preference for the appreciations of their ways and lifestyles offered by the barbarians, who have supported their ideas with generously offered bread and circuses.

Let us hope that one day they will go again. But the open question remains how should we address the real problem that lay beneath, which the barbarians exposed so violently: how can we convince the silent majority about the values we think all people should share.

How can we make sure that the bold and hopeful statement that '[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail', are not just words, words, words?

We are certain that the authors of this book, inspired by the ideas, deeds, courage and integrity of Professor Mirosław Wyrzykowski, will provide answers to this question.

> And now what's to become of us without barbarians.
> Those people were a solution of a sort.[1]

The editors would like to thank our publisher, C.H. Beck, and especially Ms Joanna Szypulska, without whose acribia, dedication, and demand for highest standards this book would never have been possible.

Warsaw, September 2021 *Jakub Urbanik* and *Adam Bodnar*

[1] *Cf.* the essay of D. Mendelsohn, '"Waiting for the Barbarians" and the Government Shutdown', *The New Yorker* 1 October 2013, https://www.newyorker.com/books/page-turner/waiting-for-the-barbarians-and-the-government-shutdown. We are deeply grateful to Prof. Mendelsohn for his kind permission to use his translation of Cavafy's poem therein contained.

# Mirosław Wyrzykowski

Mirosław Wyrzykowski, natus prima die Aprilis MCML in Ciechanów.

After finishing 1st High School 'Z. Krasiński' in his town of birth, he undertook studies at the University of Warsaw, Faculty of Law and Administration. Once graduated, in 1971, he carried on the scientific path, preparing a doctoral thesis at the same faculty. In 1975, he obtained the degree of Doctor of Laws, presenting a dissertation – *Judicial Review of Administrative Decisions in a Socialist State*. In 1986, he was granted *venia legendi* with habilitation – *The Concept of Social Interest in Administrative Law*. From 1992 to 2017, he was employed as a professor at the University of Warsaw.

He served his Alma Mater well, carrying out several administrative and social functions, including as the Vice-Dean in 1996–1999, and then as Dean in 1999–2001. In 1995–2005, he was also the Head of the Comparative and Public Economic Law Department at the Institute of Legal and Administrative Sciences. In 2003, he inducted the establishment of the Department of Human Rights, which he headed until his retirement in 2017.

Professor Mirosław Wyrzykowski was the festive supervisor of Tadeusz Mazowiecki's honorary degree, awarded to the first non-communist Polish Prime Minister, and a former student of the Faculty of Law, by the University of Warsaw in 2003. Since then, he has consistently promoted the social and political achievements of Tadeusz Mazowiecki, among other things by co-funding the University of Warsaw's Tadeusz Mazowiecki Chair – the centre for debates on current social and humanistic issues since 2014. Professor Mirosław Wyrzykowski was also one of the founders of the School of German Law at the Faculty of Law and Administration of the University of Warsaw, run in co-operation with the Rhenish Friedrich Wilhelm University of Bonn with the support of German Academic Exchange Service**.** He also created a unique seminar – *Towards European Constitutionalism* – which has been held at the University of Warsaw for over two decades now. Apart from his home faculty, Professor Mirosław Wyrzykowski also lectured at the Centre for Local Government and Local Development Studies at the University of Warsaw, as well as supervising students at Collegium Invisibile.

Professor Mirosław Wyrzykowski supervised over a hundred master theses and over a dozen doctoral theses. He lectured and conducted scientific research at many institutions and universities abroad. In the academic year 1979/1980, he was awarded the Alexander von Humboldt Stiftung scholarship. In 1990–1995, he was employed as a professor at the Swiss Institute of Comparative Law in Lausanne, and in 1997–2011, as a professor at the Central European University in Budapest. As a visiting professor he has lectured in Paris (Sorbonne), Bonn, Sydney, Constance, Bayreuth, Munich and Thamassat University in Bangkok, to name but a few. He has popularised his findings and scientific ideas through organising, co-organising and participating at innumerable national and foreign conferences and seminars.

In parallel to his scientific activity, he has been always involved in social and public life. In the years 1988–1990, he headed the Department of Constitutional Freedoms

and Rights in the Office of the Commissioner for Human Rights of the Republic of Poland. In April 1988, he participated in the first, historic visit of the first Polish Commissioner, Professor Ewa Łętowska, to the Swedish Ombudsman's office. He took part in parliamentary works aimed at introducing democratic amendments to the 1952 Polish Constitution in December 1989, and later in the work of the Sejm Constitutional Commission. In the years 1990–1993 and 1996–2001, he was a member of the Legislative Council to the Prime Minister. In 1996–2001, he served as director of the Centre for Constitutionalism and Legal Culture at the Institute of Public Affairs, one of the first Polish legal think-tanks. In the years 1999–2001 and 2012–2016, he was a member of the Legal Advisory Committee to the Minister of Foreign Affairs. Professor Mirosław Wyrzykowski was also a member of the Council of the National School of Public Administration and a member of the Public Council of the seventh-term Ombudsman.

Throughout his career, and especially after the democratic change, Professor Mirosław Wyrzykowski has been firmly committed to the works of non-governmental organisations, such as the Institute of Public Affairs, the Helsinki Foundation for Human Rights, the Stefan Batory Foundation, the International Service for Human Rights, Zbigniew Hołda Association and the Wiktor Osiatyński Archive. He presently sits on the advisory board of Law Does Not Exclude, a legal-aid fund within the Love Does Not Exclude Association.

In 2001, Professor Mirosław Wyrzykowski was elected a judge of the Constitutional Tribunal, carrying out judicial activity until 2010. During this time, he served as a rapporteur in a number of proceedings of key importance for the status of the individual and the standards of rule of law, concluded with widely respected and largely applauded judgments. Among these, the judgement of 27 April 2005 (P 1/05) on the European Arrest Warrant, the judgement of 18 January 2006 (K 21/05) on inadmissible restrictions of freedom of assembly, and the judgement of 22 September 2006 on the scope of activity of the so-called Parliamentary Investigation Commission on Banks and Banks Supervision are worthy of special mention. Professor Mirosław Wyrzykowski has been a member of the Legal Science Committee of the Polish Academy of Sciences for several terms, acting as its chair in the years 2011–2015. He is also a member of the Committee on Bioethics at the Polish Academy of Sciences, as well as the Polish Constitutional Law Association and serves as the president of the Polish Section of the International Association of Legal Science.

From 2012 to 2017, Professor Mirosław Wyrzykowski was a member and vice-president of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe. Since 2016, he has been a member of Panel 255, an organ established to provide give an opinion on candidates' suitability to perform the duties of judge and advocate-general at the Court of Justice and the General Court of the European Union.

Professor Mirosław Wyrzykowski is and has been a member of numerous scientific councils, including the former Institutes of History of Law, of State and Law Studies, and of Law and Administration Studies at the University of Warsaw. He also sits on scientific councils of national and foreign legal journals, including the *Common Market Law Review*, *European Constitutional Law Review*, *Tilburg Law Review*, *Anti-Discrimination Law Review*, *European-Asian Journal of Law and Governance*, *Deutsch-Polnische Juristen-Zeitschrift*, *Europejski Przegląd Sądowy*, and *Państwo i Prawo*.

He has authored nearly 200 scientific publications – monographs, articles and studies in Polish and other languages, focusing on administrative, constitutional and human rights law.

In 1997, Professor Mirosław Wyrzykowski was granted the Knight's Cross of the Order of Polonia Restituta for his work on the creation the new *Polish Constitution*. In 2011, for his outstanding contribution to shaping constitutional jurisprudence, the principles of a democratic state of law and legal culture, as well as for achievements in scientific research, he was awarded the Officer's Cross of the Order of Polonia Restituta. In 2003, he was awarded the Officer's Cross of the Order of Merit of the Federal Republic of Germany. In 2020, he was distinguished with the Commissioner for Human Rights Medal of Honour *For Merits for the Protection of Human Rights*.

*Jakub Urbanik / Paweł Marcisz*

# JURISTOCRACY RAINBOW-TESTED: THE CASE OF POLAND*

## Abstract

In this essay we apply Hirschl's test on juristocracy to the Polish courts dealing with cases concerning LGBTQ+ rights. Furthermore, a brief overview of the landmark judgments in similar cases rendered by selected national (Israel Supreme Court, German Constitutional Court, and the U.S. Supreme Court) and pan-national (chiefly European Court of Human Rights, also Court of Justice of the European Union) courts is offered. All these judicial developments postdate publication of *Towards Juristocracy* and prove Hirschl right. This part of the chapter is followed by a sketch of the legal panorama of the present-day Poland, against which the legal standing of the LGBTQ+ community is discussed. Finally, the most significant rulings of the Polish courts are analysed in order to appraise the validity Hirschl's hypotheses. In conclusion, we attempt to explain the recent shift in the paradigm (the Polish courts have gradually departed from the initial reluctance to protect LGBTQ+ rights). We claim this change is owed to the assault on the Polish judiciary carried out by the parliamentary majority: in a way it has put the judges into the situation of an oppressed minority.

## Keywords

LGBTQ+ rights; Hirschl; Juristocracy; Judicial crisis in Poland; Judges; European Charter of Human Rights; Polish Constitution; Article 18; Judicial authority

## 1. Introduction

What could be more fit for the Honorand than a subject covering both dismantling of rule of law in Poland and LGBTQ+ rights? These topics, *prima facie*, seem to float afar, yet the last half a decade, as we aim to prove in this essay, has brought them surprisingly close. In choosing our topic we have been captivated by Ran Hirschl's explanation of the reason some judiciaries grew so robust in the last decades of the 20th century.

In his seminal 2004 work[1] the scholar identifies alternative cause of this phenomenon. In contrast to the classically postulated theories of constitutionalisation of hu-

* The authors of this paper are involved in a number of litigations in LGBTQ+ cases (some have been analysed in this article). Part of the material and observations therefore comes from our autopsy of the Polish judicature attitude towards LGBTQ+ community. Yet this essay would never be written and completed had it not been for invaluable help and assistance of our friends, colleagues, and students, who have provided us with the cases, transcripts, notes, and comments: Jakub Czekała, Jakub Biegański, Filip Cyuńczyk, Katarzyna Dębska, Anna Mazurczak, Bartosz Przeciechowski, Paweł Knut, Radosław Baszuk, Jakub Pawliczak, Jakub Turski, Karolina Kędziora, Milena Adamczewska-Stachura. We would particularly like to thank Derek Scally for not only having proofread our text, but especially for most inspiring comments and discussion. All our contributors join us in dedicating this paper to our Mentor and Friend, Mirosław Wyrzykowski. Needless to say, all faults and shortcomings are ours.

[1] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism,* Cambridge, ma. – London 2004. See also, for a condensed version, idem, 'The political origins of the new constitutionalism', *Indiana Journal of Global Legal Studies* 11.1 (2004), pp. 71–108 (available at: https://www.repository.law.indiana.edu/ijgls/vol11/iss1/4), esp. pp. 73–90 for an overview of the previous views on the topic.

man rights,[2] he puts forward a new thesis labelled 'strategic approach and the hegemonic preservation'. His idea, somewhat simplified and overstated, could be resumed in the following way. The liberal establishment, often defined across the traditional party lines by the professionalism of its members, insecure of the future political developments, trusts that the progressive consensus on civic rights and duties would be upheld by the judiciary. It thus vests it with relatively more authority than the other two branches of power to prevail any future withdrawal from the already secured freedoms, but also to enhance these already in function, and to possibly introduce new sets of human rights guarantees. In such a manner, the political establishment avoids also opening debate on subjects of potential social controversy, debate which could have politically damaging results and therefore alienate average voters. The governments thus wash their hands, letting the courts – which are not directly connected to them – do what should essentially be a political choice. In brief: by creating an actual juristocracy the liberal consensus is preserved, and electoral minefields are strategically eschewed.

To prove his claim, Hirschl turns to an analysis of four countries which, in his view, had undergone a revolution of constitutionalisation and strengthening of judicial review in the last two decades of the 20th century. These are Canada, New Zealand, South Africa and Israel. Likewise, four test-areas of particular significance are identified:[3]

- Due procedure in criminal cases.
- Freedom of expression (yet negatively asserted), and formal equality within the sphere of expression of one's sexual identity.
- Guarantee of economic and social rights (such as social security and welfare, health protection, or housing).
- Freedom of assembly in labour relations.

A decade and half have passed since this captivating analysis. Given the world we face today, it is an open question whether this analysis remains valid. Perhaps even more importantly, whether – should Hirschl's propositions be veritable – the apparent introduction of juristocracy caused a backlash. This may have eventually contributed to a takeover of courts by illiberal politicians. If so, the end result of the process analysed by Hirschl would be the exact opposite of what he intended.

In this paper we cannot address this issue globally. What we intend to do is to apply the second of Hirschl's tests to the modern-day Poland. Naturally this would barely be a fragmentary contribution to a thorough review of Hirschl's theory (a new book would have to be written to meet such an ambitious goal). Notwithstanding, we think it is a task worth undertaking, given its purpose would not be merely academic.

Hirschl's tenet on juristocracy serving upholding and broadening of the liberal consensus on human rights, in particular of these pertaining to the LGBTQ+ minority, *prima facie*, seems quite likely. Landmark court decisions both at national and pan-national level have done oftentimes more to secure 'rainbow' rights than a parliamentary majority in a particular country. But is this always the case? Could we be certain that the courts would always stand by the core principles of a liberal society? For the sake of an argument, one could easily imagine the opposite, especially in a situation of external pressure exerted on the courts, or even expect a back-lash caused by the prior decisions considered overtly progressive by the society. Neither may one presume, as a matter of

[2] Hirsch, *Towards Juristocracy* (cit. n. 1), passim, yet esp. ch. 2, in part. pp. 38–49, and further ch. 3.

[3] Hirsch, *Towards Juristocracy* (cit. n. 1), p. 13; *cf.*, on court protection of LGBTQ+ rights, see, in part, pp. 118–125 and, idem, 'The political origins' (cit. n. 1), p. 94, n. 47.

fact, a clear progressive leaning among the judges. 'Judicial activism', in itself problematic, may also be less prominent in certain legal traditions. It is worth therefore testing Hirschl's hypothesis anew, setting it against different experimental conditions. Poland – *c'est-à-dire nulle part* – in the somewhat apocryphal *bon mot* of Alfred Jarry – seems to be a perfect Petri dish to conduct such an experiment.

* * *

*For starters*, the original situation of the Polish revolution is completely different from Hirschl's test-field countries. The scholar assigned Poland to the dual transition model, *i.e.* where the economic transition goes hand in hand with introduction and gradual domination of judicial checks and balances.[4] There is perhaps room here for a more nuanced and exact approach. Poland's Constitutional Tribunal – a kind of judicial institution which for Hirschl marks the beginning of the 'juristocratic' transition – was instituted seven years before the fall of the Berlin Wall – and started its activity in 1986. Moreover, it was predated in 1980 by the re-creation of the Supreme Administrative Court, empowered to judicially control administrative decisions (and thus weakening the standing of administrative organs). In 1988, long before the Round Table talks and communist Poland's transition to democracy, the office of Commissioner for Human Rights (ombudsperson) entered the panorama of the Polish People's Republic. While this body is not, *per se*, strictly judiciary, it could still, thanks to its constitutional standing and professional calling, be annumerated to the ranks of the juristrocrats. Much to surprise of the late communist law-makers these three bodies created considerable obstacles to the previously uncontrolled execution of government, especially on the local and lower level.[5] One could then immediately see that some premises of constitutionalisation of human rights in Poland predate actually the era of liberal democracy.

It is true, however that the coming of liberal democracy in consequence of the 1988–1989 Round Table talks brought about a particular form of empowerment of judges. The Supreme Court was practically created anew in 1990. Yet, there was not a thorough vetting of judges in the common courts; to a certain extent verification happened at the moment the elder judges reached their retirement age and over 500 of them were refused the possibility of prolonged sitting in the bench.[6] In 1999 the Parliament finally lost its remaining power to overrule the judgments of the Constitutional Tribunal by a qualified 2/3 majority vote.

*Secondly*, Hirschl's work was completed and published (and hitherto unrevised) before the landmark judgments that indeed seem to confirm his theory. It is the (highest)

[4] See *e.g.* W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe,* Dordrecht 2008.

[5] In the case of Commissioner of Human Rights this was undoubtedly due to the personality and character of the first Polish Ombudsperson, Prof. Ewa Łętowska; our Honorand was back then one the closest companions and collaborators of her struggle, heading the Department for Constitutional Freedoms and Rights at the Commissioner's Office.

For an early snapshot, still under the former regime, of the rule of law promoting function of the Constitutional Tribunal and the Supreme Administrative Court see, M. Wyrzykowski, 'Instytucjonalne gwarancje praworządności (NSA, TK)' ['Institutional safeguards of rule of law (S[upreme] A[dministrative] C[ourt], C[onstitutional] T[ribuna]), *Wychowanie Obywatelskie* 2/1987, pp. 92–98. On the office of Commissioner, see E. Łętowska, 'The Commissioner for Citizens' Rights in Central and Eastern Europe: The Polish experience', *Saint Louis-Warsaw Transatlantic Law Journal* 1 (1996), pp. 1–14.

