POLISH EXCEPTIONALISM: HATE SPEECH LAWS

BETWEEN SUPRA-NATIONAL STANDARDS AND NATIONAL POLITICS

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Abstract

This thesis explores internal and external factors behind an unsuccessful reform of hate speech laws in Poland. Polish criminal law does not provide protection for victims of hate speech motivated by bias on grounds of gender identity and sexual orientation. This legal lacuna puts the country below international standards in this area. This thesis argues that the national political leadership's interests have had decisive on policy reform, against a hypothesis that stresses the state's increased malleability under the influence of regional monitoring institutions and domestic civil society actors, including expert communities. The influence of agencies of the Council of Europe and The Organization for Security and Co-Operation in Europe in the context of the European Union fundamental rights dimension is also discussed.

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Contents

List of Abbreviations

CC	Criminal Code of the Republic of Poland of 6 June 1997
CE	Council of Europe
CETS	Council of Europe Convention on preventing and combating violence against women and domestic violence
CFR	European Union Charter of Fundamental Rights
ECHR	European Convention on Human Rights
ECRI	European Commission Against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Fundamental Rights Agency
ICCPR	International Covenant on Civil and Political Rights
LGBTQ	Lesbian, Gay, Bisexual, Transgender/Transsexual, and Queer
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PiS	Prawo i Sprawiedliwość (Law and Justice)
PO	Platforma Obywatelska (Civic Platform)
SLD	Sojusz Lewicy Demokratycznej (Alliance of Democratic Left)
TR	Twój Ruch (Your Movement)
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

Hate speech laws, criminalizing speech inciting to violence based on prejudice, are found in an increasing number or jurisdictions. This thesis focuses to answer the question: what are the country specific factors determining unwillingness of decision makers towards including explicit gender identity and sexual orientation provisions in criminal law?

For this purpose a negative case of international standards diffusion, where "international norms are deeply contested in the domestic arena" (Checkel 1999: 93), is discussed. The attention is brought to an unsuccessful attempt to raise the Polish standard of protection from hate speech motivated by gender identity or sexual orientation bias.

The lack of explicit provisions in criminal law in this respect distinguishes Poland from the majority of European Union member states and puts it under the international standards. Despite the existing empirical evidence on pervasiveness of homophobic and transphobic hate speech in the Polish context and consistent recommendations of the global, regional, and domestic human rights communities for improvement of extant legislation, the reform was hindered by the interplay of internal and external political dynamics.

In this analysis particular attention is put on political calculations of elite decision makers and factors incentivizing them to adopt new policies. This perspective places great weight on political leadership interests. The paper is not intended to build up toward specific policy recommendations, however at the end I present different possible strategies for agenda setting in the future.

Methodology

Upon completing literature a review of hate speech studies and policy diffusion studies with focus on East Central Europe, I analyzed primary sources: relevant international, European, and Polish legislation on hate speech, policy documents, administrative and organizational reports, media articles, as well as national and trans-European polling data to determine the satte of expert and public discourse on hate speech related to gender identity and sexual orientation.

Furthermore, my analysis is supported by nine semi-structured and anonymized interviews with selected representatives of the human rights expert community in Poland engaged in contemporary policy debates: scholars, officials, and non governmental organizations staffers, including a representative of the Human Rights Defender office, a representative of the National Council of the Judiciary of Poland, faculty members of the Law and Administration Faculty at the University of Warsaw and at the Polish Academy of Sciences Human Rights Center, as well as lawyers specializing in anti-discrimination law, working for non-governmental organizations (NGOs) in Poland.

The interviews were conducted in person on location in Warsaw, Poland and via teleconference in April 2016. The number of interviews was restricted due to a limited research period and the availability of interviewees. I used similar interview protocols, starting with a general question (How would you assess current hate speech laws in Poland in the context of the development of international standards in this area? What are the opportunities and obstacles for hate speech reform/update, if it is necessary?).

The interviewees were professionals with a high degree of reflexivity and criticism towards their field and their positions within it. The officials answered in their professional capacity and therefore were restricted by the official position of their office.

My standing would be best described as *confidante,* a person acquainted with the rules governing the Polish legal field, but not a professional. I have acquired a degree from law at the University of Warsaw prior to my studies at the Department of Sociology and Social Anthropology at Central European University. My first-hand knowledge of the academic legal environment in Poland, as well as personal and professional networks established during my studies, allowed me to identify key actors in the debate on hate speech regulation, and later select and contact prospective informants. I opted for information-rich cases and reviewed the sample on informants' recommendations ('the snowball effect').

An important methodological caveat about the interviews sample is related to the political polarization of the Polish legal community (cf. Conversation between Adam Bodnar, Michał Królikowski, Sebastian Duda and Zbigniew Nosowski Do human rights connect or divide? Debate 2014). This phenomenon reflects a more general political polarization in Poland, increased first, after the 2010 the presidential aircraft crash at Smoleńsk, and second, after the presidential and parliamentary victory of Law and Justice (*Prawo i Sprawiedliwość*, abbreviated PiS) in 2015. This division was mentioned in interviews.

> As you know around 90% of law professionals who are dealing with human rights issues are like me and people you interviewed, who are my colleagues and friends, but at law faculties there are also people with different views, who reject the doctrine of human rights, and deride human rights as leftists ideology (*lewackie prawa człowieka – lewacki* is a popular derogative term for leftist – the comment my own A.W.]. (human rights scholar)

> Take any academic conference. On one side there are people who want liberalization, on the other – those with ideas straight from the medieval times. Every discussion ends up in quarrel, because we are on different wavelengths. A scholarly debate becomes secondary. Moderate voices are less and less

> heard; there are no attempts to look for the common ground; everything is presented as zero to one, black or white. (human rights scholar)

Due to limited research time I contacted representatives of the Polish human rights community, who would be described by their political opponents as *lewackie* leftist, left-liberal, centrist, pro-European, or cosmopolitan. On the other hand, my informants preferred to eschew political labels and situated themselves in the 'mainstream' of global human rights scholarship. That entails that the interviewees were supportive of expanding the standard of protection from hate speech in the Polish criminal law and approved of leveling up to the highest international standard in this regard, both in terms of legal provisions and policy solutions.

My research was focused on internal and external political hindrances to hate speech laws reform in Poland, not on the degree to which the Polish legal field is politicized, nor on the role of human rights lawyers in identity politics or culture wars in contemporary Poland. The understudied Polish legal field would certainly benefit from extensive research along the lines of elite professions' analysis advanced by Richard Posner in *How judges think* (Posner 2010) or Neil Gross in *Why are professors liberal and why do conservatives care* (Gross 2013). However, given the relatively modest length of my master thesis, the limited research period available, resources, and access to representatives of the full political spectrum among the Polish legal community, the chosen sample is satisfactory for the scope of the present study.

Finally, it should be emphasized that my research is historical, albeit it deals with a very recent history. The focus on the 2012 debate on the criminal code amendments in the context of the Civic Platform's second term in power between 2011 and 2015 is a choice motivated by a radical shift in hate speech policy in Poland after the 2015 presidential and parliamentary victory of PiS. At the time when this study was being written between May and mid June 2016 the leader of the ruling party Jarosław Kaczyński declared that no anti hate speech laws

or policies would be implemented in Poland and anti-hate speech police manuals were suspended. Earlier this year year violent attacks on the headquarters of an NGO providing anti-discrimination legal advice in Warsaw intensified, among other incidents. Additionally, the Council on Combatting Racial Discrimination, Xenophobia, and related Discrimination also dissolved. Understandably, the rapidly changing context influenced also the content of interviews; as interviewees were very much preoccupied with unfolding events and underlined the differences between policy advice to PO and PiS governments. Therefore the beginning of PiS term in power in mid 2015 introduces a clear historical boundary as regards the ongoing hate speech laws debate in Poland.

