

**AN EXAMINATION OF THE LEGAL STEPS TAKEN BY CENTRAL AND EASTERN  
EUROPEAN MEMBER STATES' HUNGARY AND POLAND TOWARDS AN ILLIBERAL  
DEMOCRATIC TURN THROUGH THEIR ATTACK ON SEXUAL MINORITIES.**

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## ABSTRACT

This thesis aims to explore the legal steps central and eastern European member states' Hungary and Poland took toward an illiberal democratic turn by examining their attack on sexual minorities. Firstly, a theoretical framework discusses the socio-political and legal steps Hungary and Poland take toward their illiberal democratic values. This has been achieved by introducing the state of affairs alongside the domestic and international legislation concerning anti-discrimination that these states are required to abide by. Secondly, there is a comparative analysis of two categories of case law within the context of Hungary and Poland. The first category of case law falls under trans rights cases, and the second relates to pride discrimination cases. This has included the extent to which the domestic authorities' actions amount to discrimination against the LGBTQI community within their states. Lastly, the hostile environment that LGBTQI people continuously face within these states has been discussed regarding the challenges under the ECHR and the two lines of litigation that two civil society organizations take within the context of Hungary. One line of litigation requires the civil society organization to exhaust domestic remedies, while the other takes cases straight to the Strasbourg Court. Furthermore, there is an examination of the effectiveness of the European Union's tools in tackling specific legislative enforcements, such as infringement procedures. This has been achieved by analyzing whether the steps taken by the EU are adequate to improve the rights of sexual minorities and to stop the ruling governments within these states from taking further actions to stigmatize and discriminate against LGBTQI people. Thus, this thesis contributes to understanding human rights protections of sexual minorities on a domestic and international level from member states with illiberal tendencies who attack LGBTQI persons' rights.

## TABLE OF ABBREVIATIONS

COE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
LGBTQI	Lesbian, Gay, Bisexual, Transsexual, Queer, or Intersex
MoA	Margin of Appreciation
PiS	Law and Justice Party
Fidesz	Fiatal Demokraták Szövetsége

## INTRODUCTION

In Poland, the governing party, Law and Justice Party (hereafter ‘PiS’), came to power in 2015, whilst in Hungary, the governing party Fiatal Demokraták Szövetsége (hereafter ‘Fidesz’) came to power in 2010. Both ruling parties continue to “undermine the democratic institutions and processes under the pretense of conserving their respective cultures and traditional values”.<sup>1</sup> Democracies are known to be fragile and to face challenges such as the development of populist tendencies that undermine the rule of law. These actions can be observed through the state’s justifications for the stigmatization of LGBTQI people by maintaining that their reaction to change is effectively required to protect liberal values.<sup>2</sup> The scholar Sajó defines a populist government as a “hyperpersonalist who often views power as their individual possession”.<sup>3</sup> Hence, anti-LGBTQI movements are used as a tool to promote and advance their populist agendas.

The scholar Binni highlights that since these populist parties have taken power, the European Union (hereafter ‘EU’) has faced “socio-political and cultural responses to gender and sexual politics in Europe”.<sup>4</sup> The main reason for a comparison between Hungary and Poland is that they are often described as “rogue states” within the EU that are difficult to navigate.<sup>5</sup> Both member states usually take more socio-political decisions that are of conservative

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<sup>1</sup> Emily Schultheis, ‘Institute of Current World Affairs, *The Budapest – Warsaw express*’ <https://www.icwa.org/the-budapest-warsaw-express/> last accessed 6<sup>th</sup> June 2022

<sup>2</sup> Viktor Giled, Lukasz Zamecki, ‘Article 7 Process and Democratic Backsliding of Hungary and Poland. *Democracy and The Rule of Law*’ <https://www.ceeol.com/dearch/article-detail?id=924007> last accessed 6<sup>th</sup> June 2022 p.g. 57-85

<sup>3</sup> *Ibid*, p.g 168

<sup>4</sup> Jon Binnie, ‘Critical queer regionality and LGBTQ politics in Europe’ <https://www.tandfonline.com/doi/full/10.1080/0966369X.2015.1136812> last accessed 6th June 2022

<sup>5</sup> Roland Benedikter, ‘Europe’s New Rogue States, Poland and Hungary: A Narrative and It’s Perspectives’ <https://link.springer.com/content/pdf/10.1007/s41111-016-0048-5.pdf2022> p.g. 181

consideration as opposed to a liberal one, and this relates to the tolerance of sexual minorities fundamental human rights.<sup>6</sup> One could argue that Hungary and Poland distance themselves from the western standards by compromising the rule of law, liberalism in democracy, and human rights protection. As such, these states suffer from democratic backsliding when instead, Hungary and Poland are required to abide by the rule of law.<sup>7</sup>

Both member states are expected to adhere to the rule of law requirements within the scope of the Council of Europe (hereafter ‘CoE’), a human rights document, which includes the rights of LGBTQI persons under the European Convention on Human Rights (hereafter ‘ECHR’). LGBTQI persons are categorized as minority groups numerically. It is important to note that the acronym LGBTQI is one of the umbrella terms used to refer to sexual and gender minorities who identify as Lesbian, Gay, Bisexual, Transsexual, Queer, or Intersex. Sexual minorities often face discrimination because their sexuality and/or gender is different from the heteronormative expectation.

The European Court of Human Rights (hereafter ‘ECtHR’) has been developed to monitor the rights enshrined in the ECHR within the CoE framework. The ECHR is an international treaty that binds 46 European States, including all EU member states.<sup>8</sup> These states are under an enforceable obligation to ensure they uphold the rights within the ECHR. If any state fails to fulfill this obligation, the ECtHR can hold them responsible for non-compliance with the standards laid down within the Convention and the case law. Therefore, pressure is put on

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<sup>6</sup> Nasiya Daminova, ‘Rule of Law vs. Poland and Hungary – An inconsistent approach’ [https://www.researchgate.net/publication/348762974\\_Rule\\_of\\_Law\\_vs\\_Poland\\_and\\_Hungary\\_-\\_an\\_Inconsistent\\_Approach](https://www.researchgate.net/publication/348762974_Rule_of_Law_vs_Poland_and_Hungary_-_an_Inconsistent_Approach) last accessed 18<sup>th</sup> February 2022 p.g. 236

<sup>7</sup> Laurent Pech and Kim Lane Scheppele, ‘Illiberalism within: Rule of Law Backsliding in the EU’ <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/illiberalism-within-rule-of-law-backsliding-in-the-eu/BCC592F6AA3CC1E0642F9B9F05371CB5> last accessed 18<sup>th</sup> February 2022 p.g. 34

<sup>8</sup> EQUINET European Network of Equality Bodies, ‘Council of Europe Legislative Framework’ <https://equineteurope.org/equality-in-europe/coe-legislative-framework/> last accessed 2<sup>nd</sup> April 2022



member states of the CoE to uphold the fundamental human rights contained within the ECHR. The scholar Meunier and Vachudova emphasize that the “ideological convergence around liberal values can no longer be taken for granted, with serious implications for the EU’s position as a global power”.<sup>9</sup> Further, the scholar Gomez points out that in reality, the EU’s fundamental values are “ambiguously and democratic”, and Hungary and Poland are prime examples of this.<sup>10</sup> Either way, member states are expected to fulfill the rights enshrined within the Convention even though the reality is that there are limits to which the EU can motivate a state to comply with respecting the community values.

A plethora of labels has arisen to describe the steps taken by Hungary and Poland as a process of an illiberal democratic turn to violate EU values.<sup>11</sup> As such, questions have arisen as to whether Hungary and Poland are appropriately labeled as illiberal democracies as opposed to liberal democracies. The conception of liberal democracy is recognized by the scholar Gomez as “the separation between political and civil life”, which suggests that democratic rule equals the sovereignty of the people.<sup>12</sup> The rule of law within these two states had largely been achieved but had fallen into the process of dismantling, which has created a democratic backsliding from the date of governance. Pech and Scheppele note that “backsliding implies that a country was once better but has now regressed”.<sup>13</sup> Hence, the concern is rightly conveyed

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<sup>9</sup> Sophie Meunier and Milada Vachudova, ‘*Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union*’ <https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.12793> last accessed 23<sup>rd</sup> May 2022 p.g. 1632

<sup>10</sup> Daly, ‘*Democratic Decay: Conceptualizing an Emerging Research Field*’ <https://doi:10.1007/s40803-019-00086-2> last accessed 23<sup>rd</sup> May 2022 p.g. 347

<sup>11</sup> Martijn Mos, ‘*Ambiguity and interpretative politics in the crisis of European values: evidence from Hungary*’ <https://ntnuopen.ntnu.no/ntnu-xmlui/bitstream/handle/11250/2775759/no/ntnu%3ainspera%3a80491188%3a46845677.pdf?sequence=1&isAllowed=Y> last accessed 23<sup>rd</sup> May 2022 p.g. 21

<sup>12</sup> Gabriel Gomez, Sven Leunig, ‘*Fidesz, liberal democracy and the fundamental law in Hungary*’ <https://link.springer.com/content/pdf/10.1007/s41358-021-00297-w.pdf> last accessed 2nd April 2022 p.g. 47

<sup>13</sup> Laurent Pech and Kim Lane Scheppele, ‘*Illiberalism within: Rule of Law Backsliding in the EU*’ <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/illiberalism-within-rule-of-law-backsliding-in-the-eu/BCC592F6AA3CC1E0642F9B9F05371CB5> last accessed 18<sup>th</sup> February 2022 p.g. 12

when this regression is deliberately used, in strategy by the ruling party, as per Hungary and Poland.

One of the reasons that both Hungary and Poland have been named illiberal democracies rather than liberal democracies is because of the extent to which these governments openly discriminate against the LGBTQI people within their socio, political and legal spheres. The populist governments often use discrimination against sexual and gender minorities as a scapegoat to justify their actions to supposedly reflect what their people want. Scholars such as Bień-Kacała emphasize that an “illiberal democracy is conceptualized as a formal, manipulated and non-inclusive democracy in which constitutional institutions are to a certain extent misused, abused or neglected”.<sup>14</sup> The scholar Sajó rightly affirms that “constitutional structures of a regime that came to power in populist victories are rightly called illiberal democracies because a regime is illiberal if the state rules with its officially preferred values and its disregard of limits to power”.<sup>15</sup> As such anti-LGBTQI actions constitute illiberalism and, hence, one could argue that under these definitions, both Hungary and Poland fit into the sphere of an illiberal democracy because of their compliance with the rule of law standards and the values of the Convention to reality is replaced with their preferred values. Therefore, it can be understood that these factors violate LGBTQI people’s rights within these member states.