[6] N. Sawka, 'Premier mówi nieprawdę, że po 1989 r. nie było weryfikacji sędziów' [The Prime Minister tells untruth that there was no vetting of judges after 1989], *Gazeta Wyborcza* 29 June 2018, available at https://wyborcza.pl/7,75398,23609697,czy-prawda-jest-ze-nie-bylo-zadnej-weryfikacji-sedziow-po-1989.html.

courts that guarantee (even if, at first, limited) rights of the LGBTQ+ community, and pave the way for the law-makers. Just to mention the few most notable ones. *Ben Ari & al v Director of Population Administration, Ministry of Interior,*[7] the landmark judgment of the Israeli Supreme Court sitting as High Court of Justice, *de facto* recognised[8] same-sex marriages contracted abroad, thus granting formal equality to same sex-couples (what would have never been possible through the traditional political agents tied by the support of the religious orthodox politicians). In the ground-breaking *Obergefell v Hodges*,[9] the U.S. Supreme Court secured institutionalisation of same-sex marriages in the United States. Similarly in this case, Hirschl could not have been happier reading the words of Justice Kennedy in the Court majority opinion:

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 638 (1943). This is why 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.' (*ibid.*)[10]

In the European Area of Human Rights Protection (*nota bene*, Hirschl stresses the importance of the transnational courts for the development of juristocracy), the European Court of Human Rights step-by-step walks towards establishment of the right of formal recognition of same-sex couples as the ascertained universal (European) human right. The way to *Oliari & al. v Italy,*[11] sealed in *Orlandi & al. v Italy*,[12] was paved by *Schalke & Kopf v Austria*,[13] *Vallianatos & al. v Greece*,[14] *Chapin & Charpentier v France*,[15] *Hämäläinen v Finland*.[16] The sometimes-misread negative judgements in *Schalke & Kopf v Austria*, *Chapin & Charpentier v France*, *Hämäläinen v Finland* confirm this principle fully. The only reason for which the Court did not impose the duty to introduce same-sex marriage in the respective responding countries was the fact that legal protection of same-sex couples existed already under the form of registered partnership. It may be likely, moreover, that sooner or later Article 12 of the

[7] Israeli Supreme Court, HCJ 3045/05 – *Ben Ari et al v Director of Population Administration, Ministry of Interior* (Judgment of 21 November 2006).

[8] This context is probably best illustrated with the words of the dissenting opinion (*sic*!) of Justice E. Rubinstein (in cit. n. 7, para 9): 'Whether true or not, *Funk-Schlesinger v. Minister of Interior* (…) has *prima facie* established in the "legal" consciousness the idea that the population registry is merely a statistical tool. I say once again that this is not the case; the population registry is the "entry gate" into the Israeli legal reality. When confronted by a couple who present an Israeli certificate that declares them to be married, an ordinary person is incapable of making fine distinctions as to whether it is merely a case of registration or a recognition of status. But this is not only true of the ordinary man.' Rubinstein cited opinions expressed in *Shalit v Minister of Interior* by Justices Landau and Agranat who emphasised that the fact of registration was not only of technical value but carried important socio-political consequences. One indeed cannot agree more, a legal fact, even if a little one, does have a potential to change the social reality – on that see further in the Conclusions.

[9] United States Supreme Court, 576 U.S. 644 (2015) – *Obergefell v Hodges* (Judgment of 26 June 2015).

[10] *Obergefell v Hodges* (cit. n. 9), IV, pp. 24–25.

[11] ECtHR, Nos. 18766/11 and 36030/11 – *Oliari & al. v Italy* (Judgment of 21 July 2015).

[12] ECtHR, Nos. 26431/12; 26742/12; 44057/12 and 60088/12 – *Orlandi & al. v Italy* (Judgment of 14 December 2017).

[13] ECtHR, Nos. 30141/04 – *Schalke & Kopf v Austria* (Judgment of 24 June 2010).

[14] ECtHR, Nos. 29381/09 and 32684/09 – *Vallianatos & al. v Greece* (Judgment of 7 November 2013).

[15] ECtHR, No. 40183/07 – *Chapin & Charpentier v France* (Judgment of 9 June 2016).

[16] ECtHR, No. 37359/09 – *Hämäläinen v Finland* (Jugment of 16 July 2014).

*Convention* will be understood to comprehend same-sex marriage.[17] Unsurprisingly, if we deduce rightly the much more universal approach adopted by the Court in the *Orlandi*,[18] as opposed to the earlier Italo-centric view clearly perceivable in Oliari,[19] the ECtHR has recently followed the same path in *Fedetova & al. v Russia*.[20] It states there that even if Article 8 'does not explicitly impose on the Contracting States an obligation to formally acknowledge same-sex unions', it still 'implies the need for striking a fair balance between the competing interests of same-sex couples and of the community as a whole' (para 49). The ECtHR has prominently dismissed the Russian Government's argument that same sex unions are not approved of by the majority of the Russian society, affirming at the same time its withdrawal from the previous, respective state/society-based grounds of judgment in favour of formalization of same-sex unions:

> It is true that popular sentiment may play a role in the Court's assessment when it comes to the justification on the grounds of social morals. However, there is a significant difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to deny access of a significant part of population to fundamental right to respect for private and family life.

After all,

> [i]t would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority (para 52).

The Court of Justice of the European Union has had fewer chances to express itself in the matter as marriage and family matters generally fall outside the scope of EU law. Yet in the case of *Coman & al. v Romania*[21] where the definition of spouse was at stake in a similar manner, it forced Romanian authorities to recognise a foreign same sex-marriage of a Romanian and a third-country national, protecting thus freedom of movement and the family life.

Before we proceed further, we should still mention the jurisdiction of Bundestag since it presents attitude somewhat different to the hitherto observed. Instead of going ahead the lawgiver, it first rather followed them approvingly. Later it started paving the way for the legislative novels, yet never getting ahead of the Bundestag. Let us observe this tendency in the most important examples.

[17] Illustrative, again, a dissenting opinion of justices A. Pejchal and K. Wojtyczek, in *Orlandi & al. v Italy* (cit. n. 12), para 6, referring to para 192 of the majority reasons: 'In the instant case the majority expresses the following view in this respect: "The Court reiterates that States are still free, under Article 12 of the *Convention* as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples (see *Schalk & Kopf*, cited above, § 108, and *Chapin and Charpentier*, cited above, § 108)" (see paragraph 192 of the principal judgment). (…), Secondly, the majority states that "States are still free..." (emphasis added). This suggests the Court intends to revise this view in the future. We strongly disagree with such an approach, which presupposes that the scope of treaty obligations may be adapted by the Court on the basis of societal changes and – what is more – that those societal changes can and will develop in only one direction. The Court has no mandate to favour or inhibit societal changes. The States remain free to decide on different issues under the Convention until such time as this treaty has been modified by the masters of the treaty.' The apparent miscomprehension of the Roman law principles of marriage and the un-reserved application of this erroneous view to modernity by Pejchal and Wojtyczek in their dissent (*cf.* para 6) is culturally interesting in itself and will be an object of study currently in preparation by J. Urbanik (for a pre-*Orlandi* critique of similar tendencies, see idem, 'On the uselessness of it all: the Roman law of marriage and modern times', *Fundamina* [editio specialis: *Meditationes de iure et historia. Essays in honour of Laurens Winkel*] 20.1[2014], pp. 937–951).

[18] *Cf. Orlandi* (cit. n. 12), para 204.

[19] *Cf. Oliari* (cit. n. 11), para 190.

[20] ECtHR, No. 40792/10 – *Fedetova & al. v Russia* (Judgment of 13 July 2021).

[21] CJEU, C-673/16 – *Coman & al. v Romania* (Judgment of 5 June 2018).

The 2002 judgment on constitutionality of same-sex partnership[22] of the court's First Senate approved the amendment, yet stressed simultaneously (in this both the majority and the two dissents concur) that under the Article 6.1 of the *Basic Law* only the heterosexual marriage was constitutional.[23] Notably, *Ehe* – marriage – protected in this norm is not defined any further, the heterosexuality of it remains a kind of enthymemic premise deeply rooted in the brains of the judges, or, their own societal convictions and habits.[24] Such a premise, could however, be easily overturned, as soon as one ascertains, just as Justice Kennedy did in *Obergefell v Hodges*, that super-(or extra-)legal order recognises a construct of marriage different from the traditional one.

In the subsequent decisions the German Constitutional Court took steps towards this reasoning.[25] Let us just take the example of the judgment 1 BvL 1/11 – (19 February 2013) which declared constitutional inadmissibility of the ban on successive adoption of one person's child by their same-sex partner. In this ruling BVerfG skilfully operated the notion of family protected under Article 6.1 of the *Basic Law* (*cf.* Headnote 3, and para 100), and repeatedly compared duties and rights arising from marriage to these present in a registered partnership, finding a likeness in two figures (paras 77, 80, 98). The divergences between them could not, instead, justify, discrimination of the same-sex partnership (*i.a.*, paras 75, 104). This similarity between both legal figures was further emphasised by the Second (*sic*!) Senate – 2 BvR 909/06 (Order of 7 May 2013). In this ruling BVerG declared reservation of the spousal income tax-split only to married couples unconstitutional. The Court unreservedly stated that the law-giver made registered partnership comparable with marriage:

> Der Gesetzgeber hat die Lebenspartnerschaft somit von Anfang an in einer der Ehe vergleichbaren Weise als umfassende institutionalisierte Verantwortungsgemeinschaft verbindlich gefasst und bestehende Unterschiede kontinuierlich abgebaut. (para 91)

[22] BVerfG, 1 BvF 1/01 – *Lebenspartnerschaftsgesetz* (Judgment of 17 July 2002).

[23] Art. 6.1 'Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung.' – 'Marriage and the family shall enjoy the special protection of the state.' (trans. https://www.gesetze-im-internet.de/englisch_gg/).

[24] *Cf. Lebenspartnerschaftsgesetz* (cit. n. 22), para 79 'However, marriage is only possible to a partner of the other sex, since the fact that the spouses are of different sexes is an inherent characteristic of marriage' (*BVerfGE* 10, 59 [66]) and the right of freedom to marry relates only to this.' (official translation https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2002/07/fs20020717_1bvf000101en.html_), as well as para 126 (the dissenting opinion of Justice Papier). The cited judgment of the Court (1 BvR 205/58 – *Elterliche Gewalt* of 29 July 1959), para 24, openly assigns the admissible marriage structure to the supra-legal order, emphasises its perennial and principally unchangeable character. Such a construct of marriage is assigned to legal consciousness and common legal sense: 'Nach Art. 6 Abs. 1 GG stehen Ehe und Familie unter dem besonderen Schutze der staatlichen Ordnung. Welche Strukturprinzipien diese Institute bestimmen, ergibt sich zunächst aus der außerrechtlichen Lebensordnung. Beide Institute sind von Alters her überkommen und in ihrem Kern unverändert geblieben (...) Ehe ist auch für das Grundgesetz die Vereinigung eines Mannes und einer Frau zur grundsätzlich unauflöslichen Lebensgemeinschaft, und Familie ist die umfassende Gemeinschaft von Eltern und Kindern, in der den Eltern vor allem Recht und Pflicht zur Pflege und Erziehung der Kinder erwachsen. Dieser Ordnungskern der Institute ist für das allgemeine Rechtsgefühl und Rechtsbewußtsein unantastbar'. One cannot but observe that between the 'order of life' and 'unchangeability' there seems to be a contradiction of terms, resulting possibly from a completely ahistorical perspective on human history (and in particular on history of family and marriage), which wrongly presumes the external conditions delimiting the 'order of life' as immutable. *Cf.* completely different approach adopted by Justice Kennedy in his majoritarian Court opinion in *Obergefell v Hodges*. Kennedy seeks and finds justification for the change of marriage definition in the very societal change happening through centuries.

[25] *Cf.*, *e.g.*, BVerfG, 2 BvR 1397/09 (Order of 19 June 2012), paras 69–70: 'Die Begründung und Aufhebung der eingetragenen Lebenspartnerschaft sowie die persönlichen und vermögensrechtlichen Rechtsbeziehungen der Lebenspartner sind bereits seit 2001 in naher Anlehnung an die Ehe geregelt. Mit dem zum 1. Januar 2005 in Kraft getretenen Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts vom 15. Dezember 2004 wurde das Recht der eingetragenen Lebenspartnerschaft noch näher an das Eherecht angeglichen und auf die Normen zur Ehe in weitem Umfang (hinsichtlich Güterrecht, Unterhaltsrecht, Scheidungsrecht, Stiefkindadoption, Versorgungsausgleich, Hinterbliebenenversorgung) Bezug genommen (vgl. BVerfGE 124, 199 <206 ff.>)'.

And that, moreover, they are analogous economically, and thus under tax law:

> Das Lebenspartnerschaftsgesetz gestaltet die eingetragene Lebenspartnerschaft als eine Gemeinschaft des Erwerbs und Verbrauchs aus, die in ihren für die steuerrechtliche Anknüpfung wesentlichen Grundzügen mit der Ehe vergleichbar ist. (para 95)

Like other courts in Hirschl's analysis the Federal Constitutional Court gradually broadens the notions under scrutiny providing for greater equality. It departs, however, from cautious interpretation of the already existing law (*Act on Life-Partnership*), and leaves the final decision to the law-giver, paving the way towards it. A somewhat hermetic statement of para 104 ('Eine Erklärung nur der Unvereinbarkeit ist insbesondere geboten, wenn der Gesetzgeber verschiedene Möglichkeiten hat, den Verfassungsverstoß zu beseitigen') calls the Parliament naturally to amend the tax law, but perhaps, could also be understood as in invitation to a final elimination of discrepancies between the legal standing of heterosexual and homosexual couples. An invitation which was eventually, as we know, accepted and made into a law on same sex marriage in 2017.[26] As we could appreciate, the conduct of BVerfG over the years does speak in favour of Hirschl's hypothesis, even if the developments are more gradual and, the legal sense, more conservative than elsewhere.

*Thirdly*, and finally, this essay seems justified by the fact that some patterns noticeable in Poland's late transition to an 'illiberal' democracy may be traceable elsewhere, among others, in Israel – one of Hirschl's primary test-fields. Populist attacks on the courts have become more common across even established democracies. The argument is uniform: the judges allegedly operate above the rules of democracy, impose their arbitrary dictamen restricting the usual way of life and thus go against the public interest. It is the very problem of juristocracy: it is easily attacked with 'traditional' democratic, *i.e.* voting-polls-based, values. There is no need again to remind all singular assaults, say following President Trump's electoral defeat, or by the government of Israel.[27] Today there are too many examples to mention. Let us recall just one, since it touches upon our main theme here, *i.e.* the issue of the social and legal perception of the LGBTQ+ community. It is, moreover, resounding, since it comes from the country universally renowned as the sanctuary of judiciary. The case we have in mind is the reaction of the tabloid press in the U.K, following the ruling of High Court of England and Wales in *Miller* I,[28] which temporarily forestalled an early stage of Brexit (the issue at stake was the non-existence of the royal prerogative allowing to government to trigger the Article 50 of the *Treaty on European Union* without parliamentary permission). The front cover of *The Daily Mail* branded the three sitting judges, Lord Chief Justice, Lord Thomas, Lord Justice Sales, and the Master of the Rolls, Sir Terence Ether-

[26] This law has not been yet constitutionally challenged, should such a claim be brought forward, it does not seem likely to stand chances of success, given the line of jurisdiction adopted by the Court since 2002. *Cf.* U. Volkmann, 'Warum die Ehe für alle vor dem BVerfG nicht scheitern wird', *VerfBlog* 2 July 2017, https://verfassungsblog.de/warum-die-ehe-fuer-alle-vor-dem-bverfg-nicht-scheitern-wird/.

[27] See M. Mautner, 'Democratic backliding in Israel', in this volume, pp. 473–484. This tendency is perfectly illustrated by the electoral ad *Perfume–Fascism* of the Hayamin Hehadash right wing party starring then Israeli Minister of Justice, Ayelet Shaked (https://youtu.be/0XvIvYAtuX8). In the short film the minister mocks the opponents of her proposed judicial reforms aiming at restraining the court activism and subjecting them more to the legislative, saying that to her what the others label as fascism, 'smells like democracy'. *Cf.* A. Kaplan Sommer, 'Israel's Justice Minister sprays "Fascism" perfume in provocative campaign ad', *Haaretz* 18 March 2019 <https://www.haaretz.com/israel-news/elections/israel-s-justice-minister-sprays-herself-with-fascism-perfume-in-provocative-ad-1.7039221>.

[28] High Court of England and Wales, [2016] EWHC 2768 (Admin) – *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* (Judgment of 3 November 2016); the Supreme Court upheld the ruling in appeal, [2017] UKSC 5 (Judgment of 24 January 2017).

ton, and as 'Enemies of the People'.[29] Its on-line edition went further tagging the picture of the Master of Rolls with 'an openly-gay Olympic fencer', which was universally read as a homophobe trope. And so, the already reluctant attitude towards apparently overpowerful judges was enhanced by awaking the traditional daemons of homophobia.