Chapter 1: Hate speech as global legal phenomenon with local vernacular

'Hate speech' is an umbrella term for inflammatory, hateful expressions inciting to violence. Victims of hate speech are targeted on the grounds of perceived characteristics, including, but not limited to, race, ethnicity, nationality, religion, gender identity, sexual orientation, health, disability, and age. Hate speech is characterized of its attempt to dehumanize and by its use of the simplistic and unbalanced language (Vollhardt 2006: 27). Regarded as excessive and unlawful exercise of the freedom of expression, undermining the dignity of the ndividual and infringing upon their personality rights, it is penalized in various jurisdictions across the globe (Boyle 2001; Timofeeva 2003; Belavusau 2012).

The term is vague and there is no globally agreed definition (Peers 2014). Notwithstanding, the Council of Europe attempted to clarify it in the Committee of Ministers' Recommendation 97(20) on 'hate speech'.

> The term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. (Recommendation no. R (97) 20 of the Committee of Ministers to Member States on 'hate speech' adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies)

The term 'hate speech' entered American legal lexicon between 1940s and 1950s when the US Supreme Court developed the so-called 'fighting words doctrine', limiting freedom of speech in cases when violent expressions were likely to breach the peace (Bleich 2011: 922). In the following decades American jurisprudence tended to trump the principle of the freedom of expression, a tendency overturned on the state level in the 1980s and on the federal level in

late 2000s. Today, legal scholars agree that the US has a well-developed state and federal provisions against hate crimes (Bleich 2011: 925), but at the same time it still does not recognize hate speech as a hate crime. In the early 2000s several European countries introduced provisions restricting hate speech on more grounds that were recognized in the US.

Whilst framing certain practices of discrimination as 'hate speech' and 'hate crime' is relatively contemporary, in fact hate speech laws were enshrined in international law already in provisions introduced in the aftermath of the Second World War and at the time of the dissolution of colonial empires. Therefore traditional legal provisions related to hate speech and hate crimes came into force to primarily counter racism, xenophobia, and religious intolerance. They did not include phenomena which were included afterwards, among them homophobia, transphobia, ageism, or ableism (prejudice towards people with disabilities). The traditional, narrower catalogue of anti hate speech provisions is included in foundational international human rights instruments:

In the Universal Declaration of Human Rights (UDHR)

> Article 3
>
> Everyone has the right to life, liberty and security of person.
>
> Article 7
>
> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In the International Covenant on Civil and Political Rights (ICCPR)

> Article 20.2

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In the European Convention of Human Rights (ECHR)

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The interest in hate speech as a subject topic of political philosophy and legal scholarship has grown exponentially (Fish 1993; Sustein 1995; Butler 1997; Waldron 1993, 2010, 2012; Kahn 2012), which reflects new challenges to balancing the principle of freedom of speech with the constitutional principles of equality and non-discrimination entrenched in normative systems of liberal democracies. On the one hand, a surge of scholarly interest in hate speech is attributable to development and the spread of new information and communication technologies including social networks, which has lead to creation of the digital public spheres (Levemore & Nussbaum 2012; Citron 2014). On the other, it may also be attributed to the challenges to freedom of speech experienced in multicultural and multiethnic societies (Fish 1997; van Noorloos 2014), anti-immigration debates triggered by the rise of nationalist sentiments (Belavusau 2010), and discussions on the limits of academic freedom (Heinze 2016). Furthermore, rising scholarship on hate speech and hate crime has provoked a new academic discipline of hate studies, which has been gradually institutionalized since 1997, with the establishment of Gonzaga University for Hate Studies, publication of the scholarly Journal of Hate Studies, subsequent conferences on the topic, and crowned with the foundation of the International Network of Hate Studies in 2013.

The topic, falling into a broader theme of freedom of speech under globalized conditions (Hare & Weinstein 2010; Herz & Molnár 2012; Molnár 2015), is noticeably discussed as contemporary political, social, and legal challenge shared by democratic governments and communities across the world. Therefore hate speech regulation is a subject of comparative analysis in constitutional and anti-discrimination law, as well as policy studies, where possibilities and ramifications of global and regional policy convergence are examined with particular attention. Notwithstanding globalization's impact on our understanding of hate speech (Schweppe & Walters 2016), the phenomenon is vernacular and highly contextualized, for prejudice and bias towards certain groups result from geopolitically and historically

formed anxieties. Former OSCE Representative for Freedom of the Media Miklós Haraszti predicted 'the coming death of international standard [of hate speech laws] before it was born' (Herz & Molnár 2012: xiii). Haraszti suggested that standardizing legal and policy response to hate speech is at best "unnecessary", and at worst "inappropriate", emphasizing the needed for country-specific policies, attuned to historical, cultural, and political differences, since every nation-state or other unit of analysis has its own history of prejudice. Leo Tolstoy wrote in the opening of *Anna Karenina* "All happy families are alike; each unhappy family is unhappy in its own way" and this statement can be easily translated to hate speech policy dilemmas.

Hate speech is targeted at various vulnerable or minority groups, that benefit from recognition and protection to a varying degree. Police forces and judiciary are more inclined to recognize and punish offences committed at historically oppressed and marginalized groups (Rosenfeld 2003). Recent literature on hate speech policies and law enforcement in Western Europe showcases legal apparatus' leniency towards anti-Muslin hate speech over 'fighting words' targeted at other ethnic and religious minorities, especially towards the Jewish community, which is a result of the long-standing commitment of the French state to combat anti-Semitism; there are also differences in treatment of racist hate speech targeted at different communities of color (Bleich 2007, 2011, 2011, 2014). These elective application of hate speech laws by state apparatus could also reflect wider societal attitudes. Within the European Union, statistics showing high levels of anti-Semitism, anti-Muslim hatred or anti-Roma sentiments in all 28 EU member states are especially alarming. However, according to the survey 62% of Europeans think that new measures should be introduced to raise the level of protection for groups at risk of discrimination (Eurobarometer on Discrimination 2015: Social acceptance and discrimination on the grounds of religion and ethnicity).

Law not only constitutes an important part of culture; it also contributes to creating culture.

Codified norms influence social norms and could be effective in influencing social behavior. Law's educational role often results in a long-lasting behavioral change. The results from empirical research on the impact of hate speech laws in Australia demonstrate that hate speech laws "provide a limited remedy in the complaints mechanisms, yet at the same time provide a framework for direct community advocacy, and that knowledge of the laws exists in public discourse" (Gelber & McNamara 2015).

In the European Union, Canada, Australia, New Zealand, and South Africa, among others, hate speech has been increasingly framed as issue which requires precise legal measures and crafted policies. This conviction was expressed also by my interviewees, human rights experts from Poland, who argued against the universalization of counter hate speech policies and underlined that the phenomenon requires locally generated answers, which recognize local specificities and idiosyncrasies; they agreed there is no benchmark or model country from which Poland could 'transplant' counter hate speech policies. Nevertheless, when it comes to policy outputs, that is a legal standard of protection from hate speech and hate crimes, global and regional human rights organizations as well as specialized EU agencies provide useful guidance.

Chapter 2: Sustaining Polish exceptionalism. Failed hate speech law reform

The EU member states belong to the United Nations (UN) and are signatories of the Universal Declaration of Human Rights (UDHR). They are also members of the Council of Europe (CE) and signatories of the European Convention of Human Rights (ECHR) as well as members of The Organization for Security and Co-operation in Europe (OSCE). Since 2009, also the Charter of Fundamental Rights of the European Union (CFR) also binds the EU community.