This thesis contains three chapters: in the first chapter, a theoretical framework will be provided regarding the hostile socio-political steps Hungary and Poland took toward an illiberal democracy by attacking LGBTQI rights. First, an explanation will be given as to how the

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<sup>14</sup> Tímea Drinóczi, Agnieszka Bień-Kacała, ‘*Illiberal Constitutionalism in Poland and Hungary, The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*’ <<https://www.routledge.com/Illiberal-Constitutionalism-in-Poland-and-Hungary-The-Deterioration-of/Drinoczi-Bien-Kacala/p/book/9781032007304>> last accessed 25<sup>th</sup> January 2022 p.g. 72

<sup>15</sup> *Ibid*, p.g. 73

crusade against LGBTQI persons fits into the general illiberal tendencies of Hungary and Poland. Second, a timeline of the key socio-political and legal actions taken by the right-wing conservative governments that have discriminated against LGBTQI persons will be discussed to capture this democratic backsliding within these member states. Third, I will present both the international and domestic legislation which applies in Hungary and Poland and the extent to which the newly re-written and enforced legislations discriminate against sexual minorities and whether these hostile actions adhere to the international human rights standards that as member states of the ECHR they are required to uphold.

In the second chapter, there will be a comparative analysis of Hungarian and Polish domestic-case law to establish the extent to which the domestic authorities' actions amount to discrimination against the LGBTQI community within their states. Since Hungary and Poland are member states of the CoE, I will reference the European Court of Human Rights (hereafter 'ECtHR' judgments). The case law will be separated into two categories for this comparison between the states. The first category of case law falls under trans rights cases, and the second relates to pride discrimination cases. By comparing similar categories of cases from both states, I will demonstrate that there are illiberal trends that both member states follow to enable their hostility towards LGBTQI people. This can be seen through their cutback on the rule of law standards.

In the third chapter, there will be a discussion of the current state of affairs within Hungary and Poland regarding the socio-political and legal situation for LGBTQI people, which had been introduced in chapter one. In doing so, there will be an analysis of the hostility the actions bring to sexual minorities within these states. Further, I will examine the EU tools available and the measures that have been used to try to tackle these member states' deliberate discriminatory

actions to create a hostile environment for LGBTQI people. This will include the challenges under the ECHR of two civil society organizations within the context of Hungary and their different lines of litigation. One civil society organization exhausts domestic remedies, whilst the other takes cases straight to the Strasbourg Court. Moreover, there will be an examination of the effectiveness of the European Union's tools available and the measures that have been taken to tackle these actions, such as infringement procedures. Thus, this thesis aims to analyze whether the measures taken by the EU's response have been adequate to limit and prevent anti-LGBTQI discrimination from happening in the future to improve the rights of LGBTQI people.

## Chapter One:

# How does the decline from a liberal democracy to an illiberal democracy in Hungary and Poland affect the fundamental human rights of LGBTQI people?

## 1.1 How does the crusade against LGBTQI persons fit into the general illiberal tendencies of Hungary and Poland?

Within this chapter, a theoretical framework will provide the hostile socio-political and legal steps Hungary and Poland took toward an illiberal democracy through their attack on LGBTQI rights. The attacks will be discussed in line with the expectation of these states to adhere to both their domestic legislation and international human rights standards.

Hungary and Poland are member states of the CoE and are expected to adhere to a certain level of democratic and liberal values by upholding the rights enshrined within international human rights standards such as the ECHR to prohibit discrimination against sexual minorities. Instead, these governments have found a new target in attacking LGBTQI rights.<sup>16</sup> Through years of building an illiberal democracy, Fidesz since 2010 and PiS since 2015 have both taken steps to endorse principles “guiding the enactment of the illiberal playbook” to maintain their position.<sup>17</sup> These steps often target a minority group by discriminating against them.

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<sup>16</sup> Andrea L.P. Pirro, Ben Stanley, ‘*Forging, Bending and Breaking: Enacting the “Illiberal Playbook” In Hungary and Poland*’ <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3DD83EDB9BA4D3DA72DC4F77A8F0686A/S1537592721001924a.pdf/forging-bending-and-breaking-enacting-the-illiberal-playbook-in-hungary-and-poland.pdf>> last assessed 29<sup>th</sup> January 2022 p.g. 87

<sup>17</sup> *Ibid*, p.g. 90

This discrimination is often accompanied by anti-EU rhetoric blaming western liberalism for the EU's imposed measures alongside ECtHR judgments that harm the Hungarian and Polish desire to protect their culture and tradition.<sup>18</sup> In this regard, the scholars Dresden and Howards rightfully point out that these states take an illiberal turn to preserve their democratic mandate as “illiberals in power tilt the playing field in favor of the incumbent”.<sup>19</sup> Hungary's first propaganda tool targeted hatred towards refugees in 2015-2016, whilst in 2019-2020 against the Roma.<sup>20</sup> However, when the Covid-19 pandemic struck, the ruling party was diverted from fully exploiting this potential. During the campaign, the government chose to target sexual and gender minorities. By enacting this propaganda, the government targets the support of the right-wing and conservative supporters who want to protect Hungary's values as a conservative right-wing Christian country. In comparison, in 2019, the leading Polish party, PiS, used LGBTQI rights to create a political battleground that won the support of their right-wing, conservative Christian supporters. This led to growing opposition to the EU measures, ECtHR judgments, and interim measures. Thus, throughout this thesis, there will be a continuous analysis of how both states' crusade against LGBTQI people fits into the general illiberal tendencies of Hungary and Poland.

### 1.2.1 Hungary's first steps towards an illiberal democracy: tendencies in legislative practice from 2010

The Hungarian leading political party, Fidesz, took its first footsteps toward an illiberal democracy in 2010 when it returned to power amid a political and economic crisis that “left

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<sup>18</sup> Hanebrink, ‘*In Defense of Christian Hungary*’ <https://www.degruyter.com/document/doi/10.7591/9781501/9781501727269/html> last accessed 24<sup>th</sup> May 2022 p.g. 12

<sup>19</sup> Dresden and Howard, ‘*Authoritarian backsliding and the concentration of political power*’ <https://static1.squarespace.com/static/57bcd3b72e69cfd6f6e29cfc/t/5962ae8386e1758c6e175b/1499639428298/Authoritarian+backsliding+and+the+concentration+of+political+power.pdf> last accessed 24<sup>th</sup> May 2022

<sup>20</sup> ECRE, European Council on Refugees and Exiles, ‘*Hungary: Continued Starvation Tactics Continued Interim Measures*’ <https://ecre.org/hungary-continued-starvation-tactics-continued-interim-measures/> last assessed 19<sup>th</sup> February 2022

the Hungarian socialist and liberal parties in ruin”.<sup>21</sup> Subsequently, it gained 52.7% of the votes, translating into a two-thirds majority in parliament.<sup>22</sup> Many scholars, politicians, and NGOs have concluded that Fidesz used this supermajority to “implement a far-reaching legislative overhaul”.<sup>23</sup> Hence, an integral part of this illiberalization of legislative amendments and practice can be observed from the introduction of the 2011 Fundamental Law, which had entered into force in 2012.<sup>24</sup> The Fundamental Law replaced the “1949 Constitution, which was already heavily amended in 1989”.<sup>25</sup> For this reason, “most domains can now only be regulated through cardinal acts and two-thirds majority votes”.<sup>26</sup> One could argue that this specific feature of the new regime and the decisions that have been taken make it particularly difficult to alter or repeal in the future “in the absence of a very broad consensus”.<sup>27</sup> The Fidesz government has tweaked the legislative framework to ensure they remain in the rule. Scheppele submits that these amendments were made so that they could outlast any potential defeat.<sup>28</sup> Hence, Fidesz strengthened its grip over Hungary following the elections held in 2014, 2018, and 2022, as the party was able to “secure supermajorities in parliament following electoral processes”, which were regarded as free but not wholly fair.<sup>29</sup>

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<sup>21</sup> *Ibid*, p.g. 52

<sup>22</sup> Tímea Drinóczi, Agnieszka Bień-Kacała, ‘*Illiberal Constitutionalism in Poland and Hungary, The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*’ <<https://www.routledge.com/Illiberal-Constitutionalism-in-Poland-and-Hungary-The-Deterioration-of-Drinoczi-Bien-Kacala/p/book/9781032007304>> last accessed 25<sup>th</sup> January 2022 p.g. 89

<sup>23</sup> *Ibid*, p.g. 55

<sup>24</sup> The Fundamental Law of Hungary 2011 (ninth amendment)

<sup>25</sup> Andrea L.P. Pirro, Ben Stanley, ‘*Forging, Bending and Breaking: Enacting the “Illiberal Playbook” In Hungary and Poland*’ <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3DD83EDB9BA4D3DA72DC4F77A8F0686A/S1537592721001924a.pdf/forging-bending-and-breaking-enacting-the-illiberal-playbook-in-hungary-and-poland.pdf>> last accessed 29<sup>th</sup> January 2022 p.g. 87

<sup>26</sup> *Ibid*, p.g. 87

<sup>27</sup> *Ibid*, p.g. 86

<sup>28</sup> Kim Lane Scheppele, ‘*Autocratic Legalism*’ <https://lawreview.uchicago.edu/publication/autocratic-legalism> last accessed 2nd April 2022

<sup>29</sup> Organization for Security and Co-operation in Europe (OSCE), ‘*Election monitoring Hungary 2014 and 2018*’ <https://www.osce.org/odihr/elections/hungary> last accessed 2nd April 2022

### 1.2.2 Poland's first step towards an illiberal democracy: Tendencies in legislative practice from 2015

In comparison, PiS, a right-wing populist and national-conservative political party, took its first steps toward an illiberal democracy when it retained power in 2015 and won 37.6% of the votes in the elections.<sup>30</sup> PiS undertook a route highly inspired by the steps taken by Hungary when they had passed an intentionally calculated assault on the Polish constitutional structure as well as institutions of state and the rights and freedoms of individuals and social groups. Although they did not hold a legislative supermajority that the Fidesz government possessed, PiS had no guilt about violating the legislation. PiS, unlike Fidesz, could not write a new Constitution, so they decided to threaten the existing constitution by politically capturing the Constitutional Tribunal and repopulating that judiciary with PiS supporters. This enabled government control within the supposedly independent judiciary which then fell onto the decisions of other cases. As Pirro noted, these actions allowed the “possibility to legitimize further departures from liberal-democratic norms” by enabling constitutional propriety.<sup>31</sup> Thus, these changes can be contended to have eroded the fragile but functional pluralism of the state, which benefitted their illiberal agenda of attacking LGBTQI rights.<sup>32</sup>