* * *

In what follows, we will start with a brief sketch of the legal panorama of the present-day Poland, then proceed to a description of the legal standing of the LGBTQ+ community in our country, and report some judicial approaches thereto, finally aiming at the appraisal of Hirschl's hypotheses.

## 2. Poland as the Test-Case

### 2.1. Premise 1: The Courts under Attack

There is no need to describe the meandering detail of the Polish constitutional crisis. It would also be quite dangerous, since the changes are so swift than often the morning paper content becomes a legal-historical report in the afternoon. Some of the papers in this book focus on it, Wojciech Sadurski has dedicated an entire study to the problem, which even if outdated in detail, gives a thorough theoretical background of the issue.[30] For the purpose of introduction of our study let us restate the most basic facts which delimit the discourse.

The meticulous change aiming at overtaking the judicial authority in Poland by the governmental majority started immediately after the 2015 elections. The first battlefield was to take control over the Constitutional Tribunal, waving thus off any attempts to forestall any further laws because of their apparent unconstitutionality. What followed was the gradual dismantlement of the courts' independence. The amended *Act on Organisation of Common Courts* practically subdued them to the administrative check of the ministry of justice.[31] A complete reconstruction of the National Council of the Judiciary (the new *Act* interrupted the constitutional mandate of the previously elected one and vested the powers to elect the its members in the hands of parliamentary majority) secured the selection procedure of the new judges.[32] Finally, the new *Act on the*

[29] *The Daily Mail*, 4 November 2016, the Editorial by J. Slack. *Cf.* also the cover of *The Sun* with J. Reilly & T. Newton Dunn, 'Who do EU think you are', with the lead 'Judges' Brexit blow', and somewhat more balanced, yet still aggressive *The Daily Telegraph* "The judges versus the people' by P. Dominczak, C. Hope & K. McCann – paired on the same page with N. Farage's column 'Voters aren't going to let this incredible arrogance lie' [both of the same date]. In the next developments this denigrating campaign took a more institutionalised turn: a policy-maker for Prime Minister Boris Johnson blamed 'blob' for various failures of his government, especially slowing down of Brexit. The courts, alongside the BBC, the universities, and the Whitehall civil service became part of the invisible world-controlling power, almost a new reincarnation of world-old conspiracy theories.

[30] W. Sadurski, *Poland's Constitutional Breakdown,* Oxford 2019. The updated version of the study is available in Polish as *Polski kryzys konstytucyjny,* Warszawa 2020. See also numerous contributions in this volume, esp. A. Drzemczewski, 'The erosion of the rule of law and of judicial independence in Poland since 2015: The Council of Europe's reaction – too little, too late?', pp. 149–168; L. Garlicki, 'Polish judicial crisis and the European Court of Human Rights (a few observationson the *Ástráðsson Case*)', pp. 169–182; M. Krygier, 'The spirit of constitutionalism', pp. 357–372; *A.* Ploszka, '(In)efficiency of the European Court of Human Rights priority policy. The case of applications related to the Polish rule of law crisis', pp. 539–554, and M. Safjan, 'On symmetry in search of an appropriate response to the crisis', pp. 605–622 with A. Voßkuhle, 'Applaus von der "Falschen" Seite zur Folgenverantwortung von Verfassungsgerichten', pp. 755–762.

[31] Act of 12 July 2017 r. on *Amendement of Act on Organisation of Common Courts and of some other Acts* (*Journal of Laws* 2017 item 1452).

[32] Act of 8 December 2017 on *Amendement of the Act on National Council of the Judiciary and of some other Acts* (*Journal of Laws* 2018 item 3).

*Supreme Court* introduced new Chambers.[33] The newly instituted Disciplinary Chamber of the Court was designed to keep in check the already appointed justices, and to – together with further changes in the disciplinary regime for judges[34] – impose a chilling effect on their decisions. All these changes, needless to say, are of doubtful constitutional validity, and have been also branded as breaches of the European legal order (not only within the realm of the Union law, but also by the recent judgments of the European Court of Human Rights).[35] And so, at present, one cannot speak of institutional judicial independence in Poland anymore (even if, what needs to be stressed, there remains very visible resistance of the particular members of judiciary to the introduced changes). A side-effect of the situation is the phenomenon of legal uncertainty, and hampered access to justice (the effect potentiated by the restrictions introduced due the COVID pandemic). The reform of the judiciary (often nick-named 'de-form') contrary to the officially stated goals, seriously slowed down the judicial procedure, but even more importantly made it extremely difficult to discern the rightful legal order from the twisted one, introducing Poland into the state of *Doppelstaat* in words of Ewa Łętowska.

The executive branch attempts to exercise undue pressure (even if informal) on the courts also beyond the measures already foreseen by their legislative innovations. The Polish system unites personally the office of the Minister of Justice and that of the Attorney-General. In this capacity the Minister supervises all state attorneys, has access to all the court files, and may directly influence proceedings. In many critical cases public state-attorneys join the proceedings in order to 'represent public interest', being more or less formally mandated to do so by their supervisors. This is particularly visible in many LGBTQ+ related cases, where it is customary to see a state-attorney at the court-room, in civil and administrative matters as well. In 2017 Deputy Attorney-General Hernand obligated the state-attorneys to join all the proceedings regarding matrimonial matters of same-sex couples (especially transcription of the marriages contracted abroad).[36]

## 2.2. Premise 2: LGBTQ+ Rights in Poland

The response to the above-heading could be resumed in a laconic: formally and explicitly, next to none.[37] Naturally, just like every other modern democratic constitution, the *1997 Polish Constitution* guarantees equal rights and prohibits all types of discrimination.[38] It does not specifically refer to sexual orientation, and, as a matter of fact, does not

[33] *Act* of 8 December 2017 *on the Supreme Court* (*Journal of Laws* 2018, item 5).

[34] Introduced in the *Act* of 20 December 2019 on *Amendement of the Act on Organisation of Common Courts, Act on Supreme Court and of some other Acts* (Dz.U. 2020, item 190).

[35] The most recent act of this drama has been the judgment of the European Court of Human Rights, no. 43447/19 – *Reczkowicz & al. v Poland* (22 July 2021), in which the Court found violation of Article 6 § 1 of the *Convention* by assigning disciplinary jurisdiction to the Disciplinary Chamber of the Supreme Court, which cannot be regarded as 'tribunal established by law' due to the irregularities of the judges' appointment procedure. In its reasons the Court followed closely its Grand Chamber judgment, no. 26374/18 – *Guðmundur Andri Ástráðsson v Iceland* (1 December 2020): on this case and its implications for securing judicial independence see Garlicki, 'Polish judicial crisis' (cit. n. 30), and S. Stavros, 'A tribunal established by law: Some thoughts on the *Guðmundur Andri Ástráðsson v Iceland* judgment of the European Court of Human Right' in this volume, pp. 679–692.

[36] Circular letter of 18 January 2017, PK IV Koa 329.2016.

[37] See, among others, European Commission against Racism and Intolerance, *Report on Poland (fifth monitoring cycle),* 20 March 2015 and the response of the Polish Government: *Viewpoints of the Polish authorities regarding the fifth report on Poland by the European Commission against Racism and Intolerance (ECRI),* 2 June 2015.

[38] Art. 32.1 'All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever'. (official translation on the Polish Parliament site: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm).

expressively mention any ground of discrimination. One could obviously argue that 'any reason whatsoever' comprehends sexual orientation, too, and that there was no need to list it alongside other reasons for discrimination (also absent). Yet, as we well know, words have a creative function. Exemplifications and clarifications, even if strictly unnecessary from a legal perspective, render phenomena more visible, and thus may be more effective in counteracting them. Polish law-makers were well aware of this trend, when they expressively declared equality between men and women (see Article 33 of the *Constitution*). This reserve of the *Polish Constitution* is particularly evocative, if we compare it to the meticulous wording of Article 21 of the *Charter of Fundamental Rights*.[39]

The vague egalitarian commitment of Poland's *1997 Constitution* finds very little application in most social spheres of life or, for that matter, in the statutory law. Practically the only norm which directly translates Article 32 guarantee into a legal provision plainly referring to sexual orientation is found in *Labour Code*.[40] Its 2004 amended version, implementing *Council Directive* 2000/78/EC of 27 November 2000 *Establishing a General Framework for Equal Treatment in Employment and Occupation*[41] includes prohibition of discrimination in labour relations on any ground, but unlike the *Polish Constitution*, it lists sexual orientation, among other discriminatory grounds.[42] Moreover, it introduces an active duty of the employer to counter-act all types of discrimination (Article 94 Item 2b of the *Labour Code*), sanctioning criminally a failure to take action should it happen.

Polish criminal law – unlike that of many European countries in the present – does not outlaw homophobic acts *per se*. Homophobia is not an aggravating factor of criminal liability. Sexual orientation is not singled out by the *Criminal Code* as a possible reason for punishable hate-speech, the only grounds being expressively mentioned: nationality, race or creed (or the lack thereof).

Some limited protection may be sought, however, under the Article 212 of the *Criminal Code* penalising defamation.[43] Thus, a personal criminal action is available to a person who feels defamed by a statement of the offender. Such an action is, *prima facie,*

[39] Similarly, the bill to amend article 1 of the *Constitution of the Kingdom of Netherlands*, pending the final approval (the procedure shall be ended with a new vote of the 2/3 majority of each of the Chambers), which includes sexual orientation among the exemplifiers of the forbidden grounds of discrimination [*cf.* https://www.denederlandsegrondwet.nl/id/vlgmjszjraca/nieuws/voorstel_voor_wijzigen_artikel_1_van_de].

[40] A partially homonymous prescription of *the Act on Employment Promotion and Labour Market Instruments* of 20 April 2004 (*Journal of Laws* 2008, No. 69, item 415, as amended) sanctions with a fine a non-employment of candidate because of their gender, age, disability, race, religion, nationality, political views, ethnic origin, creed or sexual orientation. The one of the aims of the Act was to implement the very same *Directive*. See further, R. Rasmus & M. Szabłowska, 'Prawnokarna odpowiedzialność pracodawcy za nieprzeciwdziałanie dyskryminacji w zatrudnieniu' [Employer's criminal liability for failure to prevent discrimination in employment], *Palestra* 9–10/2012, pp. 39–45.

[41] *OJ L* 303, 2.12.2000, pp. 16–22.

[42] *Polish Labour Code* (Ustawa z dnia 26 czerwca 1974 r. – Kodeks pracy, *Journal of Laws* 1974, no. 24, item 141 as amended), Article $11^3$ 'Any discrimination in employment, direct or indirect, in particular in respect of gender, age, disability, race, religion, nationality, political views, trade union membership, ethnic origin, creed, sexual orientation or in respect of the conditions of employment for a definite or an indefinite period of time or full or part time, are prohibited.' (*cf.* Article $18^{3a}$).

[43] *Polish Criminal Code* (Ustawa z dnia z dnia 6 czerwca 1997 r. – Kodeks karny, *Journal of Laws* 1997, no. 88, item 553 as amended), Article 212 § 1. 'Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

§ 2. If the perpetrator commits the act specified in § 1 through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. (…) [translation at International Money Laundering Information Network, https://www.imolin.org/imolin/amlid/data/pol/document/act_6_of_june_1997_the_penal_code.html].

difficult to carry out: personal defamation of the prosecuting party needs to be demonstrated. Since public homophobic statements tend to be extremely generic and refer to gay/lesbian/transgender persons as a group, this task is usually quite challenging. An objective test of 'offensiveness' is applied. So far there has been one successful conviction in case of associating homosexuality with paedophilia (see further Section 3.3.1, *infra*).

One may also seek remedies under civil law protection of personal interests (Article 23 of the *Polish Civil Code*).[44] This too is no easy task, since, as in the case of criminal prosecution just described, personal interest of the plaintiff needs to be duly demonstrated. The courts restrain greatly *locus standi* in these cases. So far there has been no successful claim under this normative in the abundant instances of public collective defamation of the LGBTQ+ community as a group (see further, *infra* Section 3.3).[45]

Just before we end this section let us stress once again that in Poland no equalitarian legislation of any kind exists. Consequently, no same sex-partnership recognition exists (thus no spousal rights, benefits, or duties in any form), no protection of parental rights of same sex-parents, no tax privileges, or administrative protection at large). All attempts at bills formalising same-sex relationships in a very limited manner have failed over the last two decades (none of these have even passed the stage of the first reading in Sejm).[46]

Additionally, any of these undertakings have been greatly forestalled by the majority, yet seemingly faulty, opinion of a vast number of scholars and the courts alike,[47]

[44] 'The personal interests of a human being, in particular health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of protection under other regulations', trans. within public domain.

[45] See affirmative gloss of J. Wierciński, to the Supreme Court judgment, I CSK 118/06 of 21 September 2006: 'Ochrona członka partii politycznej z tytułu pośredniego naruszenia dobra osobistego – zniesławienie określonej zbiorowości a ochrona członka tej zbiorowości' [Protection of a member of a political party for indirect infringement of personal rights – Defamation of a particular collective versus protection of a member of that collective], *Orzecznictwo Sądów Polskich* 10/2009 (*nota bene*, in its judgment the Polish Supreme Court cites the House of Lords leading case of *Knupffer v London Express Newspaper Ltd.* [1944] A.C. 116, p.121.

[46] These were: the bill proposed by the senatrix Maria Szyszkowska in 2003, passed by the Senate, yet never pondered by Sejm due to the arbitrary decision of then Marshal (Speaker) of Sejm, W. Cimoszewicz (of Democratic Left Alliance) not to open it to deliberation; 2011 Bill proposed by Democratic Left Alliance; three different bills put forward at the beginning of the 7th Term of Sejm (2012) by MP Dunin (member of Civic Platform), Democratic Left Alliance, and Palikot's Movement; all these were rejected on the 25th of January 2013. The two latter ones were then reproposed in 2014 and 2015 (twice), respectively, yet to no avail. In the present, 8th Legislature, there is a bill (including right to internal adoption of the partner's child) put forward by Modernity.

[47] In the most recent scholarship, see L. Garlicki, [in:] idem & M. Zubik (eds), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* I [Constitution of the Republic of Poland. A Commentary], Warszawa 2016 (2nd ed.), art. 18, para 6–8; W. Borysiak, [in:] M. Safjan & L. Bosek (ed.), *Konstytucja RP* I. *Komentarz. Art. 1–86* (Constitution of the Republic of Poland. A Commentary, arts. 1–86], Warszawa 2016, art. 18; and, most recently, P. Tuleja, [in:] idem (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz* I (The Constitution of the Republic of Poland. A Commentary], Warsaw 2021 (2nd ed.), Art. 18, with literature. Earlier, *inter al.*, M. Szydło, 'Instytucjonalizacja związków partnerskich w świetle art. 18 i 32 Konstytucji RP', [Institutionalization of civil partnerships in the light of Articles 18 and 32 of the Polish Constitution], *Zeszyty Prawnicze Biura Analiz Sejmowych* 56(4) (2017), pp. 9–30, at p. 21 and extremely convoluted n. 38, who radically rejects not only constitutionality of same-sex marriages, but also of registered partnership. See also, A. Mączyński, 'Konstytucyjne podstawy prawa rodzinnego' [Constitutional fundations of family law] [in:] P. Kardas, T. Sroka & W. Wróbel (ed.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla* I, Warszawa 2012, pp. 757–778, at pp. 49–50, who in like manner, states that the wording of the Art. 18 of the Constitution was intended originally as *preventive* against institutionalization of any form of same-sex relationships.

Among the usually cited cases, the most prominent one is the Constitutional Tribunal judgment K 18/04 – *Polish EU Accession Treaty* (11 May 2005), para 16.6. Without getting further into detail, one could only stress that the actual Pythian wording of the judgment is not as unambivalent as the proponents of the exclusive heterosexuality of marriage would like it to be. Article 18 is taken to be a legal definition of marriage in the (in)famous judgment of the Supreme Court, I CSK 146/13 (6 December 2013), para 5. The rejected cassation was filed by a transsexual person (M/F), whose originally successful plea for legal gender recognition was reversed when the public prosecutor had filed a motion to reopen the proceeding having become aware of the plaintiff's marriage a woman.

who read Article 18 of the *Constitution* as a legal definition of the only constitutionally admissible form of marriage. These authorities often label this norm as one of the chief principles of the Polish state order since it forms part of the Chapter I 'The Republic' of the *Constitution*.

> Małżeństwo jako związek kobiety i mężczyzny, rodzina, macierzyństwo i rodzicielstwo znajdują się pod ochroną i opieką Rzeczypospolitej Polskiej.
> Marriage, as a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.[48]

Even if an unprejudiced reading of the text may rather lead to a conclusion that the conjunction *jako*/*as* introduces an exemplification and not a definition of a term,[49] the majoritarian interpretative tendency has cast shadow largely forestalling the endeavours not only to introduce equalitarian marriage, but even same-sex partnerships (as it would seemingly endanger marriage proper, the one protected by the *Constitution*).

Proposals have been put forward to reduce still further any chances for LGBTQ+ legislation. During the electoral campaign of 2020, President Andrzej Duda, running for the second term, put forward a bill to amend the Constitution aiming at expressive prohibition of adoption by same-sex couples. In a televised interview,[50] Mr Michał Woś, MP, Secretary of State at the Ministry of Justice, one of the leading politicians of the ultra-right government coalition party, Solidarity Poland, announced that works were being undertaken by the Ministry of Justice to prepare a bill echoing the Hungarian so-called Anti-LGBT-Propaganda Act. This news, has not yet been confirmed.