Hate speech negates fundamental values enshrined in the Charter (Peers 2014): the right to respect of physical and mental integrity (Article 3), the right to liberty and security of the person (Article 6), the right to non-discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation (Article 21). Moreover, in 2008 the EU adopted a framework decision relating to hate speech and hate crime motivated by racism and xenophobia (OJ L 328/2008) and in 2012

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, hate crimes mentioned only in recitals 56 and 57 and article 22.

The minimum requirement of EU fundamental rights standard is not to violate them; the more ambitious one – to improve them. With few important exceptions, notably *Melloni* ruling (Case C-399/11 Stefano Melloni [2013]), the EU usually promotes the highest standard among those found in national legislations.

The broad catalogue of the grounds of prohibited discrimination in the article 21 of the CFR sets a high bar for local standards of protection in member states. In the words of Seila Benhabib, it is rather ‘a maximum to aspire to’ than a ‘minimum to be maintained’ (Benhabib

2011: 72). Member states are expected to respect the rights and observe the principles enshrined in the Charter, as well as to promote their application, for example by local judiciary (Article 51 of CFR), however, they also maintain a high level of discretion (FRA Report How is the EU Charter of Fundamental Rights used at national level 2015).

As a result, the legal standard of protection from hate speech varies across the European community. According to the European Union Agency for Fundamental Rights (FRA) report *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015* in 2015 hate speech on grounds of sexual orientation is considered too be a criminal offence in 20 out of 28 EU member states. These are Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Malta, Portugal, Romania, Sweden, Slovenia, Spain, and the United Kingdom. 15 countries treat homophobic intent as an aggravating circumstance, and 8 have explicitly guaranteed the protection from gender-identity based hatred in their criminal codes. There is no protection from gender-identity based hatred in five East Central European member states from the 2004 and 2007 EU enlargements: Poland, the Czech Republic, Slovakia, Romania, and Bulgaria, but neither are there in two of the EU founding Western member states of Italy and Germany.

The main challenges related to hate speech in the EU include: first, review of existing national law provisions and expanding protection catalogue to include also gender identity and sexual orientation-motivated hate speech and hate crimes. Second, adopting effective, preventive policies in cooperation with various stakeholders: the state apparatus, civil society, and the private sector.

The research into prejudice in Poland carried out by the University of Warsaw Center for Studies on Prejudice has demonstrated that the levels of hostility towards Jews, Roma, and

LGBTQ groups are particularly high (Bilewicz 2014).[1] Derogatory terms such as 'pedał' and 'ciota, which are employed to describe homosexual men, are considered the most offensive terms in the Polish language according to the survey conducted by Center for Public Opinion Research Survey in 2007. 'Pedał' was considered offensive by 83%, 'ciota' by 80% of respondents; more than any other common racial, ethnic, or religious slurs (CBOS 2007).

According to extant criminal code provisions, among members of the groups at high risk of discrimination and exposed to hate speech in Poland, only those victimized on the grounds of their perceived gender identity and sexual orientation are not currently protected by the criminal law of the Republic of Poland. Whereas other groups at high risk are protected as a religious community, such as Jews or Muslims, or an ethnic community, for example Roma, "the law is blind to homosexual people" (Bilewicz 2016).

> Article 119. § 1.
>
> Whoever uses violence or makes unlawful threat towards a group of person or a particular individual because or their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years. § 2. The same punishment shall be imposed on anyone, who incites commission of the offence specified under § 1.
>
> Article 256.
>
> 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

[1] The available data does not include assessements for 2015 which is expected to include high leve of prejudice to migrants and Muslims.

> penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.
>
> Article 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. (CC).

This lacuna is putting Poland below the EU-average fundamental rights standard, and has been addressed by the United Nations, the Council of Europe, OECD, transnational NGOs such as the Amnesty International, local civil society organizations and monitoring institutions, as well as by Human Rights Defenders Office in recommendations concerning Poland. Moreover, pivotal stakeholders in the debate on hate speech law reform, local elite decision makers, has also acknowledge the need to improve extant regulation.

Drawing from historical material and interviews collected during the fieldwork, I reconstruct the discussion around amendments to the articles 119, 256, and 257 of the Criminal Code of the Republic of Poland of 6 June 1997 (CC) proposed by the parliamentary club of the governing Civic Platform in 2012 (Draft amendment no 1078 of 27 November 2012).

The 2012 bill was not the first attempt to improve legislation on hate crimes and hate speech in Poland. The background and history of two previous proposals from 2011, the first devised by the coalition of non-governmental organizations, the following largely based on the former, yet presented by parliamentary opposition parties Your Movement (*Twój Ruch*, abbreviated TR) and the Alliance of Democratic Left (*Sojusz Lewicy Demokratycznej*, abbreviated SLD) are discussed in detail by Piotr Godzisz and Dorota Pudzianowska (Godzisz

and Pudzianowska 2016: 180). However, the 2012 legislation proposal was the most significant from the perspective of this study, because first, it was issued by the parliamentary club of the governing Civic Platform, and second, focalized constraints and apprehensions of Poland's political leadership in relation to gender identity and sexual orientation issues and, more implicitly, LGBTQ rights.

The proposal merged the articles 256 and 257 and expanded extant catalogue of premises of criminal liability for hate speech to include also "political, social affiliation, and natural or acquired personal characteristics or beliefs." This wording demonstrates constraints of human rights language in Poland, where associations with gender identity and sexual orientation are perceived as highly problematic for the legislator. While lawmakers attempted to adapt international standard to make it more acceptable (or less unacceptable) to local constituencies, the modifications of the technical language of policy resulted in severe criticism from the expert community. Scholars Wojciech Sadurski and Aleksandra Gliszczyńska-Grabias criticized the wording "natural or acquired personal characteristics" in an op-ed *Która zniewaga kary wymaga* (Which offence requires penalty) in a daily "Gazeta Wyborcza", calling it a subterfuge of the governing party to avoid more accurate, precise, and appropriate wording 'sexual orientation and gender identity'. The legislator, the authors claimed, was simply afraid to "call a spade a spade" (Gliszczyńska-Grabias & Sadurski 2012).

The project was also panned by an association Koalicja na Rzecz Równych Szans (Coalition for Equal Chances), which groups several leading NGOs promoting human rights standards and respecting the principles of equality and non-discrimination in Poland.[2]

[2] The production and dissemination of knowledge about hate speech in Poland has been sponsored by foreign development aid instruments, in particular EEA and Norway Grants

> The proposal does not meet even minimal requirements of groups, whose members and clients are facing hate speech every day and are victims of hate crimes biased by prejudice of gender, disability, sexual orientation, sexual identity, and age. We consider that introducing an extra-legal, non-defined notion of 'natural personal characteristics' (or 'natural or acquired personal characteristics'), unheard of elsewhere in the world, not only will not improve the level of protection for people who are experiencing that treatment, but will result in chaotic proceedings initiated on the basis of the new regulation. (Coalition for Equal Chances 2012)

Experts argued that the wording was imprecise, unclear, undefined, and remained in stark contrast with the article 256 of CC, which requires the legislator to formulate criminal provisions in a well-defined and understandable way. Furthermore, the association considered the choice of wording as politically motivated; an excuse to omit notions of disability, gender, or sexual orientation.