## 1.2 Key legislations: Hungary and Poland's domestic legislation

The use of anti-discrimination legislation in Hungary and Poland will be observed and examined as to whether these states' actions abide by or contradict their own legislation. It is important to reiterate that Hungary and Poland have dismantled the rule of law standards by

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<sup>30</sup> Anna Gwiazda, ‘Gender Ideologies and Polish Political Parties’

<https://www.cambridge.org/core/journals/government-and-opposition/article/gender-ideologies-and-polish-political-parties/9F7B863D044AF7F8196A067F0C5AFF4D> last accessed 19<sup>th</sup> February 2022 p.g. 67

<sup>31</sup> Andrea L.P. Pirro, Ben Stanley, ‘Forging, Bending and Breaking: Enacting the “Illiberal Playbook” In Hungary and Poland’ <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3DD83EDB9BA4D3DA72DC4F77A8F0686A/S1537592721001924a.pdf/forging-bending-and-breaking-enacting-the-illiberal-playbook-in-hungary-and-poland.pdf>> last accessed 29<sup>th</sup> January 2022 p.g. 92

<sup>32</sup> *Ibid*, 103



implementing legislation to reflect their right-wing political agenda against minority groups such as LGBTQI people to undermine human rights standards. The scholars Bánkuti, Halmai, and Scheppele emphasize that in the context of Hungary, “decisions taken by the ruling government will be very difficult to alter or repeal in the future due to the tailed changed made to cement hold over the country and outlast any potential defeat”.<sup>33</sup> Hence, these rulings only reinforce the level of difficulties that the LGBTQI people will face.

The extent to which the CoE framework and Hungary and Poland’s domestic legislation provides sufficient protection from discrimination against LGBTQI people’s rights must be discussed in legislation on sexual orientation and gender identity. Article XV (2) of the Fundamental Law in Hungary states that:

“Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, color, sex, disability, religion”.<sup>34</sup>

Further, Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities<sup>35</sup> provides further protection:

Article 8 (m);(n) “Provisions that result in a person or a group is treated less favorably than another person or group in a comparable situation because of his/her sexual orientation (m) or sexual identity (n)”.<sup>36</sup>

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<sup>33</sup> Bánkuti, Halmai and Scheppele, ‘*From Separation of Powers to a Government without Checks: Hungary’s Old and New Constitution*’  
[https://books.google.at/books?hl=de&lr=&id=n\\_0OEAAAQBAJ&oi=fnd&pg=PP1&ots=pp1&ots=pp3fV46xbf&sig=7ILvbSuaVEQBI7spTRb5-MQjCRM&redir\\_esc=yv=onepage&q&f=false](https://books.google.at/books?hl=de&lr=&id=n_0OEAAAQBAJ&oi=fnd&pg=PP1&ots=pp1&ots=pp3fV46xbf&sig=7ILvbSuaVEQBI7spTRb5-MQjCRM&redir_esc=yv=onepage&q&f=false) last accessed 24<sup>th</sup> May 2022  
 p.g. 429

<sup>34</sup> Article XV (2) Fundamental Law of Hungary of 2011

<sup>35</sup> Article 8 Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

<sup>36</sup> Article 8 (m); (n) Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

Poland has legislation on sexual orientation and gender identity through Article 32 of the Constitution 1997<sup>37</sup> regarding anti-discrimination legislation:

Article 32 (2) of the Polish Constitution 1997 holds that “No one shall be discriminated against in political, social or economic life for any reason whatsoever”.<sup>38</sup>

Further, Poland has anti-discrimination legislation under Article 1 of the Act 2010 on the implementation of some regulations of the European Union regarding equal treatment:

Article 1 of “the Act specifies areas and methods of counteracting violations of equal treatment rule due to sex, race, ethnic origin, nationality, religion, denomination, beliefs, disability, age or sexual orientation, and competent authorities with respect thereto”.<sup>39</sup>

For both Hungary and Poland, a reference will be made to ECHR Articles 8, 11, and 14:

Article 8; Article 8(1), ECHR “everyone has the right to respect private and family life, his home and his correspondence”.<sup>40</sup>

Article 11; Article 11(1) ECHR “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”.<sup>41</sup>

Article 14 ECHR “prohibition of discrimination: The enjoyment of the rights and freedoms outlined in this Convention shall be secured without discrimination on any

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<sup>37</sup> Article 32 of the Polish Constitution 1997

<sup>38</sup> Article 32 of the Polish Constitution 1997

<sup>39</sup> Article 1 of the Act 2010 on the implementation of some regulations of the European Union regarding equal treatment regarding equal treatment

<sup>40</sup> Article 8; Article 8(1) European Convention of Human Rights

<sup>41</sup> Article 11; Article 11(1) European Convention of Human Rights

ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.<sup>42</sup>

The extent to which the ECtHR has the power to condemn states who violate rights within the ECHR is often contended. The ECtHR has been acknowledged to have broadened the scope of the prohibition of discrimination contained in Article 14 in cases raising issues under Articles 8 and 11. The scholar Danisi asserts that “the battle against all kinds of discrimination seems to be among the top priorities of the European institutions in the promotion and protection of human rights”, which has been re-enforced through the CoE and ECtHR.<sup>43</sup> It should be noted that the articles within the Convention “do not guarantee a right per se, but it has an effect solely about the enjoyment of the rights and freedoms granted by the Convention, and its protocols”.<sup>44</sup> However, in the case of article 14, its application does not presuppose a breach of the relevant provisions, and hence to a certain extent, it is autonomous.<sup>45</sup> A claim about the difference in treatment on the ground of sexuality is often brought under article 14 in conjunction with another substantive article, such as Articles 8 or 11, and a difference in treatment amounts to discrimination if it has no objective, reasonable justification, a legitimate aim and the measures need to be proportionate to the aim pursued. Hence, if these obligations are violated, then the ECtHR must condemn the state for this violation of its obligations under the ECHR.

Furthermore, it can be considered whether the effectiveness of the margin of appreciation (hereafter ‘MoA’), which is the European supervision by the Court, allows the states to assess

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<sup>42</sup> Article 14 European Convention of Human Rights

<sup>43</sup> Carmelo Danisi, ‘*How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence*’, Volume 9 <https://academic.oup.com/icon/article/9/3-4/793/657620> last accessed 24<sup>th</sup> May 2022 p.g. 794

<sup>44</sup> *Ibid*, p.g. 793

<sup>45</sup> *Ibid*, p.g. 795

the domestic situation to find a suitable solution. Member states “enjoy more or less a wide assessment to what extent a justification can be made for the different treatment”.<sup>46</sup> Accordingly, one could argue that the ECtHR attempts to narrow this MoA by adopting a more proactive role to counter different forms of discrimination, including LGBTQI discrimination, and raising the ECHR standards in this regard to the European level. Furthermore, although Hungary’s domestic legislation (‘CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities’ and ‘Article XV(2) of the Fundamental Law of Hungary’) and Poland’s domestic legislation (‘Article 32 of the Constitution of 1997’ and ‘Act 2010 on Equal Treatment’) covers the protection of LGBTQI people from discrimination, these are “driven by domestic dynamics between progressive and conservative forces”.<sup>47</sup> As such, because member states are afforded some discretion in assessing whether and to what extent a justification can be made for the different treatment, even though both states have anti-discrimination legislation as required by the EU and are bound by the ECHR, the decision may not always be deemed fair by the ECtHR.

## **1.4 Timeline of the key socio-political and legal discriminatory events that the Hungarian and Polish ruling governments have enacted towards the discrimination of LGBTQI persons**

### **1.3.1 Hungary’s timeline of the legal and political framework of key discrimination events against LGBTQ+ persons**

Since 2010 Hungary’s right-wing politicians have increased hatred against sexual and gender minorities and purposefully circumvented the protection afforded by Article 8 (m); (n) of Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. Parallel

<sup>46</sup> Carmelo Danisi, ‘How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence’ <https://academic.oup.com/icon/article/9/3-4/793/657620> last accessed 24<sup>th</sup> May 2022 p.g. 5

<sup>47</sup> Petra Guasti, ‘Same Same, but Different: Domestic Conditions of Illiberal Backlash Against Universal Rights’ [https://www.researchgate.net/publication/338067537\\_In\\_Europe%27s\\_Closet\\_the\\_rights\\_of\\_sexual\\_minorities\\_in\\_the\\_Czech\\_Republic\\_and\\_Slovakia](https://www.researchgate.net/publication/338067537_In_Europe%27s_Closet_the_rights_of_sexual_minorities_in_the_Czech_Republic_and_Slovakia) last accessed 24<sup>rd</sup> May 2022 p.g. 18

with this; there has been a significant rise in prejudicial statements made by government officials. This can be observed in 2015, when Prime Minister Viktor Orbán emphasized that “the topic of LGBTQI people’s rights lures one to joke” and continued to comment that “homosexuals should not behave in a provocative way like one can see in Western countries”.<sup>48</sup> Furthermore, many of Orbán’s loyalists who work in the government, such as the Mayor of Budapest, István Tarlós, publicly spoke about LGBTQI people as “unnatural and repulsive”.<sup>49</sup> More recently, the speaker of the Parliament, László Kövér, compared pedophiles and same-sex couples raising children<sup>50</sup> and emphasized that “normal homosexuals try to adapt and don’t want equality”.<sup>51</sup> Such public statements undoubtedly harm LGBTQI people, who are one of Hungary’s most discriminated social groups.

These politicalized statements further stigmatize LGBTQI people in Hungary. This stigmatization can be observed in a study released in 2021 by the European Union Agency for Fundamental Rights (FRA) found that 72% of LGBTQI people in Hungary “avoid often or always holding the hands of their same-sex partner” and “40% avoid certain locations in fear of being assaulted”.<sup>52</sup> On top of this, people in the survey stressed their frustration with the discrimination they face in Hungary, “my rights are not enforced in Hungary, I cannot marry,

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<sup>48</sup> Hungarian LGBT Alliance, Transvanilla Transgender Association, Háttér Society, Labrisz Leszbikus Egyesület, ‘*LGBTQI RIGHTS IN HUNGARY*’ [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT\\_CCPR\\_CSS\\_HUN\\_30243\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT_CCPR_CSS_HUN_30243_E.pdf) last accessed 28<sup>th</sup> January 2022

<sup>49</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality, Country data - Hungary*’ <[https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_hungary.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_hungary.pdf)> last accessed 28<sup>th</sup> January 2022

<sup>50</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality, Country data - Hungary*’ <[https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_hungary.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_hungary.pdf)> last accessed 28<sup>th</sup> January 2022

<sup>51</sup> Hungarian LGBT Alliance, Transvanilla Transgender Association, Háttér Society, Labrisz Leszbikus Egyesület, ‘*LGBTQI RIGHTS IN HUNGARY*’ [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT\\_CCPR\\_CSS\\_HUN\\_30243\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT_CCPR_CSS_HUN_30243_E.pdf) last accessed 28<sup>th</sup> January 2022

<sup>52</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality, Country data - Hungary*’ <[https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_hungary.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_hungary.pdf)> last accessed 28<sup>th</sup> January 2022

I cannot adopt as a couple, and my identity is at a disadvantage in my future career”.<sup>53</sup> Therefore, this comment summarizes the extent of the difficulties that the members of the LGBTQI community face in their daily lives. The government disregards the discrimination against LGBTQI people, and there are no government-sponsored campaigns or concentrated efforts to tackle prejudice and discrimination. Unlike other minorities in Hungary, such as the Roma people, the government has no action plan or strategy, and civil society organizations provide all the support for sexual and gender minorities.