* * *

Given the above it becomes clear that that the legal status of same-sex relationships and of their consequences in Poland are largely determined by a few self-standing, sometimes contradictory, court judgements. One can find in these a very limited protection under criminal, civil, and administrative law.[51] One needs to stress that many of these proceedings have been formally supported by the Commissioners of Human Rights, especially

The state-attorney argued that the spouse (and children) of a transexual person had passive legitimation in a legal-gender recognition suit just like the parents of that person, and that the marriage of a transexual person ought to dissolved prior to a legal recognition of their correct sex. The courts accepted this argument. This is clearly wrong and illogical in the light of the Supreme Court reasoning on the presumed heterosexuality of marriage. The Court reiterated that the requirement of different sex had to be met both at the initial moment of marriage, and during its duration. Since the ruling of legal gender recognition has *ex tunc* validity, any possible marriage of a transexual person must be declared null and void from the beginning and not dissolved. Such was actually the argumentation of the plaintiff. The Supreme Court fell into a trap of circular reasoning.

There seems to be only one ruling in which a Polish Court does not read the Article 18 of the *Constitution* as preventive to introduction of a same-sex marriage. The Warsaw Provincial Administrative Court in its judgment IV SA/Wa 2618/18 (8 January 2019) stressed that this norm *per se* could not 'be an obstacle to the transcription of a foreign marriage certificate, if the national order foresaw the institution of marriage as union of same-sex persons'. The Court, *nota bene*, dismissed the plea for transcription stating its incompatibility with the art. 1 of the *Family and Guardianship Code*.

[48] The official Sejm rendering of the Polish text actually mistranslates it to satisfy better this interpretative trend: 'Marriage, being a union of a man and a woman': this indeed looks like a legal definition. [https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm].

[49] *Cf.*, *e.g.* M. Wyrzykowski, 'Publiczne a prywatne w wykładni konstytucyjnej na przykładzie art. 18 Konstytucji RP' [The private and the public in constitutional interpretation as exeplified in Article 18 of the Polish Constitution], [in:] T. Giaro (ed.), *Interes publiczny a interes prywatny w prawie*, Warszawa 2012, pp. 215–233; E. Łętowska & T. Woleński, 'Instytucjonalizacja związków partnerskich a Konstytucja RP z 1997 r.' [Institutionalisation of civil partnerships and the Polish Constitition of 1997], *Państwo i Prawo* 6 (2013), pp. 15–44.

[50] Interview of 25 June 2021, given for Piotr Marciniak in the TV station TVN24.

[51] The situation is different under labour law due the explicit provision of the Labour Code (see supra, p. 714). There have been a number of successful rulings in favour of employees discriminated against because of their sexuality. In simple terms, as courts are bound to apply the statutory provisions in this matters, little room is left for the

by Adam Bodnar, the Commissioner of the 7th term. We shall now examine some of the most notable examples, classifying them in thematic order. This selection aims not to be exhaustive: the cases presented shall merely serve as an illustration of the most remarkable tendencies in the judicature. Some of the cases we know first-hand, many have been shared with us by the lawyers involved, usually *pro bono*, in representing the legal interests of the LGBTQ+ community in Poland; we are extremely grateful for their assistance. We aim at broadening and nuancing the results here presented in the future more in-depth studies on the legal standing of the LGBTQ+ community in Poland.

We will not discuss here (unless marginally) the case-law of the European Court of Human Rights and the Court of Justice of the European Union, which has binding and direct application in Poland by virtue of international agreements.[52] Yet, in many LGBTQ+ related cases the national courts have largely ignored it. Notwithstanding plentiful of requests presented to them by the parties so far, only one Polish court agreed to ask CJEU for a preliminary ruling in such a case (*cf. infra*, p. 735). All the others have dismissed them, claiming the apparent non-pertinence of European law.

One final theoretical note, before we proceed. The Polish legal system, just like the vast majority of the European legal orders, is that of codified law, and thus does not know the rule of court precedent as the common law jurisdictions. Nonetheless, rulings have an authoritative and persuasive function, especially if issued by the higher courts (the Supreme Court and the Supreme Administrative Court).

## 3. Polish Courts Face LGBTQ+: an Overview of Selected Cases[53]

To aid the Reader we have tried systematising the cases we want to present. The sequence presented is neither entirely coherent nor orderly: simply, in many of these rulings various aspects of the legal standing of the LGBTQ+ community in Poland overlap. It is the intensity of protection, and its inalienability that we have used as the ordering factor, presenting the material from the most obvious, seemingly undisputable issues, where the slightest possible recognitions of rights is offered, to the more 'controversial' ones.

### 3.1. Freedom of Assembly

It is only right that we start this overview with a ruling of the Constitutional Tribunal concerning freedom of assembly in context of the Equality Parade (*Parada Równości*) in Warsaw. It is not only one of the earliest significant judgments regarding LGBTQ+

court activism. We shall, therefore, not consider these cases, even if their outcome is mostly positive and promising. To that issue we are planning to devote a separate study.

[52] As we are writing these words Minister of Justice-Attorney General has filed a motion to check the constitutionality of art. 6 of the *Convention* (K 6/21). The Prime Minister Morawiecki has in turn challenged the constitutionality of Articles 1 and 19 of *Treaty on the European Union*. The case K 3/21, already adjourned once, should be decided by the Constitutional Tribunal on 22 September 2021; whatever the outcome may be, it will be of a dubious force given the fact that wrongfully appointed judges are sitting on bench. Marginally let us recall that the wrongfulness of their appointment has already been confirmed by the European Court of Human Rights in no. 4907/18 – *Xero Flor Ltd. v Poland* (Judgment of 7 May 2021): this judgment has actually triggered the Ziobro's motion in K 6/21.

[53] On this subject see an inspiring essay by W. Zomerski, 'Krytyczna analiza dyskursu sądowego dotyczącego prawnej sytuacji osób homoseksualnych w świetle art. 18 Konstytucji RP' [Critical analysis of a judicial discourse on the legal standing of homosexual persons in the light of Article 18 of the Constitution of the Republic of Poland], *Archiwum Filozofii Prawa i Filozofii Społecznej* 15 (2017/2), pp. 80–97. The author, who analyses just a few of the pre-2017 judgments, concludes soundly that the 'unmasking of axiological presuppositions underlying interpretation of the analyzed provision would fundamentally change the character of discussion devoted to the legal situation of homosexuals, satisfying Habermasian standards of deliberative democracy, and it might eventually lead to recognition of same-sex relations by legislator'.

rights in Poland, but also our Honorand was sitting on the bench as the judge-rapporteur in the matter. Following the unprecedented ban of the 2005 Pride in Warsaw, the then Commissioner of Human Rights, Andrzej Zoll, challenged the constitutionality of the Article 65 of the *Traffic Law*,[54] which had been used by the then Mayor of Warsaw, Lech Kaczyński, as the ground for refusal of the permit to demonstrate. The norm made the right to organise assemblies conditional on obtaining a prior permit. It was necessary if the prospective gathering was to cause obstruction to traffic or would involve using a public road in 'a particular way' (on a par with sport events, races, and akin happenings). The Constitutional Tribunal, declared this unconstitutional because requiring organisers of an assembly to obtain a permit was incompatible with the freedom of assembly enshrined in the *Constitution*.[55] In particular, the Tribunal warned that the 'constitutional guarantee of freedom of assembly include[d] the prohibition for the public authority to deprive this freedom on the grounds of differences of opinion or when the views expressed [during the assembly] would be incompatible with the system of values represented by the holders of public authority' (para 4). It is true that the judgment does not name the LGBTQ+ community at all. Its context, though, was commonly known: the Mayor's public statements revealing his true reasons to block the Equality Parade are referred to with these words of the Tribunal 'the moral convictions of the holders of public authority are not a synonym of "public morality" as a premise to restrict the freedom of assembly' (*ibidem*). To a certain extent the Tribunal's Aesopian language could be taken as an attempt underlying that the 'rainbow' rights are nothing but human rights. No surprise, one could argue, when such fundamental liberties as the right to assembly were at stake.

The very same ruling of the Constitutional Tribunal was, alongside Article 57 of the *Constitution* ('freedom of assembly'), as well as Article 11 of the *ECHR*, the grounds for the Supreme Administrative Court to dismiss the cassation in a case concerning another Pride ban in 2005.[56] It was also in this year that Ryszard Grobelny, a self-proclaimed liberal, long-standing president of the City of Poznań, did not allow Posen the Equality Parade claiming public security as a reason. His decision was upheld by the Provincial Governor of Wielkopolska (*wojewoda*), yet both were eventually overturned by the Posen Provincial Administrative Court in Posen. The Supreme Administrative Court confirmed this ruling and stressed that 'it [was] a duty of public administration organs to ensure the safety of persons participating in an assembly'. And thus '[i]t [was] not important how controversial, in the public perception, the views manifested by the participants of an assembly [were], provided that they [would not be] not contrary to law'. With an obvious, yet implicit, reference to the already described statement of the Constitutional Tribunal, the Supreme Administrative Court underlined that it was neither 'the task of the public administration organs, nor of the administrative courts to analyse slogans, ideas, and content not infringing the law, which the assembly [was] intended to serve, from the point of view of the moral convictions of the persons acting on behalf of the administrative organ or the judges sitting on the bench of the court, or [even] the convictions of any part of society'. These are, naturally, fair, constitutionally and socially irrefutable, statements. What deserves attention, though, is the fact that the Court in no way, *obiter dicta*, discussed the core of the issue, *i.e.* the fact of discrimination of a large group of the Polish society, a discrimination further perpetuated by the decisions of the public authority. The Court only referred to the aim

[54] Ustawa z dnia 20 czerwca 1997 r. – Prawo o ruchu drogowym (*Journal of Laws* 1997 Nr 98 item 602 as amended).

[55] K 21/06 (Judgment of 18 January 2006).

[56] Supreme Administrative Court, I OSK 329/06 (Judgment of 25 May 2006).

of the banned assembly by, in turn, referring to the facts established by the Provincial Administrative Court.

With these rulings, and *Bączowski & al. v Poland*, a parallel judgment of the European Court of Human Rights concerning the same decision of Lech Kaczyński,[57] one could think that the right to a peaceful assembly, including these intended to guarantee LGBTQ+ would be forever secure. Yet years 2018 and 2019, which brought about most ever Equality Parades in Poland, were accompanied by a surprisingly high number of objections on the part of the local authorities to permit such demonstrations. That was the case of presidents of Gniezno, Rzeszów, Nowy Sącz, Kielce and Gorzów Wielkopolski. A particularly unmeritable distinction in this respect goes to the President of the City of Lublin, Krzysztof Żak, who attempted to ban the Pride first in 2018, and then, undeterred by his loss in court (even if only on appeal, in the first judgment, the Lublin Regional Court in Lublin surprisingly upheld his decision), again in 2019. In all cases the local authorities used the argument of the participants' security (the apparent danger from the possible counter-demonstrations) to forestall the marches. In all the cases the courts in turn repealed this argument, stressing that the duty to guarantee the security was the obligation of public authorities. Both the judgment of Constitutional Tribunal and *Bączkowski* case were cited in support of such rulings.[58]

While the court rulings come as no surprise, one could be astonished by the authorities' decisions to ban the prides, especially given the political profile of some of the banning mayors: claiming their liberal inclinations and elected with the dominant support of the (economically liberal) Civic Platform. Their illegal decisions bring us back to Hirschl's 'Strategic approach' theory. The 'liberal' politicians simply wanted to keep their profile attractive for their rather conservative electorate. To illustrate it, two rather persuasive examples may be offered. Krzysztof Żak of Lublin and Bogdan Wenta of Kielce, both elected in the areas normally supporting the right-wing political formations. They washed their hands with the judicial rulings.[59]

Let us remind that these judgments triggered Kaczyński's notorious remark on the courts being under the influence of LGBT+ ideology. We will come back to this point in our Conclusions.

## 3.2. The Notion of 'Joint Cohabitation' under Civil and Criminal Law

The shifting judicial attitude in the last two decades could be well illustrated by their approach to the notion of 'joint cohabitation' in civil, and criminal law.

### 3.2.1. Civil Law

Under Polish civil law a person living with a tenant in *de facto* cohabitation has right to succeed them in lease agreement of a housing flat upon the tenant's death. This pro-

[57] In no. 1543/06 – *Bączkowski & al. v Poland* the Court found that Kaczyński's decision violated the Articles 11.1, 13, and 14 of the *Convention*.

[58] Posen Regional Court, I Ns 77/19 (Order of 11 April 2019); Lublin Court of Appeal, I ACz 1145/18 (Order of 12 October 2018); Białystok Court of Appeal, I ACz 232/17 (Order of 23 February 2017); Cracow Court of Appeal, I ACz 2213/17 (Order of 2 December 2017).

[59] Since the case is not yet concluded, we will not analyse here the issue of the peaceful assembly disbanded by the Mayor of Dębica in September 2020. The on-going proceedings are two-fold: one is a case under the *Code of Misdemeanours* initiated by the police against the organisers, *Queer Tour*, claiming that the gathering had never been properly reported, and thus illegal, the other, the organisers' suit against the Mayor of Dębica for the illegal disbanding of an assembly.

vision was originally included in the *Act on Housing Leases and Housing Allowances*[60] listing a 'de facto marital cohabitation' a as ground to claim lease-succession.[61] When the *Act* was repealed in 2001, the norm found its way to the *Civil Code*, Article 691. The new formulation, however, omitted the attribute '*marital*' in the process.[62]

Whether this (marital-like)-'joint-cohabitation' covered same-sex partners was disputed in the Polish courts in 2000, when Mr Kozak sued the municipality of Stettin seeking succession in the lease agreement of a communal flat of his now deceased same-sex partner. Both the district and the regional court (on appeal) dismissed the case, arguing that 'marital cohabitation' had to imitate marriage, which was, by definition, heterosexual.[63] Mr. Kozak was thus not recognised as living in 'close relationship' with his deceased partner. He sued Poland in Strasbourg claiming, *inter alia*, a violation of Articles 8 and 8 in conjunction with Article 14 of the *Convention*.[64] The Strasbourg Court found indeed violation of the Article 14 taken with Article 8. Even if this judgment should have direct and unreserved application in the Polish courts, it still had to be confirmed by the Supreme Court in its Resolution given as answer to a legal query posed in a similar case by a regional court.[65] The Supreme Court eventually resolved that cohabitation under Article 691 of the *Civil Code* did include same-sex relationships, too. Article 32 of the *Constitution*, Article 14 of the *Convention*, and obviously *Kozak* were cited in the reasons, yet the Court also strategically explained its decision by the lack of the attribute 'marital' in the present *Civil Code* provision, unlike the earlier formulation of the 1994 *Housing Act*. So even if it finally acknowledged the capacity of same-sex partners to form 'joint cohabitation' characterised by 'a particular type of emotional, physical (corporal), and economic bond', it still made sure that marriage in itself was not available to them.

Whereas the notion of *de facto* cohabitation is not a uniform legal term and, especially, does not serve a uniform function throughout the legal system, it does appear in some other cases. The Supreme Administrative Court decided[66] that a stable same-sex relationship of a foreigner with a Polish citizen is a sufficient proof of connection with Poland for the purposes of buying real estates in the country. The judgment referred

[60] *Journal of Laws* 1994, Nr 105, item 509.

[61] Article 8. 'In the event of a tenant's death, his or her descendants, ascendants, adult siblings, adoptive parents or adopted children or a person who has lived with a tenant in *de facto* marital cohabitation, shall, on condition that they lived in the tenant's household until his or her death, succeed to the tenancy agreement and acquire the tenant's rights and obligations connected with [the lease of] the flat, unless they relinquish that right to the landlord. This provision shall not apply to persons who, when the [original] tenant died, had title to another residential dwelling' (translation of the ECtHR). In fact, as pointed out by the Supreme Court in the Resolution III CZP 65/12, cited *infra* n. 66, the provision of the 1994 Act stemmed from a long standing legal tradition in the Polish territories securing of such right of the tenant's partner (*cf.* Article 1742 of *French Civil Code*, § 569 *BGB*, and Article 116 of *ABGB*, later incorporated into Article 391 § 2 of the 1933 *Polish Code of Obligations*, then, under Polish People's Republic into the *Civil Code*, and several particular *Acts on Housing*).

[62] Art. 691 § 1. 'In the event of a tenant's death, his or her spouse (if he or she is not a co-tenant), his or her and his or her spouse's children, other persons in respect of whom the tenant had maintenance obligations and a person who has lived in *de facto* cohabitation with the tenant shall succeed to the tenancy agreement'. (translation of the ECtHR).

[63] '[D]*de facto* marital relationship, i.e. an actual relationship of different sex persons with stable physical, emotional and economic ties, imitating a marriage.' (translation by from the ECtHR judgment). Further on the Provincial Court stressed that 'a *de facto* marital relationship differs from a marriage only by lack of its legitimisation. For this reason, the subjects actually remaining in marital cohabitation can only be persons who, under Polish law, are eligible for marriage'. What followed, unsurprisingly, was the argument built from the Article 1 of the *Family and Guardianship Code*, and, naturally, Article 18 of the *Constitution* read as the legal definition of marriage.