Godzisz and Pudzianowska noted that "negative opinions, criticizing the vagueness of the proposed solutions, were also expressed by constitutional bodies, such as the National Council of the Judiciary of Poland (14 February 2013), the Supreme Court (29 January 2013),

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sponsored by governments of Iceland, Lichtenstein, and Norway to "reduce economic and social disparities and to strengthen bilateral relations with 16 EU countries in Central and Southern Europe and the Baltics." The funds have been channeled to NGOs involved in democratization, civil society development, and fighting xenophobia and anti-Semitism in Poland. Prominent beneficiaries of the grants have included the Batory Foundation (Fundacja Batorego) and the Association Open Polish Republic (Stowarzyszenie Otwarta Rzeczpospolita). According to the project website, over the period from 2009 to 2014 Poland received 578.1 million euros, becoming the biggest recipient of the funds.

and – interestingly – the Government (29 April 2013), in which PO is the senior coalition partner" (Godzisz and Pudzianowska 2016: 186).

Four years later, one of my interviewees described the 2012 regulation as 'a monstrosity' (*potworek*), highlighting the inconsistency between the proclaimed aim of the amendment and its disappointing execution. Another informants explained the practical purpose of legal language's economy, clarity, and precision.

> We need to reform our domestic criminal code to include homophobic motivation as aggravating circumstance in both the general part and the special part of the criminal code. Because when a policeperson opens the code, they need to see it at the first glance. The state apparatus, the law enforcement authorities, need to have everything written down in a simple, unambiguous, way. (anti-discrimination lawyer working at an NGO)

The 2012 governmental proposal, however flawed, demonstrated at least the partial success efforst made by of non-discrimination policy entrepreneurs. In a justification to the proposal the lawmakers explicitly acknowledged and condemned hate speech biased by the gender identity or sexual orientation of the victim.

> Expanding the catalogue of 'natural and acquired personal characteristics' is a result of belief that no one should be discriminated against under the law, including being a victim of violence, threat, abuse or so-called hate speech on grounds of their natural characteristics, for example gender, health, sexual orientation or disability – this belief has been for years clearly pronounced in the jurisprudence on the grounds of the European Convention of Human Rights and Fundamental Freedoms. (Justifications to Draft amendment no 1078 of 27 November 2012)

Eventually, criticized amendments were dropped. The human rights expert community asserted its superiority and expertise over lawmakers, and continued to lobby for change in the following years. In 2015 the reform of hate speech provisions in the CC was back on the political agenda in Poland, however no concrete proposals were discussed. The radical change in anti-dicrimination policy in Poland during the PiS government stalled the reform.

Chapter 3: Political leadership's interests above all

Politics is the art of the possible at a given time and politicians are expected to balance demands of the expert communities, interest groups, the international obligations with the real or imagined expectations of local constituencies (Linos 2011). Academics and intellectuals, university-trained progressive thinkers are a key resource in policy debates and help to advance programmatic ideas (Skowronek 1982). Nevertheless, in the discussed case a presumed divide between the opinion of 'informed publics' and the views of the majority of Poles on hate speech biased by gender identity and sexual orientation did not work to experts' advantage.

The beginning of the 2010s gave a window of opportunity for hate speech law reform advocates. First, it was a moment of a great discussion about a general reform of the criminal as well as the criminal procedure codes. The Polish legal community had been aware of the 1997 codes' shortcomings, which resulted in excessively lengthy criminal proceedings and limited access to justice. Therefore between 2009 and 2013 the Criminal Code Codification Commission worked on substantial amendments and the legal community was supportive of changes to extant legislation. The 'great revision of the philosophy of punishment' was eventually adopted in 2015. Whilst the reform of the judiciary, and the improvement of legal architecture and law enforcement in Poland had been central to PO's program ahead of the 2011 parliamentary elections and pronounced in the prime minister's *exposé* in Sejm, planned reforms focused on speeding up criminal proceedings and deregulating legal professions. An advancement of human rights and civil liberties agenda was not at the core of the party's reform strategy.

After the victory in the 2012 parliamentary elections, the Civic Platform, a liberal-conservative, Christian-democratic, center-right, pro-European party (cf. Pacześniak 2014, Szcerbiak 2013) helmed by the Prime Minister Donald Tusk, started its second term. It was

the party's height of power, with non-partisan, yet supported by PO, President Bronisław Komorowski in the office. This was a year of taking political risks and introducing controversial and unpopular reforms, for example rising the statutory retirement age. Although 2012 brought the first signals of the international anti gender mobilizations, the specter of the 'war on gender' had been dormant in Poland, and the offensive of conservatives backed by the Polish Catholic hierarchy was only about to begin in the following year (Korolczuk 2014, Graff 2014, Borkowski 2014, Kovacs and Poim 2016, Grzebalska 2016). Nonetheless, the Polish political scene was fragile after the 2010 presidential aircraft crash in Smoleńk, which polarized the country and exacerbated political rivalry of two leading parties: center-right governing Civic Platform and opposition conservative nationalist Law and Justice (Koczanowicz 2014, Cześnik 2014).

> The radicalization of hate speech in the media [after the 2010 Smoleńsk crash] has profound impact on societal norms. If everyday we are exposed to hateful language directed at white Polish Catholics with polarized political views, it's not surprising that acceptance for hate speech targeted at racial or sexual minorities is high. (human rights scholar)

In response to the political schism in the country the Civic Platform adopted 'hot water in a tap' policy, focusing on economic performance and infrastructural modernization. The PM Donald Tusk proclaimed this direction in a programmatic interview after the electoral victory.

> As long as I am present in the political life, I prefer the type of politics that guarantees, how some maliciously say, the hot water in a tap. For there are others who greatly approve the fact that, finally, there is one, strong party, restrained and modest in imposing grand goals to the people, and guarantying grand stabilization instead. (Tusk 2010)

With the rise of PO's 'passive liberalism' and technocratic governance focused on metrics, a

progressive social and cultural agenda was not a priority. This is best exemplified by failures to introduce civil partnerships and Tusk's government's reluctance to adopt the Council of Europe Convention on preventing and combating violence against women (CETS). Only the second Civic Platform's cabinet of Ewa Kopacz, which governed Poland between 2014 and 2015, adopted the Convention ahead of the next parliamentary elections. PO's focus on appealing to more conservative parts of the Polish public opinion, often considered the core of adversary PiS, stalled the dvancements of issues associated with LGBTQ rights.

Typically in the literature two major hate speech regulations models are distinguished: the 'Western European consensus' on some forms of hate speech bans, followed by liberal democratic states of Canada, Australia, and New Zealand, and 'American exception' of almost un-limited freedom of expression (Heinze 2012). Scholars of East Central Europe advance an argument that post-socialist countries of East Central Europe have come up with a third-way, a variation of Western European model with more focus on candid, unlimited expression, as a result of their political vulnerability and the volatility of transition to democracy as well as relatively recent history of political repressions (Molnar 2012; Belavusau 2012, 2013).

The principle of freedom underpinned systemic transition in Poland after 1989, trampling other republican principles of brotherhood and equality (Król 2015). The freedom of expression and information is included in the Polish constitution from 1997. However, as every constitutional principle, this freedom is not absolute; it is limited when disproportionally infringes other constitutional principles and social 'greater goods', for example state's security, people's dignity or religious feelings. Rich jurisprudence of Polish courts on infringing religious feelings of a third party demonstrates that freedom of speech is not absolutized in the Polish legal culture (Freedom House 2010, Bieczyński 2011).

My interviewees considered that discussions concerning the specificity of freedom of speech

in East Central Europe did not influence debate around updating hate speech provisions. Instead, informants suggested that it is principally a question of politicians' distancing from gender and sexual orientation issues.