Moreover, the introduction of the 2011 Fundamental Law significantly changed the constitutional landscape of Hungary. Alongside entrenching traditional values into the Fundamental Law, the Parliament adopted the Family Protection Act in 2011. This adoption restricted the definition of family, and the Constitutional Court declared the discriminatory consequences of this formulation unconstitutional.<sup>54</sup> In response, the Fidesz majority amended Article L in 2020. This provision reads as follows:

Article L, Fundamental Law of Hungary (Foundation) (1) “Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother shall be a woman; the father shall be a man ”.<sup>55</sup>

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<sup>53</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality, Country data - Hungary*’ <[https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_hungary.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_hungary.pdf)> last accessed 28<sup>th</sup> January 2022

<sup>54</sup> Decision of the Constitutional Court no. 43/2012. (XII. 20.). Available at: <https://net.jogtar.hu/jogszabaly?docid=A12H0043.AB&txtreferer=A1100211.TV>

<sup>55</sup> Article L, The Fundamental Law of Hungary 2011 (ninth amendment)

The Fundamental Law changed the definition of the family into a heteronormative definition of family to consist of a man and a woman. These actions further restrict LGBTQI people's right to legally be seen as a parent to a child and highlight that "illiberals in power have a common set of goals to change the political system and its institutions from the inside".<sup>56</sup> Therefore, this is evidently observed through the discriminatory act of changing the definition of the family in the Fundamental Law.

The increase in discriminatory legislative changes further strengthens the stigmatization of LGBTQI people alongside government statements containing anti-LGBTQI propaganda in Hungary, which are ever more frequent and intensified during the COVID-19 pandemic. Another key event was enacted by Deputy Prime Minister Zsolt Semjén, who circumvented the public consultation prescribed by law and submitted an omnibus bill to the Parliament in March 2020 on behalf of the Government. Section 33 of the law adopted in May of that same year made it "impossible for transgender or intersex people to have their gender legally recognized".<sup>57</sup> This discriminatory act continues to put LGBTQI people at risk of discrimination, harassment, and violence, especially since transgender people must use their identity documents.

Nonetheless, the international attention which started to challenge Fidesz's actions did not seem to stop them. In November 2020, during the second Covid-19 wave, the Parliament formally abolished the Equal Treatment Authority, which took a significant role in the legal

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<sup>56</sup> Andrea L.P. Pirro, Ben Stanley, 'Forging, Bending and Breaking: Enacting the "Illiberal Playbook" In Hungary and Poland' <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3DD83EDB9BA4D3DA72DC4F77A8F0686A/S1537592721001924a.pdf/forging-bending-and-breaking-enacting-the-illiberal-playbook-in-hungary-and-poland.pdf>> last accessed 29<sup>th</sup> January 2022 p.g. 97

<sup>57</sup> HÁTTÉR SOCIETY, 'The Hungarian state does not protect but actively undermines the freedom and rights of LGBTQI people' <<https://en.hatter.hu/news/the-hungarian-state-does-not-protect-but-actively-undermines-the-freedom-and-rights-of-lgbtqi>> last accessed 29<sup>th</sup> January 2022

protection of LGBTQI people. This legal protection became subordinated, and the Commissioner for Fundamental Rights rightly states that it “lost its independence as an autonomous body”.<sup>58</sup> Instead, in December 2020, the Parliament passed the Ninth Amendment to the Fundamental Law (Article XV (1)).<sup>59</sup>

Article XV(1) holds that “Hungary shall protect the right of children to a self-identity corresponding to their sex at birth and ensure an upbringing for them that is by the values-based in the Constitutional identity and Christian culture of our country”.<sup>60</sup>

To begin with, the emphasis on children having the right to their identity in line with their birth further stigmatizes trans people and opposes diversity and inclusivity. Parallel with the constitutional changes, the laws regulating adoption were also amended. As a default rule, “only married couples will be eligible to adopt children,” which makes it much more difficult for heterosexual unmarried/single people, same-sex couples and single LGBTQI people to adopt a child without the permission of the responsible cabinet member.<sup>61</sup> The Council of Europe Human Rights Commissioner Dunja Mijatovic rightfully concludes that “the law is a blow to the human dignity of trans people”.<sup>62</sup> Thus, these legislative enforcements constitute hostile actions to stigmatize sexual minorities’ rights.

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<sup>58</sup> Andrea L.P. Pirro, Ben Stanley, ‘*Forging, Bending and Breaking: Enacting the “Illiberal Playbook” In Hungary and Poland*’ <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3DD83EDB9BA4D3DA72DC4F77A8F0686A/S1537592721001924a.pdf/forging-bending-and-breaking-enacting-the-illiberal-playbook-in-hungary-and-poland.pdf>> last accessed 29<sup>th</sup> January 2022 p.g. 47

<sup>59</sup> The Fundamental Law of Hungary 2011 (ninth amendment)

<sup>60</sup> Article XV (1), The Fundamental Law of Hungary 2011 (ninth amendment)

<sup>61</sup> HÁTTÉR SOCIETY, ‘*The Hungarian state does not protect but actively undermines the freedom and rights of LGBTQI people*’ <<https://en.hatter.hu/news/the-hungarian-state-does-not-protect-but-actively-undermines-the-freedom-and-rights-of-lgbtqi>> last accessed 29<sup>th</sup> January 2022

<sup>62</sup> Council of Europe, Commissioner for Human Rights, ‘*Commissioner presents her annual report to the Parliamentary Assembly*’ <https://www.coe.int/en/web/commissioner/-/commissioner-presents-her-annual-report-to-the-parliamentary-assembly> last accessed 24<sup>th</sup> May 2022



### 1.3.2 Poland's timeline of the legal and political framework of key discrimination events against LGBTQ+ persons

In Poland, over the past three years, LGBTQI people have also faced an increase in discriminatory attacks through legislative changes and public political figures who purposefully ignore the protection afforded by Article 1 of the Act 2010 to protect its people from discrimination. Similarly, to the Hungarian government, the Polish government has undermined its legislation (Article 32 of the Polish Constitution 1997) to prohibit discrimination against sexual minorities. An example of the first high-profile political hate speech against LGBTQI people was in 2018 by the leader of the ruling party (PiS), Jarosław Kaczyński: “no homosexual marriages can occur. We will wait peacefully for the European Union countries to sober up”.<sup>63</sup> Similar to Orbán, Duda, during his election campaign in 2020, stated that permission would not be given for the adoption of children by same-sex couples and that he would “protect children and family from LGBT Ideology as it is worse than communism” and therefore vowed to legally ban discussions in public institutions.<sup>64</sup> These statements worsen the discrimination that sexual minorities face. This can be seen in the 2021 European Union Agency for Fundamental Rights (FRA) survey, which recorded that “83% of LGBTQI people avoid, or often avoid holding hands with their same-sex partner”.<sup>65</sup> Thus, hostile political opinions motivate people to believe discrimination against sexual minorities is acceptable.

Alongside this, pride marches have faced violence, growing arrests, and anti-LGBTQI propaganda being promoted throughout the country. Despite the oppressive moves of the

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<sup>63</sup> Marta Bucholc, ‘*The Anti-LGBTIQ Campaign in Poland: The Established, the Outsiders, and the Legal Performance of Exclusion*’ <https://www.researchgate.net/profile/Marta-Bucholc> last accessed 19<sup>th</sup> February 2022 p.g 97

<sup>64</sup> *Ibid*, 99

<sup>65</sup> European Union Agency For Fundamental Rights, ‘*EU LGBT survey European Union lesbian, gay, bisexual and transgender survey, Results at a glance*’ [https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance\\_en.pdf](https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf) last accessed 19<sup>th</sup> February 2022 p.g. 42

government to discriminate against sexual minorities, the Mayor of Warsaw, Rafel Trzaskowski, signed the Warsaw LGBT Declaration in February 2019 and introduced the Warsaw LGBT+ Charter. These guidelines enabled Warsaw Cities to improve discrimination against LGBTQI people and re-introduce same-sex education. However, one month later, the Councilors in Świdnicki County adopted the declaration, which influenced 105 cities and municipalities to adopt LGBT-free zones.<sup>66</sup> Furthermore, in June 2019, a member of the PiS, Piotr Kisiel, called to ban the Equality March in Rzeszów, but the court had successfully overturned the ban. Shortly after *Gazeta Polska* started distributing stickers with ‘LGBT Ideology Free Zone’, a domestic court halted this due to a pending case made by a human rights activist.<sup>67</sup> Nonetheless, numerous violent physical attacks occurred during an Equality March between the participants and the police during the next month. Hence these governmental tactics further provoke the stigmatization of LGBTQI people’s rights under the convention.

In August 2020, the European Commission refused to include LGBT Free zones in Polish towns since Poland is part of the EU’s Town Twinning scheme. In response, the Ministry of Justice of Poland held that they would financially compensate those towns under their Justice Fund, which is designed to aid victims of crime, which is why these towns are victims of a lack of EU funding.<sup>68</sup> The citizen’s legislative initiative bill was then created by a conservative group and submitted to the Polish Government to “ban public assemblies that promote

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<sup>66</sup> Korolczuk Ekzbieta, ‘*The fight against ‘gender’ and LGBT ideology’*: new developments in Poland’ [https://www.researchgate.net/publication/337980632\\_The\\_fight\\_against\\_%27gender%27\\_and\\_%27LGBT\\_ideology%27\\_new\\_developments\\_in\\_Poland](https://www.researchgate.net/publication/337980632_The_fight_against_%27gender%27_and_%27LGBT_ideology%27_new_developments_in_Poland) last accessed 19<sup>th</sup> February 2022 p.g.