[64] ECtHR, no. 13102/02 – *Kozak v Poland* (Judgment of 2 March 2010).

[65] Polish Supreme Court, III CZP 65/12 (Resolution of 28 November 2012).

[66] Supreme Administrative Court, II OSK 2982/14 (Judgment of 14 September 2016).

to the developments in civil and criminal law (described elsewhere in this article) that recognised certain legal consequences of same-sex *de facto* cohabitations.

### 3.2.2. Criminal Law

A legal rule of a doubtful Roman pedigree reminds that *clara non sunt interpretanda*. Despite it, the First President of the Supreme Court, Małgorzata Gersdorf, in 2016 found it uncertain whether 'joint-cohabitation' under Criminal law, included same-sex relationships, too.[67] Thus she posed a legal question to the Penal Chamber of the Supreme Court, asking the bench to decide whether Article 115 § 11 of the defining the 'closest person' did cover homosexual relationships.[68] This notion is vital for some criminal law and criminal procedure provisions, establishing, *inter alia*, the conflict of interest between the judge and the parties, securing the right to refuse to give testimony, or right to conjugal visits in prison, or to initiate or continue certain criminal procedures.

In response to the query the Court undertook a *Resolution* in which it established that 'joint-cohabitation' signified 'a factual relationship' in which 'exist spiritual (emotional), physical and economic (shared household) bonds at the same time'. Interestingly, the Court did not follow the suggestion of the First President of the Supreme Court included in her[69] query that not all these bonds must be simultaneously present between individuals to create 'joint cohabitation'. The bench stressed the liking of joint cohabitation to marriage, and thus that it would have to be based 'on the existence of the same ties as those defined in Article 23 of the *Family Law Code*, *i.e.* spiritual (emotional, affectional), economic (running a joint household) and physical ones', which 'as a rule should occur simultaneously, as in the case of marriage'. Again, like in the case of marriage lack of a certain type of these bonds, if objectively justified, would not prevent 'establishing the existence of such a relationship, *i.e.* "cohabitation"'.

With the use of Articles 32 and 47 of the *Constitution*, and citing *Kozak*, the Court finally established that '[t]he difference in sex of persons remaining in such a relationship does not condition their recognition as cohabiting within the meaning of Article 115 § 11 of the *Criminal Code*'. A different interpretation would be contrary not only to the literal construction of the provision (after all the law-giver did not specify that joint-cohabitation was only constituted by a man and a woman), but above all would constitute a form of discrimination. The functional interpretation of the provi-

[67] There indeed had been controversies in the scholarship and judicature (*cf.* Polish Supreme Court, I KZP 20/15, Resolution of 25 February 2016, Introduction to the reasons [pp. 2–4]. In fact, apparently only two rulings of the Supreme Court, *obiter dicta*, admitted a possibility of understanding under 'joint cohabitation' also a same-sex relationship. These were III KK 268/12 (Judgment of 21 March 2013), and IV KO 98/14 (Decision of 4 March 2015). This latter ruling postulated individual approach in each particular case, actually foreseeing 'joint cohabitation' also in the cases in which living together is not paired with 'strong, positive, emotional bond'. On a margin it is perhaps worth noting, that the Court, perhaps somewhat unwillingly, contrasted 'the normally [stress by JU & PM] functioning marriage and concubinage', and 'cohabitation of persons of the same sex, akin to them'.

[68] 'Osobą najbliższą jest małżonek, wstępny, zstępny, rodzeństwo, powinowaty w tej samej linii lub stopniu, osoba pozostająca w stosunku przysposobienia oraz jej małżonek, a także osoba pozostająca we wspólnym pożyciu.' – The closest person is a spouse, ascendant, descendant, sibling, a relative by affinity in the same line or degree, a person in an adoption relationship and their spouse, as well as a person in cohabitation'.

[69] *Nota bene*, the President is notoriously misgendered throughout the ruling: even if the office was at the time held by a woman, the masculine grammatical gender is used for all the verbs, and for the synonyms to the official title of author of the query. It is true that such a linguistic approach may be explained by the fact that the judges referred to the Office (*Pierwszy Prezes* is indeed grammatically masculine in Polish), and not to its particular holder. Yet, we think that the consequent lack of feminisation is also indicative for the rather conservative disposition of the justices: a fact not without a significance for our case here.

sion (it is reasonable to exclude testimony of a person jointly cohabiting with the suspect, or prohibit to sit on the bench a judge who cohabits with one of the parties, no matter whether they are of the same or the opposite sex), allowed the Court to overcome the fear of approximating same sex union to marriage, perhaps for the first and only time in the history of Polish judicature.[70] Yet it also sparked a violent reaction in the public sphere: in order to 'protect marriage', initiatives were promised to pass a law that would legally define 'joint cohabitation' as strictly heterosexual.[71]

## 3.3. Protection Against Hate Speech and Discrimination

Protection against hate-speech protection is nothing other than negatively-defined freedom of speech. This, let us remind, is one of the key-test areas for Hirschl.[72] The Polish statutory law offers no explicit protection against hate speech directed at the LGBTQ+-community, so once again it is up to the courts to afford this protection. We will first analyse the meagre options of protection offered under criminal law, and then civil law remedies.

### 3.3.1. Defamation/Libel

As we have explained, criminal law does not outlaw homo/bi- and transphobic acts *per se*. In particular, sexual orientation is not singled out by the *Criminal Code* as a possible reason for punishable hate-speech. The only grounds which are expressively mentioned are nationality, ethnicity, race or creed (or the lack thereof).[73] In virtue of the principal rule of any criminal law – *nullum crimen sine lege*, one could argue that such an omission should actively prevent any persecution of homophobic hate-speech. This course of action may thus be perceived as controversial, especially when other constitutional values, like freedom of speech, association, or assembly are at stake.

Nonetheless, some limited protection may be sought under the Article 212 of the *Criminal Code* penalising defamation.[74] Thus, a personal criminal action is available

[70] See approving gloss of P. Daniluk, 'Glosa do uchwały składu 7 sędziów Sądu Najwyższego z 25 lutego 2016 r., I KZP 20/15' [A gloss to the resolution of the 7 judges panel od the Supreme Court of 25 February 2016], *Palestra* 1–2/2017, pp. 156–160, esp. p. 160 where the author underlines that the *Resolution* does not infringe Article 18 of the *Constitution*.

[71] *Cf*. the opinion of the ultra-conservative Institute of Legal Culture Ordo Iuris (https://ordoiuris.pl/rodzina-i-malzenstwo/uchwala-sadu-najwyzszego-zmieniajaca-rozumienie-wspolnego-pozycia-budzi).

[72] See Hirschl, *Towards Juristocracy* (cit. n. 1), pp. 10–13, and *supra*, p. 706.

[73] See Article 256 § 1. 'Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.' (translation available at https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/Poland.pdf).

Art. 257 'Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years.' (translation available at https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/Poland.pdf).

[74] *Polish Criminal Code* (1997), Article 212 § 1. 'Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

§ 2. If the perpetrator commits the act specified in § 1 through the mass media shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.' (…) (publicly available translation).

to a person who felt defamed by a statement of the offender, yet difficult to carry out. Personal interest of the prosecuting party needs to be proven. This makes cases quite challenging, since the most common manifestation of LGBTQ+-phobic hate-speech are generic statements referring to a whole group. Moreover, a successful conviction is only available if an objective test of 'offensiveness' of speech is passed. Even with these rigorous criteria, this has been the most effective tool of protection against hate-speech was awarded.[75] Most recently, two criminal cases initiated by the activist Bart (Bartosz) Staszewski were concluded successfully in his favour. Both concerned statements formulated by the defendants in regards the Equality Parade organised by the plaintiff.

In the first case Lublin City-councillor, Tomasz Pitucha was convicted of defamation for having, *de facto*, stated in his Facebook entry that the Lublin Equality March organisers aimed at promoting paedophilia.[76] By applying the objectivity test, the District court did not find the defendant's other statement – that the March organizers wanted to promote homosexuality – as offensive.[77] On appeal the Lublin Regional Court upheld the judgment, sharing entirely the reasons of the District Court.[78] In particular the courts established that the defendant's statement imputing promotion of paedophilia was personally, and objectively offensive to the plaintiff. Having pondered the freedom of speech, guaranteed by the *Constitution* and the *ECHR*, and the protection of human dignity under Article 31 of the *Constitution*, the District Court established that the former had no absolute character, being limited by the personal interests stemming from the latter. At the same time the Court acknowledged that the defendant's actions were socially not significantly harmful, since he acted out of a subjective conviction that he was protecting the family. One cannot resist an observation that the dignity of LGBTQ+ individuals was thus acknowledged by the Court in somewhat conditional way, as if some 'higher ends' could justify their shaming. Also, the fact that the expression 'promotion of homosexuality' was not considered as derogatory does not seem to correspond to its actual social echo (after all, it is used in order to persuade the audience that homosexuality could be spread by its active promotion).

The second case was filed against Przemysław Czarnek (then the provincial governor of the Lublin Voivodship, now the Minster of Science and Education of the Republic of Poland). It ended with a settlement in court in which virtue the defendant promised to apologise to the plaintiff. This settlement, however, has never been carried out.

In another recent case, a group of plaintiffs accused anti-abortion activist Kaja Godek for her statements equating homosexuality to perversion and linking it with paedophilia. Both the District and the Regional Court in Warsaw found that the criterion of individuality of defamation was not met in these generic statements and thus discontinued the proceedings against Godek.[79]

[75] We shall not analyse here numerous cases in which the courts (of various instances) found the use of word '*pedał*' ('faggot') as derogatory and offensive under the article 212 of the *Criminal Code*, actually most often in the contexts far from LGBTQ+ (for an overview of some of these see P. Knut (ed.). *Prawa osób LGBT w Polsce. Orzecznictwo* [Rights of LGBT Persons in Poland. Judgments], Warszawa 2015).

[76] Lublin District Court, III K 937/18 (Judgment of 17 July 2019).

[77] The entry read '(…) the most enthusiastic fans of W. Smarzewski's film [*The Clergymen* – JU & PM] want to organise in Lublin the so-called Equality parade promoting paedophilia and homosexuality'.

[78] Lublin Regional Court, V Ka 1129/19.

[79] Warsaw-Praga District Court, III K 950/19 (Order of 27 May 2020), confirmed on the 11 of February 2021 by the Regional Court. Notably, the press on the District Court Order reported that the judge in the oral reasons accepted the argumentation of the defence claiming that the prosecuting party did not prove they actually were gay (*cf.*, *e.g.* [amk], 'Umorzenie sprawy Kai Godek. "Nie udowodnili, że są gejami"' [Dismissal of Kai Godek case. 'They did not prove they were gay'], *Rzeczpospolita* 28 May 2020, https://www.rp.pl/kraj/art696731-umorzenie-sprawy-kai-godek-nie-udowodnili-ze-sa-gejami.

### 3.3.1.1. Threats Regarding the Sexual Orientation and the Response of the Authorities Thereto

On the margins of the above considerations let us very briefly discuss the problem of the authorities' unwillingness to proceed the numerous instances of homophobic attacks (especially online) notwithstanding their personal character. The cases are numerous, they are usually dropped. *Exempli gratia*, let us just mention one which one of us has been personally involved. It involves a right-wing portal publication which criticised Jakub Urbanik for his stance on the legality of the so-called Disciplinary Chamber of the Supreme Court. Under the article were numerous readers' comments.[80] Many were often of a derogatory, and offensive nature, some used vulgar and racist language, even threats of violence. The Warsaw district attorney did not undertake proceedings, and their decision was confirmed by the Warsaw-Śródmieście District Court, since, apparently, no elements of crime were found in the reported internet statements.[81]

Another example of such 'sceptical' approach of the Polish courts to homophobic attacks is the case *Bednarek et al. v Poland* (no. 58207/14) communicated on the 14 February 2021 to the Polish Government. The Applicants were attacked physically and verbally with homophobic slurs, there were also death threats. Notwithstanding that, both Warsaw-Śródmieście District Court and Warsaw Regional Court sentenced the defendants merely to a one-year prison sentence (suspended for three years) and little more than symbolic damages. Neither court found any link between the physical aggression, death threats, and the homophobic statements uttered by the offenders. In their application to ECtHR the victims raised, *inter alia*, that such a ruling was degrading (in the sense of Article 3 *ECHR*), and discriminatory (Article 14 *ECHR*). It remains to be seen what the final decision of the Strasbourg Court will be and how it will be received by the Polish judicature. Some indication of the possibly positive outcome of the application may be drawn from the judgment *Beizaras et Levickas v Lithuania* (no. 41288/15) given on 14 January 2020. In this case the Court reprimanded Lithuania for the lack of effective protection against hate-speech and hate-acts based on the sexual orientation of the victims.[82]

Finally, we should mention much more promising recent judgments in criminal cases arising from the infamous attack on the Equality March in Białystok in July 2019. In two cases of physical aggression the offenders were handed prison sentences (one suspended). The words of justice Dariusz Niezabitowski of the Białystok Region-

[80] *WPolityce* 12 June 2020 'Tak się uczy młodych prawników? List lewicowego profesora i aktywisty LGBT do studentów UW ws. Tulei: „Izba Dyscyplinarna nie jest sądem"' ['Is this the way the young lawyers are taught? A letter of a left-wing professor and LGBT activist to the students concerning [justice] Tuleya: "Disciplinary Chamber is not a court"'] (in the section *We denounce*): https://wpolityce.pl/polityka/504443-szokujacy-list-lewicowego-aktywisty-lgbt-do-studentow-uw.

[81] Justice Anna Tyszkiewicz in II Kp 3270/20 (Order of 21 June 2021).

[82] It is true though that at that time the *Lithuanian Code of Criminal Law*, unlike its Polish counterpart, already foresaw crime of incitement to hatred based on sexual orientation. Yet the very general wording of the judgment gives hope that that fact was not decisive for the ruling (*cf.* art. 170 § 2 'A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of people or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two years. § 3. A person who publicly incites violence or the physically violent treatment of a group of people or a person belonging thereto on the grounds of sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views or finances, or who otherwise supports such activities shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to three years ...' [ECtHR translation]. We are thankful to Hon. Tomas Vytautas Raskevičius, MS, who was one of the legal representatives of the applicants, for having brought this case and its circumstances to our attention.

al Court are particularly worth-recording here.[83] The judge sentencing the culprit for wrongful injury of a teenage march participant stressed that this act of aggression 'was a specific attack on the constitutionally guaranteed right of every citizen to certain beliefs, professed values, also in the sphere of sexual orientation'. And, further on, that, in a simplified way it was 'an assault on the right to diversity of external appearance'.

Even stronger were the reasons given by justice Barbara Paszkowska of the Białystok District Court in convicting four defendants for the assault of other teenage march-participants.[84] In her ruling she said: '[e]very person, citizen of the Republic of Poland – regardless of sexual orientation, race, religion, skin colour or age – has the right to freedom, safety, love and respect for their human dignity. Behaviour that violates these fundamental human rights should be stigmatised and punished – if it also violates the provisions of the Criminal Code'. Further on, clearly referring to the infamous cases of the so-called LGBT-ideology free zones, justice Paszkowska stressed '[t]he reason for such behaviour on the part of the accused was the different sexual orientation of people who were, among others, participants of the Equality March. (…) It should be stressed that people of a different sexual orientation, transgender people, or other people who differ from the majority, are not some kind of LGBT ideology. They are people. People who require their rights to be respected, just like any of us'. She finally underlined that '[these p]eople need acceptance, a sense of security and peace, in the country in which they live. This should be an absolute priority for other people, as well as for the authorities.' These strong admonition was uttered in the oral reasons of the judgment. Interestingly, in the judgment on the appeal (filled by one of the defendants), the homophobic aspect of the crime is completely absent. The court did, however, uphold the judgment below.[85]

It seems there is hope for a change in the views of the benches in the future. Let us not forget, however, that the last discussed two judgments were pronounced in the context of public scandal caused by the dramatic events and violence in Białystok. A clear example that words will likely lead to physical attacks.

### 3.3.1.2. 'LGBT-Free-Zones'

In this context, it is worth elaborating on one of the recent problems the Polish courts must face, that is the so-called 'LGBT-free zones'. This is an informal name given to local governments that adopted a resolution against 'LGBT ideology' or the so-called 'Local Government Charter of the Rights of the Family'. The later document less directly and the former more so aim at preventing any progress in LGBTQ+ rights or situation and they are widely accused of suppressing LGBTQ+ persons.[86]

The resolutions were immediately challenged by the Commissioner of Human Rights and administrative courts took two approaches towards them. Some denied the possibility of judicial review as the resolutions could not be considered administrative

[83] Judgment of 9 November 2020 (unpublished).