> I do not see any legal obstacles in expanding the catalogue, we can do it perfectly. The main obstacle is mental blockage of decision-makers. (human rights scholar and activist)

> Existing articles require updating. 'Traditional' presumptions were introduced to the criminal code because of experiences of the Second World War: racism, anti-Semitism, political persecution. The sad conclusion is that the Polish legislator simply does not take notice of social change, the new wave of emancipation of social groups, which had previously been voiceless. I am mostly speaking here about the presumptions of gender identity and sexual orientation, but there are also others, such as disability and age. (human rights scholar and activist)

Political polarization of academic legal community and politicization of human rights issues was signalized as another factor blocking reform.

> Elsewhere in the world, the academic discussion on whether hate speech should be penalized or not is polarized between liberal-left who considers that the freedom o individual should be protected and those who position themselves further on the left and argue that we should keep the possibility of re-appropriation of hateful language by the victims. Still, both sides more or less agree on the issue of human rights. Whilst in Poland, it is not the case of an intellectual discussion about the freedom of speech and its limits; it's more of an ideological bloodbath. In a nutshell, you can find statements such as 'Not only we can't say anything for a Jew, but now we would have to protect a

> faggot' in the streets, but they are not uncommon in academia either. (human rights scholar)

The legal field's autonomy and neutrality are normative ideals according to which law should be impenetrable from societal and political expectations and influences. In reality, the borders between legal, political, and social fields are porous. The modern, liberal, codified jurisprudence employs, among others, the fiction of neutral legislator. In his collection of essays on liberal rights Jeremy Waldron traced the genealogy of this concept, focusing on definitions provided by Ronald Dworkin and Jeremy Bentham. Dworkin explained that in liberal democratic state legislator is expected to be

> neutral on what might be called the question of the good life, or of what gives value of life. Since the citizens of the society differ in their conceptions [of what makes life worth living], the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or powerful group (Waldron 1993: 144).

Dworkin's idealism is in stark contrast with Bentham's psychological egoism. Bentham argued that the legislator is not interested in utilitarian increase of happiness of governed population. Conversely, "the political choice represents an opportunity to augment or diminish his own happiness" (Waldron 1993: 395). This conviction is also advanced in more recent literature, where state interests are equalized with the preferences of the state's political leadership (Goldsmith and Posner 2005: 6). The ruling class is also believed to be principally driven by the desire of the reelection–'the electoral connection' (Mayhew 1974)–and therefore choosing policies, which maintain its leadership. Daren Acemoglu and James Robinson demonstrate an example of this behavior: the governments blocking industrialization out of fear being replaced (Acemoglu & Robinson 2006). In the case of hate

speech law reform in Poland the governing party played to the alleged preference of conservative voters, presuming a high electoral cost if perceived to be advancing agenda associated with LGBTQ rights. Literature on policy diffusion suggests that policymakers usually adopt politically viable policies, which do not fundamentally threaten key interest groups and give ground for possible coalitions (Campbell 2002: 33).

Speech is free to theextent compatible with state's views (Heinze 2013). The state grants permission to certain types of abuse and penalizes others. The act of introducing and revising this classification is political. Law, despite its aspirations to universalism, is setting limits, giving exceptions, and establishing classifications. In the early 1990s Martha Minow analyzed how the US legal system attempts to achieve justice and equality "by sometimes recognizing and sometimes ignoring difference" (Minow 1990: 3). She demonstrated how classifications can express prejudice, racism, sexism, anti-Semitism, or intolerance for difference.

Extant hate speech legislation in Poland is purposefully exclusionary to certain group of people. The undercurrent of the Polish bargaining for updating hate speech provisions is the discussion about the catalogue of traits considered significant and deserving protection. In Poland gender identity and sexual orientation are contested and excluded from national framework, despite efforts of scholars, artists, and activist to queer the nation and expand the limits of though, language, and behavioral patterns (Pejic 2009; Kulpa and Mizielińska 2011; Mizielińska 2011).

A 2016 IMM Report on homophobic commentaries in social media in Poland (Twitter, Facebook, Youtube) demonstrates on average 4 000 comments which should be classified as gender identity and sexual orientation-biased hate speech per week (Jadaś 2016). The 'dramatic' or 'monumental' shift of the public opinion on the LGBTQ rights which happened for example in Germany and the Untied States (Henry 2014), has not occurred in Poland, where homophobic public discourse is not perceived negatively by the majority of public

opinion and the support for LGBTQ rights is low. The results of the European Social Survey from 2010 demonstrated that 44% of Poles agreed with the statement 'gays and lesbians free to live life as they wish' in comparison to 65% of Czechs, 45% of Hungarians and 42% of Slovaks (European Social Survey 2010).

Homophobia, the "irrational fear towards a person because that person is lesbian, gay or bisexual" (FRA Report Hate Speech and Hate Crimes against LGBT Persons 2012) "attaches intensely negative connotations to any arguments concerning homosexuals and homosexuality" (Dececco & Plummer 2016:). Hate speech laws are perceived as yet another frontier of the politicized discussion on sexual orientation and human rights (Heinze 1994). Their detractors fear that expanding the catalogue of hate speech premises in the criminal law would open a window of opportunity to introducing positive rights, including civil partnerships and the right to same sex marriage.

Substantially adding to discussion on sexuality and nationalism in Europe, Robert Kulpa advances the claim that the construction of post-socialist space as inherently homophobic and therefore non-European (or not European enough) by old EU member states and international institutions is an example of Othering and asserting cultural superiority (Kulpa 2014). Kulpa introduces the idea of 'Western leveraged pedagogy of Central and Eastern Europe', which is understood

> as a didactical and cultural hegemonic relation of power, where the CEE figures as an object of West/European pedagogy. This discourse frames CEE as permanently 'post-communist', 'in transition' (i.e. not liberal, yet, enough), and, last but not least, homophobic (Kulpa 2014: 432).

The author claims that positioning CEE as homophobic, which is exemplified by rejecting human rights related to sexual identity, obfuscates and downplays the reality of homophobia in Western Europe. For this purpose, in the Western European imaginary CEE remains the

space in-between, looped in a never-ending transition, situated both geographically and mentally between the Western civilization and its absolute Other, embodied by Russia. On the other hand, the distinctive identity of Russia is asserted by branding 'Europe' as sexually deviant, the practice represented by the concept of 'Gayropa' (Rabiov & Rabiova 2014). In Poland, the LGBTQ agenda is often similarly, albeit with lesser forcefulness, associated with process of unwanted social and cultural Europeanization, globalization, and cosmopolitanism. Popular suspicions are reflected in expressions 'homo propaganda', 'homo lobby', or 'first vege[tarian], later homo[sexual]' (*najpierw wege, potem homo*). Resistance to expanding LGBTQ rights is a marker of cultural identity. Polish Eurosceptic conservatives, nationalist, and populist politicians skillfully use homophobia in political battles (Graff 2010). Therefore the impact of European Union framework on advancement of LGBQT rights in Poland remains ambiguous (O'Dwyer 2012).

The process of bargaining to expand the catalogue of hate speech premises in the criminal code encountered yet another unexpected difficulty: the ruling party concentrated efforts on fighting anti-Semitic, racist, and xenophobic hate speech, associated with football hooliganism and right-wing movements, which have been on the rise in Poland, as a part of a broader government's strategy to counter violent extremism. In 2013 after the after racial and ethnic-motivated hate crimes committed by hooligans in the city of Bialystok the Interior Minister delacred 'We are after you' (*Idziemy po Was!*). On the one hand, deciding what kind of violence requires more urgency was fuelled by the ruling party's leadership own interest: in 2011 the Polish stadium hooligans declared a "war" on the government and on the then prime minister Donald Tusk, immortalized by a popular stadium chant 'Donald, you idiot, your government will be overthrown by hooligans'. On the other, given the long history and pervasiveness of anti-Semitism in Poland (Krzemiński 2016) and the fact that the Polish-Jewish reconciliation was one of the top symbolic priorities of the Third Polish Republic's

governments, the fight with anti-Semitic and xenophobic hate speech was crucial for the *raison d'État*, whereas the fight with homophobic or transphobic hate speech was not, especially since homosexuality is constructed as a threat in the Polish national discourse (Godzisz and Pudzianowska 2016).