<sup>67</sup> European Parliament, ‘*Parliament declares the European Union as LGBTIQ Freedom Zone*’ <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone> last accessed 19<sup>th</sup> February 2022

<sup>68</sup> Michael Bernhard, ‘*Democratic Backsliding in Poland and Hungary*’ [https://www.researchgate.net/publication/356990886\\_Democratic\\_Backsliding\\_in\\_Poland\\_and\\_Hungary](https://www.researchgate.net/publication/356990886_Democratic_Backsliding_in_Poland_and_Hungary) last accessed 19<sup>th</sup> February 2022 p.g. 57

LGBTQI rights”.<sup>69</sup> This was met with an international backlash from human rights experts such as the CoE Commission for human rights Dunja Mijatović, who issued a Memorandum about LGBTQI rights in Poland. This held that “Polish governments should stop stigmatizing sexual minorities and for the Family Charters to be revoked”.<sup>70</sup> The Polish government did not respond but instead continued to discriminate. Additionally, in the context of Hungary, the Minister of Justice and the Prosecutor General, Zbigniew Ziobro, announced at a similar time to Orbán the “creation of a bill preventing same-sex couples from adopting children”.<sup>71</sup> This was announced the same day the European Parliament implemented “the resolution for the LGBTQI Freedom Zone”,<sup>72</sup> suggesting that both states are seemingly motivated to challenge the expectation to support LGBTQI rights through hostile tactics.

In response, the European Commission informed that due to the situation with the anti-LGBT resolution, “the negotiations of the European Fund 2021-2027 for those provinces may be blocked”.<sup>73</sup> Nonetheless, five regions “voted to keep the anti-LGBT resolution” and ignored that there was a threat of losing EU funds.<sup>74</sup> Therefore, one week later, the European Commission’s “DG REGIO temporarily blocked REACT-EU” funds to those five regions with the anti-LGBT resolutions or Family Rights Charter as it considered that “the European

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<sup>69</sup> European Union Agency For Fundamental Rights, ‘*EU LGBT survey European Union lesbian, gay, bisexual and transgender survey, Results at a glance*’ [https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance\\_en.pdf](https://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf) last accessed 19<sup>th</sup> February 2022 p.g. 13

<sup>70</sup> Council of Europe, Commissioner for Human Rights, ‘*Poland should stop the stigmatization of LGBTI people*’ <https://www.coe.int/en/web/commissioner/-/poland-should-stop-the-stigmatisation-of-lgbti-people> last accessed 2nd April 2022

<sup>71</sup> *Ibid*, p.g. 47

<sup>72</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality*’ [https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf) last accessed 29<sup>th</sup> January 2022 p.g. 23

<sup>73</sup> ILGA EUROPE, ‘*POLAND ANTI-LGBTI HATE TIMELINE*’ [https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf) last accessed 29<sup>th</sup> January 2022 p.g. 23 12

<sup>74</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality*’ [https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf) last accessed 29<sup>th</sup> January 2022 p.g. 42

Structural and Investment Funds was not ensured under the principle of non-discrimination”.<sup>75</sup>

Thus, shortly after realizing the extent to which the EU funds are imperative to support municipalities to function, these five regions slowly withdrew their anti-LGBT resolution.<sup>76</sup>

Within chapter one, a theoretical framework has been provided for the legal steps taken by Hungary and Poland toward an illiberal democracy by focusing on the socio-political and legal actions taken by populist governmental officials and state authorities to discriminate against LGBTQI rights. It should be noted that in the third chapter, there will be an analysis of the most severe actions taken by these states and the extent to which EU response can change the rights of these sexual minorities. Nonetheless, international and domestic legislation has been introduced, which will be used as a reference in chapters two and three to analyze the extent to which the actions enforced within these states amount to discrimination against this minority group.

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<sup>75</sup> ILGA EUROPE, ‘*POLAND ANTI-LGBTI HATE TIMELINE*’

<[https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf)> last accessed 29<sup>th</sup> January 2022 p.g. 14

<sup>76</sup> FRA European Union Agency For Fundamental Rights, ‘*EU LGBTI survey II A long way to go for LGBTI equality*’ [https://fra.europa.eu/sites/default/files/fra\\_uploads/lgbti-survey-country-data\\_poland.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/lgbti-survey-country-data_poland.pdf) last accessed 29<sup>th</sup> January 2022 p.g. 43

## Chapter Two:

### An analysis of case law depicting discrimination against the LGBTQI persons in Hungary and Poland

#### 2.1 Trans rights cases

This chapter will examine the legal steps Hungary and Poland took toward the attack on the LGBTQI minority group and how it adds to the illiberal democratic narrative of these right-wing nationalist governments. Furthermore, there will be a comparative analysis of LGBTQI case law in Hungary and Poland regarding trans rights cases. This will include the critical analysis of the case-law judgments and whether they abide by or contradict the domestic legislative framework within these states and the CoE framework. Lastly, within this context, there will be an analysis of whether the judgments hold any discrimination which may go against the rights of the LGBTQI people on the domestic and international scale.

##### 2.1.1 Trans rights case in Hungary (legal gender recognition)

The case of *Egészségügyi Engedélyezési és Közigazgatási Hivatal* [2011] (hereafter ‘Trans pharmacist case’)

Transgenderism has been defined by the scholar Green as a person who “breaks gender roles and identity”.<sup>77</sup> This is often done when a transgender individual “expresses their gender identity outside the traditional normative definitions”, which can otherwise be referred to as identifying outside the binary.<sup>78</sup>

<sup>77</sup> Jamison Green, ‘Part of the package: Ideas of masculinity among male-identified Transpeople, Special Issue: *Queer Masculinities*’

<[https://journals.sagepub.com/doi/abs/10.1177/1097184X04272116?casa\\_token=jPEu7cM6VaoAAAAA:vsCOh4w-nz3ljcFDvuO9oMLDzshyibgop6uDw\\_cowkuORrPYwK3j9mnjhfbPijkQ8CI90gUd5cms8](https://journals.sagepub.com/doi/abs/10.1177/1097184X04272116?casa_token=jPEu7cM6VaoAAAAA:vsCOh4w-nz3ljcFDvuO9oMLDzshyibgop6uDw_cowkuORrPYwK3j9mnjhfbPijkQ8CI90gUd5cms8)> last accessed 20<sup>th</sup> May 2022 p.g. 291

<sup>78</sup> K. Bornstein, ‘Gender Outlaw: On Men, Women, and the Rest of Us’

[https://scholar.google.com/scholar\\_lookup?hl=en-gb&publication\\_year=1994&author=K+Bornstein&title=Gender+Outlaw%3A+On+Men%2C+Women%2C+and+the+Rest+of+Us](https://scholar.google.com/scholar_lookup?hl=en-gb&publication_year=1994&author=K+Bornstein&title=Gender+Outlaw%3A+On+Men%2C+Women%2C+and+the+Rest+of+Us) last accessed 20<sup>th</sup> May 2022 p.g. 56

It is known that LGBTQI persons face socio-political and legal challenges changing their name in the context of a birth certificate, work, and education. The online court decision database yielded few results concerning legal cases involving transgender people in Hungary. There are few cases relating to trans rights, and as such, a reference will be made to a case decided in 2011 regarding a trans pharmacy license case.<sup>79</sup> The legal situation for transgender persons is ever so worsening in Hungary. Takács determines that “LGBT minority stress is based on the premise that their heterosexual social environment is subjected to chronic psychological stress related to their stigmatization”.<sup>80</sup> The justification of psychological stress is often used to make a claim by the transgender or intersex applicant who has faced issues with changing their legal gender. The problem in the case began after a transgender woman, the petitioner, had changed her legal gender, “the Hungarian National Public Health and Medical Officer Service issued a pharmacy license for a transgender pharmacist that contained a reference to her birth name and original sex.”<sup>81</sup> In response, the NGO Háttér Társaság took the case on behalf of the applicant to the Hungarian domestic court and on the first instance claimed that the legal grounds for overturning the issue of the renewed license which contained a reference to her birth name and original sex constituted the violation to the right to human dignity and that the treatment constituted indirect discrimination which has initially failed.<sup>82</sup>

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<sup>79</sup> Egészségügyi Engedélyezési és Közigazgatási Hivatal, Hungary, Office of Health Authorisation and Administrative Procedures (2011) Decision No. 28326-004/2011/ELN, 8<sup>th</sup> August 2011

<sup>80</sup> Thomas Köllen and Judit Takács, ‘Sexual Orientation and Transgender Issues in Organizations Global Perspectives on LGBT Workforce Diversity, LGBT Employees in the Hungarian Labour Market’ <<https://link.springer.com/book/10.1007/978-3-319-29623-4>> last accessed 17<sup>th</sup> May 2022 p.g. 17

<sup>81</sup> Hatter Society, ‘Significant cases, Trans Pharmacist Case’ <https://en.hatter.hu/what-we-do/legal-aid/significant-cases> last accessed 8<sup>th</sup> April 2022

<sup>82</sup> Háttér Társaság, ‘Fellebbezést jóváhagyó végzés a transz patikus ügyében, Egészségügyi engedélyezési és közigazgatási hivatal’ <https://hatter.hu/tevekenyseguink/jogsegelyszolgalat/jelentosebb-ugyeink/transz-patikus-ugye-2011/fellebbezest-jovahagy> last accessed 18<sup>th</sup> May 2022

Although the facts of the case did not originally arise under article 14 ECHR, one could suggest that hypothetically if it were to be argued under article 14, then the facts of the case would raise solid grounds for challenging the right to non-discrimination because it is likely that the violation would have occurred on the grounds of discrimination against the applicant's gender identity. Instead, on appeal, the Hungarian Office of Health Authorization and Administrative Procedures, acting on the second instance, "found a violation of human dignity and ordered the Medical Officer Service to carry out a new procedure, and to issue a consolidated personal pharmacy license that would not contain the birth name of the applicant".<sup>83</sup> Thus, a violation was found because these actions exposed transgender people's gender history.<sup>84</sup>

Furthermore, the contested decision unequivocally runs counter to Article 8 (n) Act no CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. The reference to the "prohibition of being treated less favorably due to sexual identity" had been wholly discounted when the employer consolidated a personal pharmacy license that contained the birth name of the applicant when the applicant had clearly changed her legal gender, and the workplace was fully aware of this. It can be contended that this case undermined the fundamental rights of this trans applicant under Article 8 (n)/ (m) of the Equal Treatment and the Promotion of Equal Opportunities Act no CXXV 2003 in a time when changing legal gender recognition was legal and available to do in Hungary.<sup>85</sup> Hence, this case highlights the extent to which the Hungarian authorities openly discriminate if left unchallenged.