[84] After I. Krzewska, 'Marsz Równości w Białymstoku. Wyroki więzienia w zawieszeniu i nawiązki za pobicie dwóch nastolatków' [Equality March in Białystok. Suspended prison sentences and compensation for beating two teenagers], *Białystok Nasze Miasto* 8 October 2020. https://bialystok.naszemiasto.pl/marsz-rownosci-w-bialymstoku-wyroki-wiezienia-w-zawieszeniu/ar/c1-7934937

[85] Białystok Regional Court, VIII Ka 739/20.

[86] *Cf., e.g.,* Council of Europe Commissioner for Human Rights, Memorandum on the stigmatisation of LGBTI people in Poland of 3 December 2020, CommDH(2020)27, available at https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e.

acts in the proper sense, since they do not produce legal effects.[87] The Supreme Administrative Court, however, disagreed on appeal and ordered the cases to be decided on merits.[88] Other provincial administrative courts found resolutions null and void, as discriminatory and *ultra vires* for local governments.[89]

The best known and the most representative of the judgments vacating resolutions is the one issued by the Provincial Administrative Court in Gliwice. The court, composed of justices, Anna Apollo, Krzysztof Wujek, and Barbara Brandys Kmiecik (judge-rapporteur) found that the resolution under review was an act of government and was adopted without a proper legal basis; it went, however, further, finding that the resolution infringes the constitutional prohibition against discrimination. Whereas the resolution ostensibly was adopted against the so-called 'LGBT ideology', the court noted that the whole notion of the LGBT ideology is far from clear. There is no indication that all lesbian, gay, bisexual and trans persons share a common ideology. As a result, the resolution should rather be understood to refer to non-heteronormative sexual life. At the end of the day, the resolution affects LGBT people and its effects on the people should be assessed by the court. Under this test, it transpires that the resolution excludes LGBT people from the broader community – and as such is discriminatory, infringing the *Constitution* (Article 30), the *ECHR*, and *the Charter of Fundamental Rights*. It also violates other constitutional provisions beyond the prohibition of discrimination – protection of privacy, freedom of expression, and freedom of educations. Finally, the Court, evoking Articles 7 and 30 of the *Constitution*, stressed that freedom of expression of local authorities is subordinated to higher standards and limited by 'unconditional respect for human dignity which is inviolable'.

### 3.3.2. Protection of Personal Interests under Civil Law

Given the controversial nature of the penal way, one could be inclined to seek remedies under civil law. The vast concept of personal interests defined by Article 23[90] and protected by Article 24 of the *Civil Code* provides some space to protect oneself from derogatory comments and remarks (*i.e.* hate-speech). A person whose personal interest has been infringed may demand discontinuation of the infringing act, provided this act is unlawful. If the act arises out of infringer's fault, the injured party may also seek damages or compensation paid to an indicated social cause. Like in the case of the criminal proceedings for defamation individual interest of the plaintiff needs to be proven. So far, thus, this way has only turned out to be fully effective in the cases where the court established a direct link between the deprecating statement and the claimant's dignity. It is therefore an extreme rarity, since, as remarked above, the homo/bi/trans-phobic *dicta* are usually of very generic character and refer to the whole community.

[87] For instance, Cracow Provincial Administrative Court, III SA Kr 360/20 (Order of 20 June 2020).

[88] Supreme Administrative Court, III OSK 3682/21 (Order of 2 July 2021) and III OSK 3682/21 (Order of 2 July 2021).

[89] Gliwice Provincial Administrative Court, III SA/Gl 15/20 (Judgment of 14 July 2020); Warsaw Provincial Administrative Court, VIII SA/Wa 42/20 (Judgment of 15 July 2020); Lublin Provincial Administrative Court, III SA/Lu 7/20 (Judgment of 6 August 2020); Kielce Provincial Administrative Court, II SA/Ke 382/20 (Judgment of 11 September 2020).

[90] The provision contains an open catalogue of personal interests: 'The personal interests of a person, in particular: health, freedom, honour, freedom of conscience, surname or alias, image, secrecy of correspondence, inviolability of the dwelling, scientific, artistic, inventive and rationalisation creativity, remain under the protection of civil law irrespective of the protection provided by other laws.'

### 3.3.2.1. Infringement of Individual Personal Interest

The case finally decided by the Stettin Court of Appeal in 2010 is a good illustration of this legal remedy.[91] The plaintiff, a gay man from a small Pomeranian borough, sued his neighbour for infringement of his personal interests. The defendant continuously and publicly referred to the plaintiff's sexuality and lifestyle, she also often used the word *pedał* ('faggot') while referring to him. Both the Regional and the Appellate Court found the complaint justified. Interestingly for our topic here, they drastically differed in the reasons of their respective judgments.[92] The Stettin Regional Court[93] found the defendant's statements to be 'a typical manifestation of so-called hate-speech towards homosexual persons', and explained that '"hate speech" aims to perpetuate a negative and untrue image of homosexual people in public opinion. Those who resort to hate speech do so because they themselves derive satisfaction from the pain inflicted, while additionally being convinced of their superiority and dominance'. Finally, the Regional Court linked this term to 'homophobia', and citing the *Resolution of the European Parliament* of 18 January 2006[94] on *Homophobia* in Europe, and concluded that the defendant acted on homophobic grounds. *Obiter dicta*, the Court stressed the need to introduce stricter anti-discriminatory provisions protecting homosexual persons. One probably could not have wished for better reasoned and so to-the-point ruling.

Surprisingly, on appeal, the higher Court, having shared most of the lower Court findings, decoupled the slander caused by the defendant from her homophobic attitude.[95] It rebuked the lower Court for having cited the *Resolution*, and reminded that 'any hate speech, irrespective of whether it concerns persons of heterosexual or homosexual orientation, or of a different religion, language or skin colour, and irrespective of whether it is uttered for ideological or other reasons or for no reason at all, cannot be regarded as lawful', and that the 'constitutional principle of freedom of speech must give way in such a situation'. Such reasoning, even if *prima facie* generalises the protection offered to the victim of slander, and leads to the same result achieved by the Regional Court, seems in fact to have purposedly desired to ignore the homophobic context of the happening. It thus dimmed the visibility of a significant social problem. Acting under the guise of equality for all, it consciously refused some particular protection to a seriously under-privileged minority. The educational function of such ruling seems to have been thus gravely weakened.

Somewhat similarly first the Warsaw-Śródmieście District Court, and then the Warsaw Regional Court,[96] undermined the breach of personal interest of a plaintiff fired after his employer saw him in the media broadcasts participating in 2012 Cracow Equality Parade. While both courts found violation of anti-discriminatory provisions and adjudicated accordingly relevant compensation, they denied any pecuniary damages for the alleged infringement of the plaintiff's personal interest. They agreed with plea finding that the plaintiff's dignity was indeed violated by the employer's act, yet they refused to acknowledge that the plaintiff suffered any harm in consequence (both

[91] Stettin Court of Appeal, I ACa 691/09 (Judgment of 4 February 2010).

[92] The Court of Appeal lowered thrice the amount of damages originally adjudicated by the Stettin Regional Court.

[93] I C 764/08 (Judgment of 4 August 2009).

[94] Available at https://www.europarl.europa.eu/doceo/document/TA-6-2006-0018_EN.html.

[95] 'Incidentally, yet not insignificantly the present case, the Court of Appeal finds that there are no unequivocal grounds for formulating the thesis that the respondent acted in the case on homophobic grounds, *i.e.* out of dislike for persons of homosexual orientation'.

[96] Warsaw-Śródmieście District Court, VI C 402/13 (Judgment of 9 July 2014); Warsaw Regional Court, V Ca 3611/14 (Judgment of 18 November 2015).

Courts agreed that the plaintiff on whom the burden of proof lay, was unable to prove his harm). Such a strict adherence to probatory trial rules seems to have overseen the plaintiff's weakness *vis-à-vis* his employer resulting from his sexual orientation, and was oblivious to the social aspect of the accident (let alone any possible preventive function of such judgment for the future).

Another case, still on-going, is worth mentioning here: both because of the gravity of the facts of the case and certain almost cinematic panache on the part of the defendants. In reaction to the plea of Campaign Against Homophobia, the Warsaw Regional Court decreed an interim injunction to remove the documentary *Invasion* from the Polish Public TV YouTube channel.[97] The film presented LGBTQ+ community as barbaric invaders aiming at destruction of the traditional Polish values, attacking the catholic church; it linked the LGBTQ+ community with the 'corrupted West', and it intended to create an impression of the connection between homosexuality and paedophilia. It attacked a number of individual activists, and the plaintiff, a well-known NGO working for the LGBTQ+ community.[98] Granting the request, the Court observed that the material aimed at presenting the plaintiff in decisively negative and stigmatising matter was achieved in part using problematic technical means: the use of spy equipment without their consent. In its plea Campaign Against Homophobia managed thus to evidence plausibly that its personal interest was violated by the film which further broadcasting could provoke irreparable harm.

### 3.3.2.2. Collective Slander

In the last part of this section let us discuss the attempts to prevent hate-speech in the form of collective homophobic slander. To date there has been no final court ruling in the few pending cases, their intermediate fates are rather ambiguous, thus it is difficult to predict the final outcome. No matter, however, how they will end in the Polish courts, they will be undoubtedly taken to Strasbourg. We still think that, even if the previous outstanding, rulings are perplexing, they are worth attention as indicative of the possible judicial tendencies.

In the case of sixteen LGBTQ+ activists (their individual claims were joined in a single summons) *versus* Kaja Godek,[99] claiming that their personal interests, and primarily, their dignity, good name, freedom, sexual integrity, and privacy was violated by the defendant's public and broadcasted statements describing homosexual persons as perverts, pairing homosexuality with paedophilia, or submitting that gays adopt children in order to molest and rape them, Warsaw Regional Court rejected the plea. Judge Adam Mitkiewicz found that the plaintiffs lacked locus standi: he was unable to link the derogatory remark of the group as a whole to the personal interests of each of the individual plaintiffs.[100] Interestingly, the judge in the oral ruling rebuked the defen-

[97] Warsaw Regional Court, III C 982/20 (Order of 11 May 2020).

[98] Incidentally, Warsaw Provincial Administrative Court ordered release of the data concerning the costs of this material borne by the Polish Public TV, regarding it 'public information' and thus accessible upon demand to any interested party (II SA/Wa 234/20, judgment of 24 September 2020).

[99] Among the plaintiffs there is also one of the authors of this paper. Warsaw Regional Court, XXV C 2147/18 (Judgment of 12 January 2021).

[100] It must be noted that the earlier jurisprudence and scholarship join in a rather restrictive approach to the individualization of the personal interest infringed in the particular case. *Cf.* the leading judgment of the Polish Supreme Court I CSK 118/06 (21 September 2006) with an approving gloss of J. Wiercińśki, *Orzecznictwo Sądów Polskich* 10 (2009), p. 746. Citing J. Wiercińśki, *Niemajątkowa ochrona czci*, Warszawa 2002, pp. 81 and 82, the Court referred the famous English Case *Knupffer v London Express Newspaper*. While the Court was indeed generally sceptical as to the possibility of establishing a link between a collective slander and infringement of the interest of an

dant for her derogatory language. In his next breath, he stated that civil law offered no remedies for the case and suggested the plaintiffs seek them in 'other systems of law'.

These *dicta* have not been, however, entered into the written reasons of the judgment. Judge Mikiewicz stated instead that the plaintiffs lacked legitimation not only because of the collective character of the defendant's words, but primarily because they did not effectively prove their belonging to the group of homosexual persons. For this purpose, the Court would have wished 'an expert opinion from a court-appointed sexologist or, at the very least, by means of evidence in the form of a medical certificate from a sexologist, confirming the sexual orientation of each of the plaintiffs'. By demanding such evidence, the Court manifestly discriminated against the plaintiffs because of their sexual orientation, and breached the Anti-discriminatory Directive (Directive 2000/78), in the sense well-established in the European case-law.[101]

Finally, even if the judge did not ponder this matter further, since he decided that the case should be dismissed due to the lack of legitimation, the court accepted preliminarily the view of the defendant that her words were an expression of a religious view, thus uttered under religious freedom, and that her public opinion was made under the freedom of speech. This potentially opened the way to the defence that the act itself was lawful.[102]

One more ruling should be mentioned here, even if it is only preliminary, since it seems to radically deviate from the hitherto described judicial practice of a narrow and strict understanding of personal interest. It is an interim injunction ordered by the Court in the case in which the plaintiff sued for protection of personal interests infringed by homophobic actions.

In June 2019 the weekly *Gazeta Polska* appended to their printed edition a sticker bearing an effigy of a cancelled rainbow and a legend 'LGBT-Free Zone'. The activist Bart (Bartosz) Staszewski pleaded the court to halt any further dissemination of the sticker and its removal from the hitherto unsold copies of the magazine in order to prevent any further personal harm on his part. First the Warsaw Regional Court, and then the Warsaw Court of Appeal granted the interim measures forbidding the distribution of the stickers.[103] In particular, the Court of Appeal noted that '[t]he fact that the content of the "LGBT-free zone" sticker refers to a sexual minority group of an undeterminable number of persons, and thus does not allow for the direct identification of specific persons whose personal interests have been infringed, does not prevent the claimant from seeking protection of personal interest.' The court directly applied to its reasoning the obligation of public authority to protect human dignity enshrined in Article 30 of the *Constitution*, as well as the prohibition of all discrimination established by Article 32 of the *Constitution* as well as European law.[104] Further on, the Court, in an unprecedented manner, admitted that 'the stickers promoted and disseminated by the Respondent, violate the dignity of the representatives of sexual minorities by incit-

individual, it still left a small path allowing for such reasoning. It noted that '[a] claim that a statement addressed to a group, or to a group whose membership cannot be accurately determined, concerns a particular member of that group may be regarded as well-founded, if it is proven that the statement concerns all the members of the group without exception, or a particular person within the group'.

[101] *Cf.* CJEU, C-81/12 – *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* (Judgment of 25 April 2013), as well as, Joint Cases, C-148/13, C-149/13, and C-150/13 – *Staatssecretaris van Veiligheid en Justitie* (Grand Chamber Judgment of 2 December 2014).

[102] Freedom of religion used as a tool to limit LGBTQ+ rights is further discussed in section 3.4.

[103] Warsaw Court of Appeal, V ACz 831/19 (Order of 13 November 2019) upholding the Warsaw Regional Court, IV Co 130/19 (Order of 24 July 2019).

[104] 'A sticker saying "LGBT-free zone", regardless of where it is placed, means total exclusion of non-heteronormative people'.

ing their exclusion and condemnation', and as such 'refer to the tradition of the Third Reich and the Nazi narrative'. In fact, the Court noted 'the similarity of the slogans promoted by the Respondent to the plates with inscriptions such as "No entry for Jews and dogs" or "Jews enter at their own risk"'. In conclusion the Court stressed that such actions intensified discrimination and hatred against members of the LGBTQ+ community (to whom the claimant belonged), and therefore would be 'absolutely excluded from the protection afforded to the media under freedom of expression'.

This last development, also in the light of the inclusive and politically correct language the Court used in its reasons allows for some moderate optimism for any further use of civil law as a protective tool against homophobic hate-speech. This view is somewhat strengthened by the ECtHR *Beizaras et Levickas v Lithuania* (no. 41288/15) already discussed above, but actually should be primarily based on the wording of the *Polish Constitution*. Article 47[105] which enshrines the right to protect one's private and family life, honour, and good reputation read together with Article 30 formulating the duty of public authority to protect human dignity should be taken as interpretative directives for the scope of protection afforded under Articles 23 and 24 of the *Civil Code* until *ad hoc* measures combatting homophobia are introduced.

## 3.4. LGBTQ+ Rights versus Religious Freedoms

One of the most famous and consequential cases regarding LGBTQ+ rights concerns their collision with religious freedoms, in the manner well-known from the US.[106] In the so-called *Printer Case* (*sprawa drukarza*), an employee of a printing outlet refused the LGBTQ+ Business Forum Foundation to print a banner promoting LGBTQ+ equality, saying that he does not want to contribute to any promotion of LGBTQ+ movements by his work. The event took place in Łódź, in 2015. The NGO alerted the Police that a misdemeanour was committed under the *Petty Offences Code*. Under Article 138 of the *Code*, it was forbidden, while professionally performing services, to refuse – intentionally and without a justified cause – performing a service, to which one is obliged. The police charged the printer with this misdemeanour and he was found guilty after a lengthy legal battle (though the courts decided not to impose any punishment).[107] Over the course of litigation the main argument of the defendant evolved to stress his religious freedom that allegedly protects him from being forced to promote believes contrary to his religious beliefs.

The Minister of Justice, Zbigniew Ziobro, a head of a party co-forming the governing coalition, disagreed with the judgments and challenged Article 138 of the *Petty Offences Code* before the Constitutional Tribunal, claiming, *inter alia,* that it unduly restraints freedom of religion. The case was heard by a panel including one of the wrongfully-appointed judges, Mariusz Muszyński. The Tribunal decided[108] that the whole penalization of refusal of service is unconstitutional as civil-law instruments are sufficient to protect those discriminated.