The hate speech policy of the Civic Platform from 2011 to 2015 was focused on improving law enforcement in Poland on the basis of extant criminal code provisions. The Council or Combatting Racial Discrimination, Xenophobia, and related Discrimination was established, anti discrimination workshops and manuals were introduced to policy training programs, the Persecutor General published guidelines for persecutors concerning hate speech investigation, in particular online hate speech (General Persecutor of the Republic of Poland 2014a, 2014b), and the police forces improved monitoring of hate crimes and hate speech (Seremet 2012).

However, those measures were targeted at acts of discrimination and violence on the grounds enumerated in the criminal code, and thus did not include hate speech motivated by homophobic or transphobic prejudice. Since this subcategory of hate speech is absent from the Polish criminal law, it is not the subject of particular attention of the Polish law enforcement forces and the judiciary. The excerpt from interviews demonstrate that lawmakers are hugely responsible for agenda setting in hate speech cases, and their reluctance to expand the scope of protection to victims of gender identity and sexual orientation related violence distorts the problem in the eyes of the state apparatus.

> I was working on a case of defamation and punishable threat. The court judged favorably to our client, but explicitly stated that I will not mention 'homophobia' as an aggravating circumstance until this is expressly stated in the criminal code. (anti discrimination lawyer working at an NGO)

> Turning a blind eye to the social need implies a vicious circle: people, for example LGBTQ people, are victims of offences; they go to the police and to

> the persecutor; state organs do not see the presumption and do not register those offences as for example homophobic or transphobic offences, but as generic ones. Then the minister of justice, pushed by the NGOs, asks about the number of homophobic or transphobic offences, and it seems there are none, because they are not registered. (human rights scholar and activist)
>
> The lack of a wider catalogue results in a lower level of consciousness. First, the victims are not aware that they should expect protection from the system of justice. Second, they don't know that they should get compensation. Third, the perpetrators feel immune. (human rights scholar and activist)
>
> For me, the role of the criminal law is educational. The role of the criminal law is entrenching in social consciousness that one should not steal neither insult thy neighbor. (human rights scholar and activist)

A punitive, preventive, and educational role is therefore delegated to breakthrough civil law cases and the jurisprudence of the European Court of Human Rights, which domestic courts are obliged to follow. The victims of gender identity and sexual orientation related hate speech can claim compensation on grounds of civil law, and the Polish system of justice has produced several interesting judgments. *Giersz* judgment from 2009 (IC 764/08) was described as 'a candy, a veritable treat for non discrimination lawyers in Poland' by one my informants. In this case the claimant was awarded considerable compensation for homophobic hate speech on grounds on the civil law provisions concerning personality rights. The court stated that calling homosexual person 'pedał' is infringing the personality rights. In principle, local judges should know the rich jurisprudence of the European Court of Human Rights concerning gender identity and sexual orientation as well as hate speech, and are obliged to rule along the lines of Strasbourg standards. However, in practice the dissemination of knowledge about the ECtHR judgments is selective and uneven.

> My experience is that judges in district courts consider hate speech and especially homophobic hate speech as small fish and underestimate the problem. However, recently we have received more satisfactory judgments for our clients in upper courts. This has to do, I imagine, with less workload for judges, their greater experience, and willingness to be updated with precedents. (anti discrimination lawyer working at an NGO)

Bruno Latour's observations on the workings of the French Supreme Administrative Court are insightful also for understanding the constraints of the system of justice in Poland: "Judges has to produce justice, and declare the law, in accordance with the existing state of the texts, taking into account the precedent, with no arbiter other than the judges, who have no one to judge for them" (Latour 2010: 241). 'Law in books' constraints the range of possible actions and solutions. In a thought provoking *Should Trees Have Standing?* C.D. Stone demonstrated how naturalization of legal order hinders change.

> Throughout legal history, each successive extension of rights to some new entity has been, therefore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of some status quo. (Stone 1996: 6)

In case of hate speech legislation, 'the right' in question is a negative right of a group at high risk to be free from harm and violence. The purpose of this chapter was to demonstrate the limits of language that Polish political elites perceive as acceptable and intertwined internal political factors behind it. Lawmakers, constraint by the logic of 'social appropriateness' (Campbell 2002: 24) and fear of the alleged high electoral cost of links with the progressive LGBTQ agenda, were not incentivized to engage in hate speech law reform. The following

chapter argues that the pressure exercised on the legislator by international institutions is also limited.

Chapter 4: Limits of external pressure

Under what conditions are countries most likely to comply with international standards? Some authors exclude a preference for complying with international law from states' interest calculations, arguing that the citizens and leaders care more for security and welfare than for compliance with international norms (Goldsmith & Posner 2005: 8). Countries tend to harmonize their policies when they encounter, among others, parallel domestic problem pressures (Holzinger and Knill 2007: 779). Another factor is having a peer group "a group of similar others, whose behavior is relevant for comparison and whose good behavior is valued" (Prentice 2012: 25); this similarity includes for example development paths or cultural closeness. In addition to inter-states relations and competition, relations between states and their citizens are suggested as a possible incentive to look up to international standards. An interesting hypothesis is that "governments are disproportionately likely to mimic countries whose news citizens follow, and international organizations are most influential in countries with internationally oriented citizens" (Linos 2011: 678).

Poland has achieved its post 1989 strategic goals: accession to NATO in 1997 and European Union membership in 2004. The 'Copenhagen criteria', set up when Poland and other countries from East Central Europe were applying to the European Union, included 'human rights and respect and protection of minorities'. However, among the privileges of membership is lack of conditionality and weaker pressure on human rights standards convergence.

At the time of the 2012 debate on criminal code amendments, Poland was presented as a model post-socialist East Central European country transitioning to democracy and capitalism (Ekiert & Soroka 2013, Piatkowski 2013). The narrative of Poland's success was adopted by tone-setting global institutions, from the European Council of Foreign Relations through the Brookings Institution to the World Bank. The country performed decently also in various

freedom indices; it was classified as free by the Freedom in the World by the Freedom House and took 45th place out of 167 in the Democracy Index (compared to the 16th place of the Czech Republic and 49th of Hungary), among others. In 2012 Human Rights Watch reproached Poland for its, at that time, unclear involvement in establishing CIA detention center on the Polish soil and for restrictive abortion laws, but the report did not mention LGBTQ rights, nor hate speech or other forms of discrimination (Human Rights Watch Report 2012). This selectiveness brings attention to ambiguous use of indicators in measuring overall country performance (cf. Davis, K. E., Kingsbury, B., & Merry 2012)

The European Union

Specialized international bodies monitoring the standards of human rights are vigilant and issue recommendations concerning Poland, but their normative influence remains limited. While the Fundamental Rights Agency of the European Union expresses ambitions to become "catalyst in a fragmented human rights landscape" (FRA Meeting with National Stakeholders Report 2015), complex political, economic, and cultural reasons for retrenchment of the EU fundamental rights dimension undermine FRA's impact.