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<sup>83</sup> European Union Agency for Fundamental Rights, '*Protection against discrimination on the grounds of sexual orientation, gender identity and sex characteristics in the EU, Comparative legal analysis Update 2015*' [https://fra.europa.eu/sites/default/files/fra\\_uploads/protection\\_against\\_discrimination\\_legal\\_update\\_2015.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/protection_against_discrimination_legal_update_2015.pdf) last accessed 10th April 2022 p.g. 73

<sup>84</sup> Háttér Társaság, '*Fellebbezést jóváhagyvégzés a transz patikus ügyekben, Egészségügyi engedél yezési és köz igazgatási hivatal*' <https://hatter.hu/tevekenyseguink/jogsegelyszolgalat/jelentosebb-ugyeink/transz-patikus-ugye-2011/fellebbezest-jovahagyo> last accessed 18<sup>th</sup> May 2022

<sup>85</sup> Article 8 (m); (n) Act no CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities

Legal gender recognition has always faced challenges, even in the years when the Hungarian government had supposedly accepted legal gender recognition cases before 2020. Nonetheless, on the 29<sup>th</sup> of May 2020, section 33 of Act no XXX of 2020 was entered into force.<sup>86</sup> Section 33 made it impossible for a transgender person to have their gender legally recognized in Hungary.<sup>87</sup> Hence, this legislation forces trans and intersex people to use documents that do not reflect their gender identity and/ or appearance.<sup>88</sup> However, an important result that came from the Hungarian Constitutional Court in March 2021 is that section 33 no longer applied to ongoing proceedings.<sup>89</sup> The significance of this result will be discussed further in chapter three regarding the ongoing proceedings of legal gender recognition cases on the domestic and ECtHR levels that were brought both before and after this Act was entered into force.

Transgender persons face significant problems in the process of their legal gender recognition. A comparison is required to identify noticeable changes in how the Hungarian domestic courts are currently dealing with ongoing cases in the context of transgender identity challenges before the legislative change in 2020 with a comparison to gender identity cases taken to court post the 2020 legislative change. Before the 2020 legislative change, Act I of 2010 on Civil Registration enabled the recognition of the legal change in an applicant's gender identity.<sup>90</sup> Nonetheless, in an ongoing case that started in June 2018, a transgender man applied for legal recognition of his gender and name in the Hungarian Government Office (Kormányhivatal),

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<sup>86</sup> Háttér Társaság, 'Article 33, Legal Gender Recognition (2020)' <https://en.hatter.hu/what-we-do/legal-aid/significant-cases/article-33> last accessed 19<sup>th</sup> May 2022

<sup>87</sup> Section 33, Act no XXX of 2020, The Fundamental Law of Hungary; Háttér Társaság, 'Nem jogi elismerése (2020-)' <https://hatter.hu/tevekenysegunk/jogsegelyszolgalat/jelentosebb-ugyeink/33-paragrafus> last accessed 18<sup>th</sup> May 2022

<sup>88</sup> Háttér Társaság, 'Nem jogi elismerése (2020-)' <https://hatter.hu/tevekenysegunk/jogsegelyszolgalat/jelentosebb-ugyeink/33-paragrafus> last accessed 18<sup>th</sup> May 2022

<sup>89</sup> Háttér Társaság, 'Nem jogi elismerése (2020-)' <https://hatter.hu/tevekenysegunk/jogsegelyszolgalat/jelentosebb-ugyeink/33-paragrafus> last accessed 18<sup>th</sup> May 2022

<sup>90</sup> Act I of the 2010 on Civil Registration Hungary



which holds the responsibility of registering births, refused to examine the applicant's request arguing that it lacks competence. This dispute was then taken to the Kúria (Supreme Court in Hungary), which instructed the Government Office in Budapest to conduct the proceedings. However, when the 2020 legislative change was enacted, the Government Office used section 33 to justify its rejection of the application. The NGO that took the case on behalf of the plaintiff appealed and sought judicial review from the Metropolitan Court. In their submission, the NGO asked the court to grant its legal gender recognition despite Section 33 or to apply to the Constitutional Court for the unconstitutionality of Section 33.<sup>91</sup> However, the court decided that the Government Office was unlawful, annulled it, and ordered the authority to reopen the proceedings stating that the application had to be examined on medical opinions that the applicant had submitted.<sup>92</sup> The Budapest Government Office, in response, filed an application for review with the Kúria against the verdict. However, the Kúria upheld the lower court's judgment on the basis that if the decision of the Government Office of the Capital City of Budapest established that the attached medical documents support the applicant's transgenderism, it means that the Government Office of the Capital City of Budapest accepted it as a supporting medical opinion; hence the registration of gender and name change cannot be refused.

Nonetheless, the Government Office of the Capital City of Budapest rejected the application in the repeated procedure.<sup>93</sup> The decision to reject is currently awaiting to be challenged in the

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<sup>91</sup> A Kúria mint felülvizsgáló bíróság ítélete, 'Az ügy száma: Kfv. III. 37.787/2021/6.'

<https://hatter.hu/sites/default/files/dokumentum/konyvlap/kuria-2021nov.pdf> last accessed 19th May 2022

<sup>92</sup> Háttér Társaság, 'Nem jogi elismerése (2020-)'

<https://hatter.hu/tevekenysegunk/jogsegelyszolgalat/jelentosebb-ugyeink/33-paragrafus> last accessed 18th May 2022

<sup>93</sup> A Kúria mint felülvizsgáló bíróság ítélete, 'Az ügy száma: Kfv. III. 37.787/2021/6.'

<https://hatter.hu/sites/default/files/dokumentum/konyvlap/kuria-2021nov.pdf> last accessed 19th May 2022

Metropolitan Court.<sup>94</sup> Therefore, one could agree that even before the implementation of section 33, transgender and intersex people were faced with disproportionate challenges when taking steps to legally align their gender identity with their legal recognition.

A comparison can be made to another ongoing case which involves a transgender applicant who had applied in January of 2021 after the 2020 Act had been introduced to the Metropolitan Court to change the sex and name on the birth certificate. The court responded by rejecting the application on the grounds that pursuant to section 33.<sup>95</sup> The applicant sought judicial review of the official decision rejecting the application. In the opinion of the court, it was found necessary to examine the compliance of the impugned legal provisions with the international framework, as the case law of the ECtHR established that transgender people have the right to respect their privacy under article 8 ECHR and to the recognition by the state of sex and a name appropriate to their identity under article 14 ECHR. Thus, it can be contended that this ongoing case allows more room to be hopeful for questioning the removal of gender identity and the possibility of having it recognized in individual case applications.

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<sup>94</sup> European Parliament Committee on Petitioners, ‘*Petition No 0377/2020 by Ferenc Tibor Zsák (Hungarian) on Covid-19 and the risk of violations of fundamental rights in Hungary*’

[https://www.europarl.europa.eu/doceo/document/PETI-CM-696627\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/PETI-CM-696627_EN.pdf) last accessed 19th May 2022

<sup>95</sup> Háttér Társaság Case number II/02647/2021, ‘*Transgender case post 2020 ban on legal recognition*’ <<http://public.mkab.hu/dev/dontesek.nsf/0/4B15803AE31C7EE7C12587640033D796?OpenDocument>> last accessed 19<sup>th</sup> May 2022

### 2.1.2 Trans rights case in Poland (legal gender registration)

#### The case of *Y v Poland* [2022]

In contrast, the case of *Y v Poland* is a trans case in Poland where, before taking the case to the ECtHR between 2005 and 2008, the applicant had unsuccessfully applied to three levels of the Polish domestic courts to have his annotation of the origination birth certificate removed.<sup>96</sup> However, all these attempts before the domestic courts failed. Hence, this case presented the ECtHR with an opportunity to decide how far it is willing to uphold states such as Poland's interest regarding trans legal registration and Article 8 (right to private life) and Article 14 (prohibition of discrimination) of the individual.<sup>97</sup> The applicant relied on these articles to complain that although he had successfully changed his name and official sex/gender on his identity documents, his original birth certificate had only been annotated, and it continued to include a reference to the sex/gender assigned to him at birth. Therefore, the claimant argued that this constituted discrimination compared to adopted children who are issued new birth certificates after adoption.<sup>98</sup>

In the context of Article 8, the Court first held that the applicant's complaint did not refer to the lack of regulatory framework for legal gender recognition in Poland.<sup>99</sup> Instead, the Court considered that the applicant's aim of the complaint was whether Article 8 imposed a positive obligation on the state to provide "a procedure that is effective and accessible for gender recognition which enables the person concerned to obtain a birth certificate that does not mention sex/gender assigned at birth".<sup>100</sup> The Court referred to its previous judgment in *Hämäläinen v Finland* [2014]<sup>101</sup> to point out that states such as Poland enjoy a certain margin

<sup>96</sup> *Y v Poland* [2022], Applicant number 74131/14, 17<sup>th</sup> July 2022

<sup>97</sup> Article 8 and 14 of the European Convention on Human Rights

<sup>98</sup> *Y v Poland* [2022], Applicant number 74131/14, 17<sup>th</sup> July 2022 (para 46)

<sup>99</sup> *Ibid*, (para 47)

<sup>100</sup> *Ibid*, (para 52)

<sup>101</sup> *Hämäläinen v Finland* [2014], Application number. 37359/09

[https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-145768\"\]}](https://hudoc.echr.coe.int/eng#{\) last accessed 10<sup>th</sup> April 2022

of appreciation (hereafter ‘MoA’). When certain cases are concerned with an important facet of an individual’s identity, then the MoA is restricted. Although the Court identified the issues regarding the marginal annotation of change of his registered sex and was mindful of the historical nature of the birth record system, it observed that the applicant successfully gained legal recognition to live as a male. Further, it was held that “a potential risk of adverse consequences was not capable of rendering the Polish legal framework deficient in light of the state’s positive obligation”.<sup>102</sup> Thus, the Court concluded that the Polish domestic courts struck a fair balance between the different interests.<sup>103</sup>

Although Polish legislation implies upholding the protection of the rights of LGBTQI people in line with international legislation, in reality, the extent to which the Polish domestic legislation, such as Article 32 of the Polish Constitution, complies with the rights in the ECHR needs to be questioned.<sup>104</sup> In this case, the applicant demonstrated discrimination by comparing his situation with a new birth certificate after full adoption. Accepting the applicant’s argument would have overridden Poland's legislation. Instead, this could have been a justified solution had the applicant demonstrated that the difference in the treatment resulted in unacceptable inconvenience. The applicant’s reason for making a complaint was because he felt discriminated against on the grounds of being a trans person.<sup>105</sup> A comparison could have been made of his situation as a trans person, “who after obtaining gender recognition still runs the risk of being challenged on the grounds of gender identity, which would not happen to a cisgender person whose gender identity has been correctly registered since birth”.<sup>106</sup> The