While the Constitutional Tribunal was deliberating on the case (2017–2019), the Supreme Court was presented with a cassation appeal by the Minister of Justice. Ini-

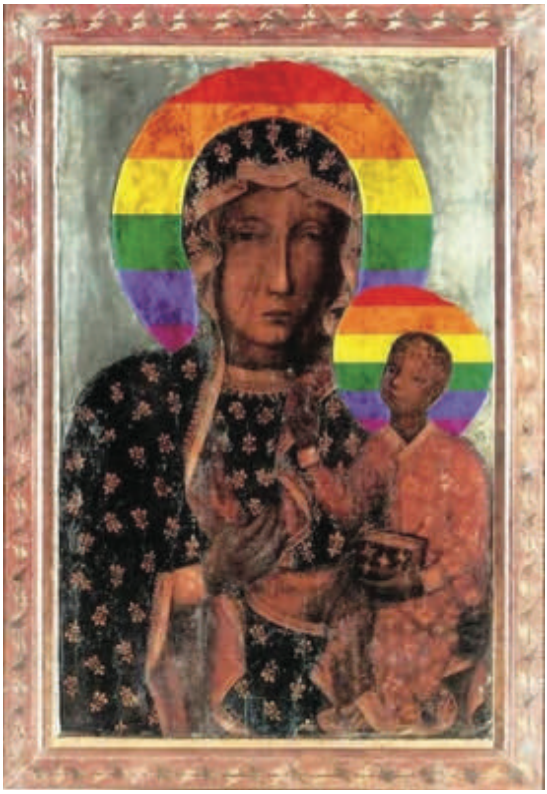
[105] 'Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.' (official Sejm translation).

[106] See for an overview W. N. Eskridge & R. F. Wilson (ed.), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground,* Cambridge 2018.

[107] Łódź District Court (Judgment of 31 March 2017) and Łódź Regional Court (Judgment of 26 May 2017).

[108] Constitutional Tribunal, K 16/17 (Judgment of 26 June 2019).

tially the Supreme Court sided with the accusers[109] but after the judgment of the Constitutional Court, the case was re-opened by the Appellate Court in Łódź that set the previous conviction aside. This was in turn confirmed by the Supreme Court that decided against the possibility of questioning the legitimacy of the newly-reformed Constitutional Court.



*Anonymous Artist:* Rainbow Molly, 2020

Another major case where LGBTQ+ rights collided with religion was so-called *Rainbow Molly* (*tęczowa Maryjka*). Under Article 196 of the *Criminal Code*, it is prohibited to offend religious feelings of others, by publicly defaming cult objects or places of worship. The provision is broad and used predominantly to protect the Polish Catholic majority; it is at times hard to distinguish from blasphemy laws of the old. In 2020 three pro-LGBTQ+ activists, Joanna Gzyra-Iskandar, Anna Prus, and Elżbieta Podleśna, disseminated pictures of the Black Madonna of Częstochowa, with her and baby Jesus' golden halo replaced with rainbow ones. This in turn had been provoked by an earlier action by a catholic Płock parson, who decorated Easter installation of Christ's tomb with symbolic representations of sins labelled, among others, 'LGBT' and 'gender' (*sic*). The three activists were charged under Article 196. On 2 March 2021 they were acquitted in the first instance, chiefly as the doctored picture was found not offensive.[110] The Court affirmed that the defendants did not intend to offend Jesus

[109] Supreme Court, II KK 333/17 (Order of 14 June 2018).

[110] A. Sawa, 'Jest wyrok. Tęczowa Maryjka nie obraża', *Kultura Liberalna* 9 (2021), available at https://kultura-liberalna.pl/2021/03/02/aleksandra-sawa-wyrok-teczowa-maryjka-nie-obraza/.

or Maria, whereas intention is required to establish defamation of religious feelings. Judge Agnieszka Warchoł established that an ordinary Catholic would not be offended by a picture of Mary in rainbow halo. Moreover, she noted that the defendants intended to draw public attention to an important social problem (that is, the dire situation and suicides of LGBTQ+ teens). This reasoning was supported by invoking the ECtHR case-law regarding protection of the freedom of religion. When compared to the general intellectual mood in Poland, the judgment is progressive and takes a bold stance against strong protection of religious feelings.

Finally, it is worth mentioning the ongoing Ikea case, which resulted in both civil and criminal litigation. When in 2019 Ikea declared an LGBTQ+ rights day, one of the employees, Mr Jan Komenda, published his opinion on a company internal forum. He quoted the Bible – the need to drown those who bring about scandal and capital punishment for men having sex with men: 'Temptations to sin are sure to come, but woe to the one through whom they come! It would be better for him if a millstone were hung around his neck and he were cast into the sea than that he should cause one of these little ones to sin.' (*Luke* 17:1) and 'If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them.' (*Lev* 20:13)

As a result, he was swiftly terminated (his court case is also ongoing). In an ironical turn of events, the manager who terminated him is now prosecuted by public authorities, under criminal law, for infringing his rights as an employee, especially his freedom of belief under Article 218 of *Criminal Code* in conjunction to article $11^{3}$ and $18^{3a}$ of *Labour Code* (the only ones, let us recall, which *expressis verbis* name sexual orientation among the prohibited ground of discrimination). Ikea was also sued for unlawful termination of employment in civil proceedings.[111]

## 3.5. Towards Family Recognition(?)[112]

### 3.5.1. Same-sex Parenthood and Surrogacy, and Citizenship

With internal recognition of homosexual relations and their consequences extremely limited, many of the problems faced by the Polish legal system come from abroad. Simply, the lack of internal regulation contributes to the uncertainty of how to treat foreign same-sex couples, their children, or even their assets governed by a foreign matrimonial property regime. Broadly speaking, the issue here is whether the consequences of foreign same-sex marriages and parenthood should be accepted in Poland, or whether the courts and administrative bodies should refuse to recognise them, based on the public policy exception.

Surrogate parenthood is not limited to same-sex couples. The phenomenon is hard to analyse as reliable data are lacking: it is not possible for the authorities to identify surrogacy when a heterosexual couple is registering a child as their own. There are also instances of single-parent surrogacy where, for the purposes of our analysis, it is not possible to decide whether the intended parent is heterosexual or not. Nevertheless, it seems fit to analyse Polish case-law concerning surrogacy as a part of the LGBTQ+

[111] Płock District Court, II K 296/20 (Judgment of 2 March 2021).

[112] For the societal context of the here described legal matters see the summary outcomes of Joanna Mizielińska's titanic research project carried out on rainbow families in Poland in 2012–2015: J. Mizielińska, M. Abramowicz & A. Stasińska, *Families of Choice in Poland. Family Life of Non-Heterosexual People*, Warsaw 2015). This is the most recent comprehensive sociological treatment of this issue.

framework. First, surrogacy allows gay couples have genetical offspring. Second, the most important judicial decisions on surrogacy concern same-sex couples as surrogacy concerning heterosexual couples takes place unnoticed, undistinguishable for the law from natural parenthood.

Polish law does not criminalise surrogacy, neither does expressly allow it; therefore, one cannot enter a valid surrogacy agreement under Polish law. Some of the commentators[113] argue for punishing surrogacy as illegal adoption under Article 211[a] of the *Criminal Code*; however, thus far there is no case-law that would support this reading and we do not believe it would be correct as it would constitute an expansive construction of criminal law, broadening the scope of prohibited behaviour.

The practical problems arising out of foreign surrogacy (when at least one of the intended parents has Polish nationality) pertain chiefly to the citizenship status, registration, and documents for children born by surrogate mothers. According to the general rules, when at least one of the parents has Polish citizenship, the child is a Polish citizen by the operation of law (Article 14 Point 1 of the *Polish Citizenship* Act). If his or her birth was registered abroad, the registration may be transcribed into the Polish civil registry (Article 104 Section 1 of the *Civil Registry Act*). He or she has also the right to apply for an ID card and a passport (Article 5 Section 1 of the *Identification Cards Act* and Article 3 of the *Passport Documents Act*, respectively). On a plain reading of the statutes, issuing ID cards and passports for children born abroad requires a prior transcription of the birth certificate (Article 104 Section 5 of the *Civil Registry Act*) as well as to the issuance of a personal identification number (Article 28 Point 1 and Article 13a Section 1 Point 1 of the *Passport Documents Act*).

Gay and lesbian couples encounter problems at various stages of this process. There are instances where they were refused the confirmation of the Polish citizenship of their children, where they were refused transcriptions of birth certificates, issuance of personal identification numbers, as well as ID cards and passports. The reasonings of administrative bodies leading to these refusals are large and by homogenous, regardless of the kind of the proceedings.

The major argument for not confirming the citizenship is the unknown surrogate mother as typically the intended parents refuse to reveal her identity (because of legal or contractual considerations or to spare her problems with the Polish law considering her a legal mother). Polish law adopts the principle that the mother is the woman who gave birth to the child (Article 61[9] of the *Family and Guardianship Code*).[114] This, together with the conflict-of-laws rule that the filiation of a Polish citizen is to be determined by Polish law (Article 55 Section 1 of the *Private International Law Act*) leads to the conclusion that for a child born to a surrogate mother this surrogate mother is the legal mother, irrespective of any genetical bounds or any filiation determined by the law governing the surrogacy. Moreover, under Article 62 Section 1 of the *Family and Guardianship Code*, the husband of the mother is presumed to be the father of the child (and the presumption may only be rebutted in special court proceedings). This leads Polish authorities to the belief that they have to identify the surrogate mother as well as her civil status. If the surrogate mother is married and her husband is not a Polish

[113] Ordo Iuris, *Analiza dotycząca zjawiska surogacji („macierzyństwa zastępczego") w świetle prawa międzynarodowego oraz polskiego prawa krajowego* [Analysis concerning surrogacy in the light of international and Polish domestic law], 1 December 2020, available at https://ordoiuris.pl/rodzina-i-malzenstwo/analiza-dotyczaca-zjawiska-surogacji-macierzynstwa-zastepczego-w-swietle-prawa

[114] *Nota Bene* this provision was only introduced in 2008, by the *Act* of 6 November 2008 on *Amendment of the Act – Family and Guardianship Code and some other Acts* (*Journal of Laws* 2008, Nr 220, item 1431) in order to negatively settle the issue of surrogate motherhood.

citizen, the authorities do not believe that the child is a Polish citizen either. In practice, the intended parents refuse to submit any personal data of the surrogate mother as they believe this would be a breach of trust. It would be so not just because the personal data would be revealed to the Polish authorities but also because the surrogate mother would be deemed by these authorities to be the legal mother of the child, which is obviously not what the parties to the surrogacy agreement agreed upon and which is contrary to the law governing the surrogacy agreement as this law severs the link between the surrogate mother and the child. Consequently, administrative bodies refuse to confirm the citizenship of surrogate children of gay couples, based on the argument that it is not possible to confirm citizenship without identifying the mother.

The general strategy of the intended parents to prove their filiation with the child and therefore his or her Polish citizenship is to present a foreign birth certificate, documenting, *i.a.*, that they are the parents. However, this is routinely rejected by the authorities as the certificates are seen as contrary to the public policy and hence unable to produce any evidentiary force. The certificates of same-sex couples were deemed contrary to the public policy for the reasons elaborated below whereas those of single parents were held contrary to the public policy as documenting surrogacy (by referring to 'surrogate mother'). Surrogacy itself is found to infringe the public policy, because of objectifying the child.[115]

Problems with transcriptions of birth certificates documenting children born in surrogacy are a part of a broader problem with transcribing any foreign civil status certificates mentioning same-sex marriages. The birth certificates contain information on the same-sex intended parents. Entering this information into the Polish civil registry would, according to Polish administrative authorities, infringe upon Polish public policy. This argument is based on Article 18 of the *Constitution* construed in such a way that it limits marriage to heterosexual couples.

Denying ID cards and passports is, under these circumstances, a corollary to denying a prerequisite transcription.

The litigation regarding surrogacy has developed against this background. The current of this litigation is twofold. First, there are challenges to refusals of transcriptions; second – to the refusals of citizenship. The first line of litigation was largely unsuccessful. Provincial administrative courts and the Supreme Administrative Court agreed with the administrative authorities that registering same-sex parents would infringe on public policy.[116] Only one ruling[117] held that refusing a transcription infringes the *Convention of the Rights of the Child*, but it was an outlier.

Even attempting to register a single parent can prove unsuccessful, under the theory that Polish public policy actually requires registering both parents. Neither leaving the mother's data empty nor entering the words 'surrogate mother' into the registry has been found acceptable for the Supreme Administrative Court.[118]

To deal with the issue of transcription once for all, the Court issued a resolution,[119] which unequivocally held that entering the names of same-sex parents into the Polish civil registry is not allowed and therefore transcribing a birth certificate containing such names is not allowed either. The resolution was an answer to the preliminary ques-

[115] This is settled case-law originating from the Supreme Administrative Court, II OSK 2372/13 (Judgment of 6 May 2015).

[116] See Supreme Administrative Court, II OSK 1298/13 (Judgment of 17 December 2014) and Supreme Administrative Court, II OSK 1808/16 (Judgment of 20 June 2018).

[117] Supreme Administrative Court, II OSK 2552/16 (Judgment of 10 October 2018).

[118] II OSK 1390/18 (Judgment of 10 September 2020).

[119] Supreme Administrative Court, II OPS 1/19 (Resolution of 2 December 2019).

tion by a panel of the Supreme Administrative Court; for all intents and purposes, its operative part is binding on all administrative courts. Interestingly, however, in a posterior case, Cracow Provincial Administrative Court made a preliminary reference to the CJEU, asking whether such a lack of transcription may infringe EU law when one of the parents is an EU citizen.[120] This is the first case ever when a Polish court agreed to refer a case to Luxembourg in a LGBTQ+ matter. The case is still pending.

The Supreme Administrative Court did, however, recognise the problem caused by the inability to acquire identification documents while not having a Polish birth certificate. In the written grounds of the resolution, the Court stated that in such cases the whole requirement of transcribing the certificate in order to get an ID card and a passport is not applicable. According to the Court, the parents may apply for these documents for their child and administrative authorities should produce them, at the same time issuing a personal identification number. This solution to the problem was championed by the conservative Commissioner for the Rights of the Child as well as the Institute Ordo Iuris, one of the most influential conservative NGOs. While the solution would greatly alleviate the situation of children affected by their origin from surrogacy, serious practical obstacles to its implementation remain. The written grounds of the resolution are not binding and consequently are ignored by administrative authorities in a number of cases.

Litigation proved much more successful in cases concerning citizenship. Early case law by a lower court supports the administration's view that citizenship should not be confirmed in cases concerning surrogacy.[121] However, the Supreme Administrative Court states emphatically that surrogate children of same-sex couples are Polish citizens.[122]

The Court stressed the public-law nature of citizenship, thereby refuting authorities' attempts at determining filiation according to family law. It held that the foreign birth certificate containing the data of same-sex parents is indeed capable of proving filiation between the Polish parent and the child, and this does not depend on whether surrogacy or same-sex parenthood are compatible with Polish law. This finding was supported by citing the protection of privacy under the *European Convention on Human Rights* as well as the best interest of the child under the *Convention on the Rights of the Child*.

A later decision in which the Supreme Administrative Court[123] confirmed the citizenship of children born from surrogacy, by a different panel of the Supreme Administrative Court took a slightly different approach. Dealing with a single parent and a birth certificate containing his data accompanied with 'surrogate mother', the Court accepted a foreign (US) birth certificate as evidence of fatherhood, declaring that the identity of the mother is of no relevance as the Polish citizenship of either of the parents suffices for the Polish citizenship of the child. It also stated that the public policy cannot be used to deny facts (as opposed to legal effects) and that fatherhood, as well as birth itself, are facts and cannot be denied as such.

At the same time, the struggle for citizenship has been far less successful with regard to adoption. In a case concerning a mixed, German-Polish, lesbian couple, where

[120] Cracow Provincial Administrative Court, III SA/Kr 1217/19 (Order of 9 December 2020); CJEU, C-2/21 (still pending).

[121] See *cf.*, *e.g.* Provincial Administrative Court in Warsaw, IV SA/Wa 3680/15, IV SA/Wa 3681/15, IV SA/Wa 3682/15 and IV SA/Wa 3683/15 (Judgments of 11 April 2016).

[122] For the first time when setting aside the above quoted judgments by the Provincial Administrative Court in Warsaw in Supreme Administrative Court, II OSK 1868/16, II OSK 1869/16, II OSK 1870/16 and II OSK 1871/16 (Judgments of 30 October 2018).

[123] II OSK 3362/17 (Judgment of 10 September 2020).

a Polish woman adopted a biological child of her partner, the Supreme Administrative Court declared that the child does not become a Polish citizen.[124] Article 16 of the *Polish Citizenship Act* provides that a minor below 16 years of age becomes a Polish citizen as a result of an adoption by a Polish citizen. However, the Court declared that a foreign adoption by a same-sex couple is contrary to the Polish public policy and therefore cannot produce any legal effects under Polish law.

### 3.5.2. Marriage and Alike

As already explained, Polish law provides neither for same-sex marriages nor civil partnerships. For the same reason, unions contracted abroad are not recognised. It is widely believed that any legislation introducing same-sex marriages, and perhaps even legislation introducing same-sex partnerships, would be unconstitutional (see above section 2.2). The conservative reading is dominant in the legal literature and virtually exclusive in case-law.[125]

Against this background, two main lines of litigation are worth mentioning. First, contracting marriage abroad (in EU member states) has become fairly popular for Polish same-sex couples. Consequently, there are cases where they try to recognise these unions in Poland. So far none of these attempts have been successful. Second, there are cases of people actually trying to contract a same-sex marriage in Poland.