> Speaking of EU law diffusion. The Victim's Right Directive is an example of a hard EU law, the law that judiciary and law enforcement are obliged to follow, but in my opinion in Poland it exists exclusively on paper. (anti-discrimination lawyer working at an NGO)

After entering into force the Amsterdam and Lisbon Treaties, the EU has developed remarkably advanced human rights framework in comparison to other regional organizations (Scott 2011; Leconte & Muir 2014: 2). The emergence of a foundations for the federal system of fundamental rights (Iglesias Sanchez 2012) was particularly striking in the late 2000s when

the EU Fundamental Rights Agency (FRA), a monitoring and advisory body, was established in Vienna in 2007, the Charter of the Fundamental Rights of the EU (CFR), signed in 2000, became binding after the Treaty of Lisbon in 2009, and the European Commission introduced an office of the Commissioner for Justice, Human Rights, and Citizenship held from 2010 to 2014 by Vivianne Reading.

The preamble to the European Union Charter of Fundamental Rights, the programmatic document binding EU states since 2009 declares: "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values." Since the adoption of the CFR, the European Union not only ceased to be symbolic and normative workshop of the world (Fabiani 2013), but the calls for strengthening the nation-state framework instead of pursuing further integration have become more pronounced. Already in the 2010 law scholars identified a blind spot in architecture of the EU – "the lack of a principled way of reconciling the protection of fundamental rights within each EU Member State, with the establishment between these States of an internal market and of an area of freedom, security and justice (AFSJ)" (De Schutter 2010). Not to forget, that UK and Nordic Countries engaged selectively with AFSJ, securing opt-outs (Adler-Nissen 2015). While EU leadership has been striving to keep the economic and monetary union intact, the human rights dimension of integration is no longer high on the political agenda. This was symbolically exemplified, among others, by changing the name of the Commissioner for Justice, Human Rights, and Citizenship to the European Commissioner for Justice and Consumers in 2014. The 2010s economic crisis, austerity policies adopted to counter it, and deeper EU legitimacy crisis have considerably undermined fundamental rights dimension of the European project (Tamamović 2015).

The backlash to fundamental rights of the EU has different foundations than current intellectual and political disillusionment with human rights expressed by human rights expert

elites (Moyn 2010; Fassin 2012) or critiques along the lines of Hannah Arendt or Jacques Rancière, who distinguish betweem the excersizable 'rights of men', that is citizens, and void human rights of non-citizens, to which no state is accountable (Arendt 1973; Rancière 2004). The reluctance to adopt EU standards has more to do with the functionalist interpretation of human rights, in which development of human rights puts strains on state sovereignty.

The current decade has brought salient examples of member states', West and East, reluctance to comply with politically 'sensitive', 'inconvenient' or 'burdensome' standards declared in the EU Charter. States fear that application of European fundamental rights may generate a centralizing effect (de Visser 2014; Claes & de Visser 2012). Member states have been effectively bargaining to grant themselves exceptions, focused on safeguarding national autonomy. The British and Polish Protocol to the Charter assured exceptions to the UK and Poland. The Polish apprehension was motivated by the document's perceived liberal stance on social and cultural issues. Another example discussed in literature is the French government's questioning of the EU authority into clash over expulsion of Roma from France (Dawson & Muir 2013).

Europeanization "has re-enclosed citizens in a larger whole in a wide range of areas. This could be seen as liberating citizens from the constraints of their national state, e.g. through borderless travel, protections in terms of work conditions and human rights across borders. But it could also be seen as further constraining citizens through a more rigid kind of EU re-caging, given the emphasis on 'norms' and rule of law" (Schmidt 2015: 54).

The impact of EU law on diffusion of policies against domestic violence (Roth 2008; Krizsan & Popa 2010, Sedelmaier 2010) or improving political opportunities for LGBT mobilizations (Ayoub 2013) in Central and Eastern Europe is a popular topic in literature on Europeanization. However, the Polish exceptionalism demonstrates that local political elites do not consider those dimensions of EU integration as representing the Polish state's core

interest. Europeanization is not uniform: the states tend to adopt EU policies and recommendations selectively, maintaining sovereignty and discretionary especially in regard to issues framed as social or cultural, the traditional domains of domestic law. Concern for uniformity of the EU law has to be balanced with diversity of member states, and convergence is halted by cross-national differences.

The issue of human rights is close to the heart of national sovereignty – to a Rawlsian model of justice achieved in a nation-state framework rather than on the international forum in a cosmopolitan model introduced by Kant (Rawls 2001). Whereas there is no doubt that states operate in "increasingly transformed legal environment, surrounded by many intergovernmental organizations, non-governmental organizations, and new post-national reconfigurations of sovereignty such as the European Union" (Benhabib 2011: 12), the nation-state remains the principal arena where fundamental rights are enacted and interpreted.

To tie all the strings of precedent argument together, we may observe several sediments of national opposition to fundamental rights: opposition to further integration and introduction of EU-level policies, opposition to expanding the role of the state (liberal conviction that the state should not interfere), and opposition to cultural Europeanization (Ruzza 2014: 74), vilified as a 'foreign' imposition of recognition of minority groups, which would lead to their unsolicited empowerment. Therefore in many cases harmonization of EU member states fundamental law is politically unrealistic to be achieved (De Schutter 2010).

One of the successes of Europeanization is a tendency to compare country's performance with the EU average and with individual or grouped scores of other 28 member states. The European Union standards are key performance criteria in Poland, where discourses on modernization and development are conflated with Europeanization (Riedel 2015). Looking at country's human rights standard only through EU lenses is, however, not sufficient, as this is not a specialized human rights regional organization. In the following paragraphs I will

discuss the role of specialized agencies of Council of Europe (ECRI) and OSCE (ODIHR) on influencing hate speech policy in Poland in recent years.

Council of Europe and Organization for Security and Co-operation in Europe

The pivotal instruments of the Council of Europe (CoE) are the European Convention of Human Rights (ECHR) and the European Court of Human Rights in Strasbourg (ECtHR). In addition to vast and diverse body of jurisprudence related to freedom of expression, ECtHR developed a considerable body of case-law on hate speech, including cases related to ethnic, racial, and religious hate, Holocaust denial and revisionism, threat to the democratic order, apology of violence and incitement to hostility, condoning terrorism and war crimes, insult of state officials, and hate speech on the Internet (ECtHR Fact Sheet Hate speech March 2016). Importantly, the ECHR case law recognizes that discrimination on grounds of sexual orientation should be granted the same level of protection as discrimination based on race, origin, or colour (cf. *Vejdeland and others v. Sweden* Application No. 1813/07) (cf. ECtHR Fact Sheet Sexual orientations issues June 2016; ECHR Fact Sheet Gender Identity Issues April 2016). Recent literature on hate speech underscores the potential of discriminatory violence complaints to ECtHR in establishing shared understanding of hate speech (Mačkić 2016).

The CoE influences 47 ECHR signatories also by means of conventional soft instruments, chielfy through reports and recommendations issued by specialized monitoring body, the European Commission against Racism and Intolerance (ECRI). ECRI has devoted particular attention to the challenges posed by hate speech to human rights protection in CoE member states, and most recently issued its comprehensive General Policy Recommendation (GPR) No. 15 on Combating Hate Speech. The preamble to this document indicates historical and contemporary sources of European obligation to anti-discrimination.

> Europe derives from its history a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condonation of such crimes. [original spelling] (ECRI General Policy Recommendation (GPR) No. 15 on Combating Hate Speech 2016)

The 66-page policy document is remarkable for its scope, comprehensiveness, urgency, understating and sophistication in addressing the multifaceted phenomenon of hate speech. This great achievement of policy entrepreneurs, 'the madmen, intellectuals, and academic scribblers' (Leighton and López 2013) is a roadmap for CoA member states. However, the very characteristics that made it a great intellectual and moral achievement render it less politically viable.