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<sup>102</sup> HUDOC, ‘*Y v Poland* [2022]’, Applicant number 74131/14 [https://hudoc.echr.coe.int/fre#{\"itemid\":\[\"002-13567\"\]}](https://hudoc.echr.coe.int/fre#{\) last accessed 10<sup>th</sup> April 2022 (para 64)

<sup>103</sup> HUDOC, ‘*Y v Poland* [2022]’, Applicant number 74131/14 [https://hudoc.echr.coe.int/fre#{\"itemid\":\[\"002-13567\"\]}](https://hudoc.echr.coe.int/fre#{\) last accessed 10<sup>th</sup> April 2022 (para 66)

<sup>104</sup> Article 32, The Polish Constitution

<sup>105</sup> HUDOC, ‘*Y v Poland* [2022]’, Applicant number 74131/14 [https://hudoc.echr.coe.int/fre#{\"itemid\":\[\"002-13567\"\]}](https://hudoc.echr.coe.int/fre#{\) last accessed 10<sup>th</sup> April 2022 (para 32)

<sup>106</sup> HUDOC, ‘*Y v Poland* [2022]’, Applicant number 74131/14 [https://hudoc.echr.coe.int/fre#{\"itemid\":\[\"002-13567\"\]}](https://hudoc.echr.coe.int/fre#{\) last accessed 10<sup>th</sup> April 2022 (para 35)

scholar Califia argues that as opposed to people who identify as transsexuals, “the term transgender does not recognize the real experience of changing one’s sex, not just one’s gender”.<sup>107</sup> Instead, one could agree with the scholar Prosser that a transgender person who is post-operative (undergone sex reassignment surgery (SRS)) should be treated on equal grounds to those transgender people who are pre-operative.<sup>108</sup> Thus, one could argue that if the applicant put forward this claim mentioned above under article 14, then it is likely that the Court would have held that there was a violation made in the Polish domestic Court’s decisions.

### 2.1.3 Comparison between Hungary and Poland trans rights cases

As was stated earlier, Hungary and Poland are both member states of the CoE and thus are signatory states to the ECHR. This means that they are under the ECtHR’s jurisdiction and must comply with the requirements of the Convention and the criteria established in the ECHR’s case law. The above-discussed cases revolve around how the Hungarian and Polish authorities challenged the rights of trans people to have their legal gender recognized on essential documents after the applicant had legally changed their names.

It should be noted that the ECtHR offers a narrow margin of appreciation to the states in matters affecting an intimate aspect of private life. However, when it comes to compliance with positive obligations and striking a fair balance between the competing interests and rights – such as was presented in the Polish case – states enjoy a wider margin of appreciation. One could argue that in the case of the Polish applicant, it can be deemed fair that the state had the margin of appreciation to decide how to comply with its ECHR obligation and set the rules on

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<sup>107</sup> Patrick Califia, ‘*Sex changes: the politics of transgenderism*’ <  
[https://www.researchgate.net/publication/247390390\\_Book\\_Review\\_Sex\\_Changes\\_The\\_Politics\\_of\\_Transgenderism](https://www.researchgate.net/publication/247390390_Book_Review_Sex_Changes_The_Politics_of_Transgenderism) By Pat Califia Cleis Press San Francisco California 1997 307 pp 1695> last accessed 21<sup>st</sup> May 2022  
p.g. 155

<sup>108</sup> Jay Prosser, ‘*The Body Narratives of Transsexuality*’  
<https://www.journals.uchicago.edu/doi/abs/10.1086/495591?journalCode=signs> last accessed 21<sup>st</sup> May 2022  
p.g. 319

legal gender recognition. In particular, no new birth certificate is issued to trans persons, but the papers used in everyday life reflect the change of gender and name. Additionally, it can be inferred that the applicant should have brought a claim in the form of a comparison between the applicant's situation obtaining gender recognition with a cisgender person correctly registered at birth.

The Hungarian case significantly differs from the Polish one since the applicant's birth gender was included in a document they used in their daily work (their license to practice their profession). As such, it cannot be considered a minor inconvenience. The decision in the Hungarian case before the appeal can therefore be argued to have violated the human dignity of trans people because it exposed the trans person's gender history, which, if it had been claimed to violate articles 8 and 14 of the ECHR, then it would have been held to have blatantly violated article 14 of the ECHR in conjunction with Article 8.<sup>109</sup> Therefore, while both cases show hostility and discrimination towards gender minorities, the Hungarian governmental authorities' position seems more extreme with how the state deals with transgender people's fundamental rights enshrined under the ECHR.

## 2.2 Pride discrimination cases

This chapter will examine the legal steps Hungary and Poland took toward the attack on the LGBTQI minority group and how it adds to the illiberal democratic narrative of these right-wing nationalist governments. Furthermore, a comparative analysis of LGBTQI case law in Hungary and Poland will be made regarding pride discrimination cases. This will include the critical analysis of the case-law judgments and whether they abide by or contradict the domestic legislative framework within these states and the CoE framework. Lastly, within this context,

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<sup>109</sup> Article 14, European Convention on Human Rights (Article 14, ECHR); Article 8, European Convention on Human Rights (Article 8, ECHR)

a critical analysis will be made as to whether the judgments hold any discrimination which may go against the rights of the LGBTQI people on the domestic and international scale.

### 2.2.1 Pride discrimination case in Hungary

#### The case of *Budapesti Rendőrfőkapitányság (BRFK)* [2011-2014]<sup>110</sup>

In Hungary, LGBTQI people enjoy the right to freely host and participate in events and demonstrations, including pride marches. Pride is viewed as holding significance and stemming from “North American and Western European LGBT politics which has provided the model for LGBT activism”.<sup>111</sup> Halperin & Traub agree that “pride emerged as a positive, countering concept to the negotiations of hegemonic heteronormativity, as well as the internalized shame and isolation, understood to accompany them.”<sup>112</sup> Therefore, the right to assembly is significant because it allows pride demonstrations to exist, which adds to the advocacy of LGBTQI rights.

Nonetheless, in central and eastern European countries such as Hungary and Poland, pride has been and continues to be stigmatized. In the context of Hungary, between the years 2011 and 2014, LGBTQI people encountered extreme difficulties in acquiring authorizations for LGBTQI-related events and the ability to practice their rights to freedom of assembly and freedom from violence, contrasted with Article VIII (1) of the Hungarian Fundamental Law<sup>113</sup> which holds that “every person shall have the right to peaceful assembly” and Article III which

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<sup>110</sup> Hungary, Chief of the Budapest Police (*Budapesti Rendőrfőkapitány*) [2012], Decision Number. 01000/15246-6/2012/Ált., 5 April 2012; Hungary, Metropolitan Court of Budapest, Decision No. 27. Kpk. 45. 188/2011/4, 18 February 2011; Metropolitan Court of Budapest, Decision Number. 27 Kpk. 45.385/2012/2, 13 April 2012; Hungary Metropolitan Regional Court of Appeal, Case no. 18.Pf. 20.436/214/8, 18<sup>th</sup> September 2014

<sup>111</sup> John D’Emilio, ‘*Sexual Politics, Sexual Communities*’ <https://www.press.uchicago.edu/ucp/books/book/chicago/S/bo3640270.html> last accessed 22<sup>nd</sup> May 2022 p.g. 108

<sup>112</sup> Halperin & Traub, ‘*Gay Shame*’ <[press.uchicago.edu/ucp/books/book/Chicago/G/bo5877479.html](https://www.press.uchicago.edu/ucp/books/book/Chicago/G/bo5877479.html)> last accessed 22<sup>nd</sup> May 2022 p.g. 118

<sup>113</sup> Article VIII (1), The Fundamental Law of Hungary 2011 (ninth amendment) (Magyarország Alaptörvénye)

prohibits ill-treatment.<sup>114</sup> Hence, these hostile actions go against the Hungarian legislative rights of LGBTQI people and the protections that have been given to them.

Further, LGBTQI people experienced extreme difficulties already in 2008: the Hungarian police tried to ban the pride marches for the first time. Nonetheless, within 24 hours after an evaluation was made to repeal this decision. There was a realization that this action of simply banning the pride march without a justified reason would amount to discrimination against the Hungarian LGBTQI community under articles such as article 14 ECHR in conjunction with Article 11. However, in 2011 and 2012, the Hungarian police decided to issue bans claiming that the pride parade “would have impeded traffic”.<sup>115</sup> The justification given for the police’s actions was overruled by domestic courts and was held unfounded, which allowed the pride parade in these years to continue eventually.<sup>116</sup> Nevertheless, there was a court case made in both 2011 and 2012 in response to the actions taken by the police with the claim that the Hungarian police had “acted in a discriminative manner and harassed members of the LGBT community by disregarding their fundamental rights”.<sup>117</sup> Renkin points out that the pride marches have enacted “backlash in the form of national pride” by both authorities and citizens to justify harassment and discrimination.<sup>118</sup> These claims to the Court against the Hungarian police were granted judicial review, and the court held that the police’s actions involved

<sup>114</sup> Hungary, Act No. III of 1989 on the prohibition of ill-treatment

<sup>115</sup> Hatter Society, ‘Court reaffirms that the police discriminated when banning the Budapest Pride March in 2012’ <https://en.hatter.hu/news/court-reaffirms-that-police-discriminated-when-banning-the-budapest-pride-march-in-2012> last accessed 15 April 2022

<sup>116</sup> Hungary, Act No. XXIX of 2009 on registered partnership and related legislation and on the amendment of other statutes to facilitate the proof of cohabitation (2002. Évi XXXIX. törvény a bejegyzett élettársi kapcsolatáról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról); Lidia Balogh, ‘Legal Study on Homophobia and Discrimination on the Grounds of Sexual Orientation and Gender Identify’ [https://fra.europa.eu/sites/default/files/fra\\_uploads/country-study-lgbt-legal-update-2014-hu.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/country-study-lgbt-legal-update-2014-hu.pdf) last accessed 21st April 2022 p.g. 43

<sup>117</sup> Hungary, Metropolitan Court of Budapest (2011), Decision Number. 27. Kpk. 45.188/2011/4, 18<sup>th</sup> February 2011; Hungary, Metropolitan Court of Budapest (2012), Decision Number. 27. Kpk. 45.385/2012/ 2, 13 April 2012