From the technical standpoint, the cases of foreign same-sex marriages were no litigation for actual recognition of marriages as foreign acts (in semblance to recognition of judgments) but for transcriptions of foreign marriage certificates into the Polish civil registry. All such motions for transcriptions have been rejected by the administrative authorities (Civil Registry Office) and all appeals were so far rejected by the Administrative Courts and the Supreme Administrative Courts (there are still some cases pending).[126] The reasoning of the courts was rather uncomplicated and generally boiled down to the fact that same-sex marriages are contrary to the Polish public policy, which is determined by the definition of marriage in Article 18 of the *Constitution*.

In some of these cases the claimants went to the European Court of Human Rights and one of these cases has already been communicated.[127]

The non-recognition is not the only hindrance foreign same-sex marriages encounter in Poland. When a Polish national wishes to contract marriage in a foreign jurisdiction (be it with another Polish national, be it with a foreigner), foreign authorities usually require documents proving the civil status of a prospective spouse. In other words, to contract marriage abroad one has to show, at very least, that they are single (and at most that they are capable to contract marriage under their national law). The traditional instrument issued to this effect in Poland, as well as various other countries, is the marriage eligibility certificate (*nihil obstat*). Polish authorities, however, refuse to issue such certificates to people who want to contract same-sex marriages. These refusals gave rise to litigation, in which Polish courts took the position that the certificates

[124] Supreme Administrative Court, II OSK 3094/19 (Judgment of 23 June 2020).

[125] Discused in detail *supra* n. 47 (p. 715).

[126] Supreme Administrative Court, II OSK 1112/16 (Judgment of 28 February 2018); II OSK 2608/19 (Judgment of 22 June 2021); Warsaw Administrative Court, IV SA/Wa 2618/18 (Judgment of 8 January 2019); Warsaw Administrative Court, IV SA/Wa 1638/19 (Judgment of 18 September 2019; case pending before the Supreme Administrative Court); IV SA/Wa 2982/19 (Judgment of 1 July 2020; case pending before the Supreme Administrative Court).

[127] ECtHR, No. 58828/12 – *Formela & al. v Poland*.

may only be issued for the purposes of contracting heterosexual marriages as nobody under Polish law is eligible to contract marriage otherwise.[128]

Whereas, in the broader context of the expansive reading of Article 18 of the *Constitution* by Polish courts, this kind of reasoning does not really come as a surprise, it is interesting to follow court's approach to the *Charter of the Fundamental Rights*. In the case under analysis, the *Charter* was invoked by the applicants under the premise that, when one of the prospective spouses is a Polish national and the other is Spanish, the refusal to issue a marriage eligibility certificate effectively restricts the EU citizens' right to reside in another Member State by refusing to him various benefits conveyed by marriage. Therefore, the case comes within the scope of application of EU law and thus trigger the application of the *Charter*, including its prohibition against discrimination based on sexual orientation. The Warsaw Regional Court, while failing to refer the case to the Court of Justice (despite being a court of last remedy under Article 267(3) of the *Treaty on the Functioning of the European Union*), declared that the *Charter* is not applicable in Poland because of the Polish-British Protocol. The case under analysis was a subject of an application to the ECtHR and is still pending, after being joined with a similar one.[129]

Other Polish cases now pending before the European Court of Human Rights concern in general various privileges not afforded to same-sex couples but afforded to marriages.[130] In all of them the claimants seek at least partial and episodic recognition of their relationships. The claims regard: changing a surname to that of a partner; inheritance tax waiver; and joint subscription for a private insurance.[131] Others focus on donation tax waiver; social spousal benefits: and generally, the impossibility to institutionalise the union. Among them, perhaps most interestingly, there are also cases of Polish citizens demanding to contract same-sex marriages before Polish authorities (the Civil Registry Office), desiring to mimic *Oliari* in Poland.[132]

All these cases, as far as we know, have been in fact intended as strategic litigations, aiming at challenging the lack of same-sex marriages before the European Court of the Human Rights. Notably and symbolically all these cases were communicated to the Polish government on the same day by the Court, marking an important stage to fight discrimination of same-sex couples in Poland. These still pending proceedings did give some hope for a judicially (yet externally to the national judiciary) induced change amidst the ardour of homophobically tainted 2020 presidential campaign.

## 3.6. Gender Reconciliation

There are no regulations of gender reconciliation in Poland, including a formal avenue of correcting or amending one's documents. As a result, to obtain legal transition, and in particular documents consistent with one's identity, plaintiffs have to sue their own

[128] In the case of one of the co-authors, Jakub Urbanik, represented by the other co-author, Paweł Marcisz, which is the basis of our present analysis, it was the District Court for the Capital City of Warsaw, III RNs 661/14 (order of of 17 March 2015), which ruling was upheld on appeal by the Warsaw Regional Court, VI Ca 435/15 (Order of 28 October 2015).

[129] ECtHR, nos 78030/14 and 23669/16 – *Szypuła v Poland* and *Urbanik & Alonso Rodríguez v Poland*.

[130] For a comprehensive overview, see P. Johnson, 'New ECHR cases about discrimination against same-sex couples in Poland', *ECHR Sexual Orientation Blog* of 24 July 2020, available at https://echrso.blogspot.com/2020/07/new-echr-cases-about-discrimination.html?fbclid=IwAR3uL0BnJZwQhD3C50jLzpir9jhhvWeyW-V77CFLfOBphTwxoX2ATZeF_54.

[131] ECtHR, no. 18822/18 –*Starska v Poland*; no. 11560/19 – *Meszkes v Poland*; no. 131/15 – *Grochulski v Poland*.

[132] ECtHR, no. 11454/17 – *Przybyszewska & al. v Poland* and no. 58828/12 – *Formela v Poland.*

parents, employing a standard civil-law proceedings for declaratory relief (that is to say, to declare that one is a man or a woman, which is a legal relationship and as such determinable under Article 189 of the *Code of Civil Proceedings*). The Commissioner for Human Rights observed however,[133] based on the complaints he receives, that trans persons are not always afforded even this possibility by the courts.

The necessity to sue one's parents arises out of a resolution of the Supreme Court issued in 1989[134] and another resolution from 1995.[135] The Court eliminated the possibility previously afforded by case-law.[136] This case-law, from the communist period, was far more generous towards the trans people, as it allowed a simple correction of the birth certificate in the civil registry, even in absence of any surgical procedure. Apart from the necessity to sue one's own parents, the new procedure has a substantive disadvantage: whereas correction of the birth certificate works *ex tunc,* after obtaining a declaration from the court, the civil registry mentions that the indication of birth has been altered (although this is, for all intents and purposes, unobtainable for anyone except for the person concerned). No surgical procedure is required for legal transition; other requirements vary from court to court (usually claimants' appearance of the intended gender, claimant testimony, or an expert opinion is required).

## 4. Conclusions

The picture painted by this sketchy presentation of some significant, yet as we have warned, subjectively chosen, cases certainly does not attest massive national courts activism in preservation of the LGBTQ+ rights. The cases in which the judges have gone any further than safe-guarding the *minina minimorum* (right to free assembly, for instance) are rare and sporadic. How could one explain than this apparent failure of Hirschl's rainbow test on juristocracy? Why are the Polish courts unlike other Hirschl's specimens? In this instance we cannot offer a definite answer, let us however formulate some hypotheses, constituting research questions for the studies to come. These will necessarily have to consider such important aspects as sociological studies on judges' attitudes in general, and whenever possible, perhaps the sociological profiles of the authors of the interesting rulings, too. Yet the appraisal of the judgments alone (and our first-hand experience in the courts), allows us to observe a degree of insensibility of the people sitting on the benches to the problem of exclusion and alienation.

This is particularly visible in the Stettin Court of Appeal cutting off the offenses occasioned by the defendant from their social context of common homophobia. The upper court in the case, let us remind, did not acknowledge (and had refuted to realise) that the slander was particularly hurtful to the plaintiff, because it used homophobic hate-speech (*supra*, p. 727). Neither did it want to see that it probably only happened because the defendant targeted a member of the under-privileged and discriminated group. The same happened between the first and the second instance of the criminal case of assault against a participant of Białystok Equality March (*supra*, p. 738). Same observation could explain the mechanic and merciless repetition of the apparent definition of marriage of Article 18 of the *Constitution* in the cases in which it was the welfare and security of the children of same-sex partners, and not merely the status

[133] Rzecznik Praw Obywatelskich, *Postępowania w sprawach o ustalenie płci. Przewodnik dla sędziów i prokuratorów* [Gender Reconciliation Proceedings. A Guide for Judges and Prosecutors], Warszawa 2020, p. 6.

[134] Supreme Court, III CZP 37/89 (Resolution of of 22 June 1989).

[135] Supreme Court, III CZP 118/95 (Resolution of 22 September 1995).

[136] Supreme Court, III CZP 100/77 (Resolution of 25 February 1978).

(apparently controversial to the judges) of the latter's relationship. This viewpoint of a privileged majority combined with the obvious lack of imagination, and education[137] prevents findings that could ease the life of a minority.

This grim picture has been recently brightened by several rulings going in the opposite direction. Still, their 'activism' and 'revolutionary' character is mostly relative. Probably the furthest going are the reasons of the interim injunction forestalling the distribution of the LGBT-free zone stickers, and the ground-breaking justification of the Gliwice (Gleiwitz) Provincial Administrative Court voiding the 'LGBT-ideology-free-zone-declaration' (see *supra*, pp. 725–726). For the first time also, the Court (Cracow Provincial Administrative Court) has accepted a plea to request a preliminary ruling of the CJEU in a rainbow-case (see *supra*, p. 735) – all previous motions being dismissed on the grounds of the apparent inapplicability of European law, sometimes dressed in pretence of *acte clair*, or worse even veiled by the so-called Polish-British Protocol to the Charter (*supra*, p. 737).

There is a temporal correlation that might elucidate this sudden wind of change (sporadic and still unpredictable, we must admit). As we have pointed most of these rulings post-date the attack on courts in Poland and also coincide with the rising wave of LGBTQ+phobia in our country. The latter aspect means hardship and adversity for the LGBTQ+ community in Poland, yet also it makes their situation more visible, and, contrary to the hopes of its pushers, instead of discouraging, ignites support and mobilises allies. The societal change may simply have impact on the judges, who are, at the end of the day, the product of their own society (again to prove this statement one would need to conduct thorough sociological studies).

Yet it is the first factor that in our view may have played a significant role in the change. Ever since 2016 first assaults on the judiciary, the LGBTQ+ community has played an active role in the civic movement of the defence of the courts. The rainbow banners populated the demonstrations showing support of the courts (admittedly, not without controversies at first, but soon with growing recognition and acceptance). The slogan 'Free courts' was chanted at many Pride parades in grateful recognition that the gatherings were made possible by rulings voiding the wrongful decisions of the local authorities. All that has seemingly contributed to building of, even if still feeble, some mutual trust. In that manner the LGBTQ+ rights moved to the mainstream discourse on human rights and civic society in Poland.

Finally, perhaps it was easier for the judges, who found themselves in a situation of constant assault, and propaganda of dehumanisation, to sympathise and empathise with a minority group. They were put into a situation, in which they themselves were an attacked, (medially-)misrepresented, and miscomprehended minority (this might also have played a role in the decision to request a preliminary ruling of CJEU in a rainbow case in likeness to dozens of requests sent to Luxembourg by the Polish judges in the cases orbiting around the core issue of judicial independence). The association between the LGBTQ+community and the judges did also happen in an explicit way: it was carried out by the Law and Justice chairman Jarosław Kaczyński, MP, himself.

It happened during the 2019 electoral campaign before the general elections. This campaign was already the second, after the 2019 spring European elections, marked

[137] A particular instance of such is a scene in Bart Staszewski's *Article 18*, in which a female judge questions a couple of lesbians who in their relationship would play a role of a wife and who that of a man; even the visible emotions of the claimants do not stop her from this sort of a degrading interrogation (see https://youtu.be/1fCRBKkMETo at 1 hour 06').

by the particularly intense use of LGBTQ+phobic speech,[138] which was added to the earlier constant attacks on the courts. During an electoral rally before the 2019 general election, Kaczyński was approached by a supporter of his own party outraged by the Equality Parades, particularly – as we have already recorded – numerous that year. He recalled that that his late brother, while Mayor of Warsaw, banned the pride, and blamed the European Union for inability to prevent the marches. Finally, he firmly added that if it depended on him, it would be 'all very clear'. Yet, he concluded it would be to no avail, because eventually 'the courts will quash [these decisions banning prides], since the courts are completely under the influence of this [LGBTQ+] ideology'.[139] This noteworthy statement was obviously triggered by the court rulings lifting the bans imposed on the prides by the local authorities (*supra,* pp. 717–719).

In his comment Kaczyński not only managed to undermine the courts impartiality. He also aimed at combining two societal 'enemies': the LGBTQ+ community and the judiciary, in one. He wished to mutually strengthen the negative feelings towards them, and to create even more prominent figure of the *homines sacri*, scapegoats, whose exclusion from the society has as the aim its reinforcement and unification.[140] Such an Agambenian-Schmittian scapegoat was to be even more suggestive to his supporters, and plausibly offered even stronger rejection by the majority. With this observation Kaczyński did actually nothing else than the *Daily Mail* which framed British judges as idle, useless, gay 'enemies of the people', to awaken in their readers the dormant, societal phobia, only superficially purged by the means of political correctness.[141]

Kaczyński's remark was, as a matter of fact, not the first attempt to use the 'gay' argument in the assault on the courts in *Law and Justice* Poland. Out of Chroniclers' duty particularly in this instance we ought mention the personal attack on our Honorand during the first PiS mandate. The Constitutional Tribunal was then requested to check the constitutionality of the so-called *Vetting Law.*[142] During the proceedings, ended by the judgment of non-constitutionality, the Act defenders tried to impede the ruling by attacking personally the judges sitting on bench. One of the targeted justices was Professor Wyrzykowski. A vetting procedure on completely wrong and invented charges was initiated. Before he was fully exonerated and acquitted, Prof. Wyrzykowski, had to face files compiled by the governmental agents which largely included the data on his private life (and sexual identity) collected by the communist secret service, partially during the infamous *Operation Hyacinth*. His forcible *outing* was thus yet another means to disgust even more the already 'suspect' figure of a judge.[143]

Yet, perhaps what Kaczyński and PiS functionaries created was a scapegoat too strong to be sacrificed for the majority, the *homo sacer* so-fashioned was not a meek

[138] It culminated with the public TV prime-time broadcast of *Invasion*, a 'documentary' presenting LGBTQ+ community as the barbaric invaders aiming to destroy the true 'Polishness', just three days short of the elections (ironically on the same date when Olga Tokarczuk's award of 2018 Nobel-Prize for literature was announced: 10 October 2019). On this material see *supra,* p. 728. The same tactic was successfully adopted by the ruling party in the 2020 presidential elections.

[139] Family picnic in Zbuczyn, 12 August 2019, https://tvn24.pl/polska/kaczynski-o-marszach-rownosci-sady-sa-pod-wplywem-ideologii-lgbt-ra960409-2289126.

[140] *Cf.* G. Agamben, *Homo Sacer: Sovereign Power and Bare Life,* Stanford 1998.

[141] Captioning Lord Chief Justice Thomas as 'Europhile' was obviously neither an innocent pun, but quite a ghastly innuendo.

[142] Act of 18 October 2006 on Disclosing Information on Documents of State Security Organs in the Years 1944–1990 and on the Content of Such Documents, *Journal of Laws*, No. 218, item 1592, as amended. *Cf.* Constitutional Tribunal, K 2/07 (Judgment of 11 May 2007 on the unconstitutionality of the act).

[143] Further on the circumstances of the case, see, E. Łętowska, *Rzeźbienie państwa prawa 20 lat później. Ewa Łętowska w rozmowie z Krzysztofem Sobczakiem* [Sculpting the Rule of Law 20 Years Later. Ewa Łętowska in Conversation to Krzysztof Sobczak], Warsaw 2012, pp. 195–196.

victim anymore. And so, the effect was just the opposite to what it had been expected. This, as if we are right, the Hirschl's rainbow test on juristocracy in Poland will come out positive in the future. The judges having themselves felt the hatred and exclusion may become more active in protecting the fundamental rights of minorities, even stepping ahead of politicians, and actually doing their job. To come back to Hirsch's thesis: the political elite still largely plays in Poland the tactic not even of hegemonic preservation (not much as we have seen is there to be upkept and preserved), but that strategic approach.

'My poor child, the best thing I can send you is a little MISFORTUNE' said the Fairy Blackstick to little Rosalba much to disgust of the christening party attendees portrayed in Thackeray's satirical book *The Rose and the Ring*. In this fairy-tale 'a little MISFORTUNE' brings correction and redemption, and eventually a happy-ending. At this stage we may only hope that the misfortune brought about on the Polish courts in the recent years would prove as effective in awakening compassion for those who suffer it more than a little, as it was for the Princess Rosalba.

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