ECRI, established in 1993, issues also specific country reports. Periodical assessments for Poland were published in 1996, 1999, 2004, 2010, 2013, and 2015. The 2015 fifth report on Poland for 2012-2015 mentioned the issue of hate speech and homophobic and transphobic hate speech and violence for the first time, underlining the pervasiveness of homophobic statements in political discourse and pointing out to deficiencies of criminal law regulation in this area in Poland (ECRI Fifth Report on Poland adopted on 9 June 2015). The impact of ECRI's recommendations on member states policies remains an understudied topic in scholarly literature. The influence of ECRI 2015 country specific and 2016 general recommendations on Poland will be tested in the coming years. One of informants, the member of ECRI, was convinced that it is a successful instrument for the diffusion of the highest international standard of hate speech policy, arguing that "The most up to date recommendations on hate speech policies are in ECRI documents. Poland just needs to

implement them." Other interviewees were more skeptical and underlined persistence of political blockage to hate speech provisions reform.

> "Do recommendations of research agencies influence Polish lawmakers? My experience suggests that they do not. Poland has been a party to the Convention [ECHR] for years. The demands to expend the catalogues have been voiced for years. This is not something dreamed up in the last year or two. The most recent recommendations of the international institutions were clear-cut. But from what I see, from what I and understand, we are witnessing a game, and I am not afraid to use this term, the game that we [Poland] accept most of the recommendations, but we do not eventually fulfill them. So far those recommendations are simply ineffective." (human rights scholar and activist)

Contrary to the latter opinion, recent empirical research demonstrates that Organization of Security and Co-peration in Europe Office for Democratic Institutions and Human Rights (ODIHR), the most specialized institution focused on hate crimes and hate speech, had an instrumental role in improving Poland's data collection mechanisms. These findings counter the hypothesis of diffusion policy scholars, who consider that recommendations of regional organizations such as CoE and OECD are prinicipally 'mechanisms of transnational communication' (Holzinger and Knill 2007: 781), and as such exercise little impact on decision-makers. The Office of the Democratic Institutions and Human Rights of the Organization of Security and Co-operation in Europe has most recently voiced its opinion on the draft amendments of the Polish penal code in a document from 3rd December 2015 (HCRIM–POL/277/2015 [AlC]). At the same time, ODIHR was remarkably absent from the debate on the amendment of the Criminal Code; the institution's leverage was not used to the advantage by human rights expert community lobbying for the reform (Goszczyński 2015).

According to majority of my informants, in addition to leveraging international monitoring bodies impact, civil society should concentrate efforts on influencing political leadership by other means. "Political change happens when [idea] entrepreneurs notice loose spots in the structure of ideas, institutions, and incentives and then finds ways of implementing those new ideas into society's shared institutions" (Leighton and López 2013: 11).

The most frequently mentioned strategy is construction of crisis, which could lead to wider social support to hate speech laws reform. In particular, the need to mediatize 'landmark cases' and individual stories of hate speech victims was highlighted.

> The previous government stalled the reform, I don't want to justify them. I guess the ruling class would have to experience hate speech on its own skin to understand the problem. On the other hand, we need to achieve a critical mass of support in society. That's why we need to mediatize cases which touch people's hearts, for example the case of Dominik from Bieżuń [a teenage boy who commited suicide in 2015, a victim of homophobic bullying at school]. (anti discrimination lawyer working at an NGO)

> I'm afraid we need a major crisis, something very bad has to happen to bring about change in societal attitudes. (human rights scholar and activist)

> To fight with hate speech we need to create a constituency, a massive front, similarly to Environmentalist cause. (human rights scholar)

Another possible strategy is re-enchantement of 'gender identity and sexual orientation' wording in order to disassociate it–in the perception of the legislator–from LGBTQ agenda. In short, this *realpolitik* approach proposes to a certain 'heterosexualization' of the issue, the strategy employed during French debate on civil partnerships in the 1990s (Robcis 2016) in order to frame the amendments as expression of universal rather than particular interest.

Conclusions

The thesis demonstrates that he failure to level up Polish hate speech laws to international standards is largely attributable to supremacy of political leadership's interests compounded with vernacular cultural anxieties.

First, the principle internal reason for the blockage is a particular politicization of human rights discourse in Poland and the reluctance of the country's ruling party Civic Platform to engage with issues associated with gender identity and sexual orientation during their second term in power from 2011 to 2015. The alleged high political (electoral) cost of the reform and indeterminate benefit structure for the government reinforced the *status quo,* and prevented them from including any criminal provisions in the form suggested by policy entrepreneurs. This was salient during the 2012 debate on the reform of criminal code provisions proposed by PO. Furthermore, I advance the argument that the rise of other forms of violent extremism in Poland at the same time rendered the struggle to reform the criminal code more difficult, as the government concentrated efforts on combatting anti-Semitic, xenophobic, and racist hate speech. These are the forms of prejudice entrenched in the Polish society and recognized as valid societal problems requiring a decisive governmental response, whereas homophobic or transphobic attacks are not.

Second, the changing external context did not work to the reformists' advantage. The Polish example falls under a wider phenomenon of selective Europeanization of law and member states backlash to the fundamental rights standards of the European Union, especially pronounced during the economic and political legitimacy crisis of the EU in the 2010s. While the EU crises hinder fundamental rights convergence, the attention of specialized bodies of Council of Europe and OSCE has only recently focalized on hate speech and hate crime as well as specifically homophobic and transphobic violence, and its impact on the domestic legislator is uncertain.

Is the past our future? A note on conservative reaction to hate speech laws in Poland

The bargaining for the hate speech laws reform during PO government brought incremental change to hate speech policy in Poland. The government was cautiously postponing reform of the criminal code provisions to include premises of gender identity and sexual orientation. Nevertheless, the possibility and necessity of reform was acknowledged on the political agenda.

The current outlook for hate speech law reform is negative. PiS government brought a reversal of fortune for hate speech law reform advocates, employing a decidedly reactionary. It is highly implausible that as a nationalist conservative party PiS will adopt any progressive legislation even vaguely associated with gender identity and sexual orientation or LGBTQ rights. What is more, the governing party's leadership openly opposes the very concept of hate speech legislation, including a 'traditional' post second-world war catalogue of premises, which criminalizes racist or xenophobic speech. Jarosław Kaczyński, PiS Chairman, officially declared his party's disdain for hate speech laws.

> Today being in Europe means being in the European Union. But we are not going to agree on everything. […] We will not adopt any hate speech laws, which aim at blocking the freedom of speech. Poland should be an island of freedom even, when [the freedom] is restricted elsewhere (Kaczyński 2016).

The above demonstrates that on the rhetorical level hate speech is no longer constructed as societal challenge by the country's political leadership; political correctness – to the contrary. If rhetoric is followed by concrete policies, an establishment of an actual 'third-way' approach to hate speech regulation in East Central Europe may be on the horizon. This shift would bring an important element to a wider debate about the reception of Western institutions and paradigms in 'transition democracies' of East Central Europe (Trencsenyi 2014) and would further call into question EU fundamental rights dimension.

Further research on political hindrances to hate speech laws reform could be extended at least in two principal directions, which are not mutually exclusive. First, the signalized radical shift of policy paradigm calls for a comparative analysis of subsequent Polish governments' approaches to hate speech. Second, a cross-country analysis of hate speech laws in Poland and countries with similar development paths and political and legal culture, for example the countries of the Visgerad Group–the Czech Republic, Slovakia, and Hungary–would contribute to better understanding of the so-called Polish exceptionalism in this area.

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