<sup>118</sup> Hadley Z. Renkin, ‘Perverse Frictions: Pride, Dignity, and the Budapest LGBT March’ <https://www.tandfonline.com/doi/full/10.1080/00141844.2013.879197> last accessed 22<sup>nd</sup> May 2022 p.g. 11



discrimination against LGBTQI persons' fundamental human rights. Moreover, though the 2011 and 2012 decisions were later appealed, in 2014, "the Regional Court of Appeal of Budapest upheld the decision of the lower court and declared that the Budapest Police did commit direct discrimination and harassment based on sexual orientation" in the decision to ban the 2012 pride march.<sup>119</sup>

Another issue that highlights the government's discriminatory actions, in this case, is the attempt to prohibit LGBTQI demonstrators' freedom of assembly (Article 11) but not pro-government demonstrators' freedom of assembly. Between 2011 and 2012, various large-scale demonstrations about pro-government peace marches (Békemenet) were allowed to occur multiple times a year, including more than 100.000 participants. This meant that ten times more people attended these demonstrations than the average number of people attending the Budapest pride marches in those years. Yet the Hungarian police did not think that this type of demonstration with 100,000 marchers would disrupt the traffic in contrast to the pride marches containing an average of 10.000 people that occurred once a year.<sup>120</sup> In addition, although the Budapest police appealed the decision above, the individual submitted a supplementary appeal to gain compensation. However, Budapest's Regional Court of Appeal held that "the individual did not have standing" and subsequently rejected the claim.<sup>121</sup> Nonetheless, the appeals court agreed with the lower-level court that since the Budapest police did not put forward a legitimate justification for their action, this "amounted to direct discrimination and harassment based on sexual orientation".<sup>122</sup> Further, the appeals court contended that the police had "strengthened

<sup>119</sup> Hungary, Metropolitan Regional Court of Appeal, Case number 18 Pf. 20.436/214/8, 18<sup>th</sup> September 2014

<sup>120</sup> Hatter Society, 'Court reaffirms that the police discriminated when banning the Budapest Pride March in 2012' <https://en.hatter.hu/news/court-reaffirms-that-police-discriminated-when-banning-the-budapest-pride-march-in-2012> last accessed 15 April 2022

<sup>121</sup> Hungary, Metropolitan Court of Budapest (2011), Decision Number. 27. Kpk. 45.188/2011/4, 18<sup>th</sup> February 2011; Hungary, Metropolitan Court of Budapest (2012), Decision Number. 27. Kpk. 45.385/2012/ 2, 13 April 2012

<sup>122</sup> Hungary, Metropolitan Regional Court of Appeal, Case number 18 Pf. 20.436/214/8, 18<sup>th</sup> September 2014

the degrading and hostile environment which amplified the hostility towards the LGBTQI community”, which was evidently present in Hungarian society and as such actively manifested itself in the form of counter-demonstrations of violent nature.<sup>123</sup> Hence, the judgment by the Court ordered the Budapest police to “issue a letter of apology and refrain from continuing with the practice” to avoid further discrimination violations under the convention against the LGBTQI community in Hungary.<sup>124</sup> Thus, it can be observed that the Hungarian courts acknowledged and gave effect to freedom of assembly and the prohibition of discrimination in the case of this attack on the vulnerable minority group.

## 2.2.2 Pride discrimination case in Poland

### The case of *Baczowski and Others v Poland* [2007]

The case of *Baczowski and Others v Poland*<sup>125</sup> arose after Poland entered the EU and the European Commission’s push to introduce discrimination legislation as attempts were made by the nationalist government to “ban homosexual propaganda” between 2005-2007.<sup>126</sup> As such, “the increasing polarization around LGBT issues led conservative right-wing politicians to target parades,” which can be observed in this case.<sup>127</sup> In this case, the applicants argued before the ECtHR that the Polish domestic Court had failed to assert their right to freedom of

<sup>123</sup> Hungarian LGBT Alliance, Transvanilla Transgender Association, Háttér Society, and Labrisz Lesbian Association, ‘*LGBTQI Rights In Hungary*’ [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT\\_CCPR\\_CSS\\_HUN\\_30243\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/HUN/INT_CCPR_CSS_HUN_30243_E.pdf) last accessed 22<sup>nd</sup> May 2022; Hatter Society, ‘*Court reaffirms that the police discriminated when banning the Budapest Pride March in 2012*’ <https://en.hatter.hu/news/court-reaffirms-that-police-discriminated-when-banning-the-budapest-pride-march-in-2012> last accessed 15 April 2022 p.g. 67

<sup>124</sup> Hatter Society, ‘*Court reaffirms that the police discriminated when banning the Budapest Pride March in 2012*’ <https://en.hatter.hu/news/court-reaffirms-that-police-discriminated-when-banning-the-budapest-pride-march-in-2012> last accessed 15 April 2022

<sup>125</sup> *Baczowski and Others v Poland* [2007], Application number 1543/06, European Court of Human Rights, 3<sup>rd</sup> May 2007 (para 48)

<sup>126</sup> O’Dwyer, ‘*Does the EU help or hinder gay-rights movements in post-communist Europe? The case of Poland*’ <<https://www.tandfonline.com/doi/full/10.1080/21599165.2012.721094>> last accessed 22<sup>nd</sup> May 2022 p.g. 344-348

<sup>127</sup> Peterson, ‘*Pride parades and LGBT movements*’ <https://library.oapen.org/bitstream/handle/20.500.12657/24158/1005973.pdf?sequence=1> last accessed 22<sup>nd</sup> May 2022 p.g. 56

assembly in their application of domestic administrative law. The claim was made in response to the Warsaw mayor's decision to refuse permission for a march that aimed to raise awareness of minority groups' discrimination, including the LGBTQI community. The mayor's office argued that the permission was rejected because the organizers failed to submit a traffic organization plan, a legal requirement under article 65(a) of Poland's Traffic Road Act.<sup>128</sup> Thus, a day before the march was meant to start, the mayor's office banned stationary assemblies by the same organizers to protest discrimination against minority groups. Yet, despite the ban, the march proceeded as planned.

Furthermore, the mayor used the organizers' failure to submit a traffic organization plan as a pretext to ban the march. As such, it can be contended that this act clearly demonstrates discrimination because, within the same month of the request, the Warsaw mayor publicly commented that "propaganda of homosexuality is not tantamount to exercising one's freedom of assembly".<sup>129</sup> In this regard, the scholars O'Dwyer and Vermeersch contend that post-socialist countries would be more compliant with LGBTQI people's rights under the ECHR because "the leverage of conditionality would decrease after countries like Poland gained EU membership".<sup>130</sup> However, in reality, "the character of social learning during the accession augured poorly for activism going forward".<sup>131</sup> Therefore, it is more common for central and eastern European member states to hold more conservative viewpoints toward more liberal social movements.

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<sup>128</sup> Article 65(a) of the Poland's Traffic Road Act

<sup>129</sup> *Baczowski and Others v Poland* [2007], Application number 1543/06, European Court of Human Rights, 3<sup>rd</sup> May 2007 (para 54)

<sup>130</sup> O'Dwyer and Vermeersch, 'From Pride to Politics: Niche-Party Politics and LGBT Rights in Poland' [https://link.springer.com/chapter/10.1057/978-1-137-48093-4\\_6](https://link.springer.com/chapter/10.1057/978-1-137-48093-4_6) last accessed 23<sup>rd</sup> May 2022, p.g. 20

<sup>131</sup> *Ibid*, p.g. 25

Nevertheless, notwithstanding this ban, the march was allowed to eventually continue after a claim was put to the Constitutional Court by the Ombudsman, which found the Road Traffic Act's provision unconstitutional. The Road Traffic Act was found unconstitutional because it was held to be incompatible with Article 57 of the Polish Constitution regarding political freedoms and rights and guarantees of freedom of assembly.<sup>132</sup> Hence, under Article 57, Poland is required to allow the freedom of peaceful assembly as participating in such assemblies should be ensured to everyone, which the state had failed to provide in this case.<sup>133</sup> Furthermore, after the Appeals Board's judgment, the applicant successfully sought a determination in the European Court of Human Rights regarding the administrative decision to the ban with the argument that the ban was a breach of their freedom of assembly, that there were no domestic remedies deemed acceptable and that ultimately the action of the ban was discriminatory.<sup>134</sup> Thus, this reinforced that the Polish authorities actions did amount to discrimination and were against both Polish law and the rights enshrined within the ECHR.

LGBTQI people's rights are essential for a democratic society. Although Poland is labeled an illiberal democracy, it is required to uphold these rights within the ECHR. The ECtHR analyzed numerous articles about the issue at hand, such as Articles 11, 13, and 14. As a preliminary objection, the Polish government maintained that the applicants did not have victim status and failed to exhaust the domestic remedies that were available to them. In response, the ECtHR rejected the first ground of argument and held that the applicants were negatively affected by the Court's decision to ban the assembly.<sup>135</sup> Further, this decision's interference with the

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<sup>132</sup> *Baczowski and Others v Poland* [2007], Application number 1543/06, European Court of Human Rights, 3<sup>rd</sup> May 2007 (para 41)

<sup>133</sup> Article 57, The Constitution of the Republic of Poland 1997

<sup>134</sup> *Baczowski and Others v Poland* [2007], Application number 1543/06, European Court of Human Rights, 3<sup>rd</sup> May 2007 (para 41)

<sup>135</sup> *Ibid.*, (para 68)

applicants' freedom of assembly was not prescribed by Polish domestic law, and thus there was a breach of Article 11.<sup>136</sup>

Another issue is that the ECtHR found under Article 13, "no effective domestic remedy could have redressed the violation made regarding the right to freedom of assembly".<sup>137</sup> Hence, Poland must make a domestic remedy if a citizen claims that their rights under Article 11 were infringed.<sup>138</sup> However, in this case, the applicants could only apply for any remedy before the date of the planned assembly (march) and were not permitted a domestic remedy that could have stopped the breach from happening. It should be highlighted that "there was a lack of reasonable time-limits for the domestic authorities to deliver their decision" to the Court's decision-making process.<sup>139</sup> Thus, the Court held that the Polish state authorities "must give the decisions within reasonable time limits"; hence, in this case, the decision should have been given to the applicants before the day the assembly occurred.<sup>140</sup>

The last issue that the Court had analyzed was whether the decision to ban the assembly was discriminatory or not under Article 14.<sup>141</sup> The ECtHR held that this decision did amount to discrimination because the intended march required submission of a traffic organization plan. Yet in comparison, other marches did not have to submit these plans. Additionally, it should be noted that the Polish Mayor had made a hostile comment within the same month before the ban was initiated. Hence, it was held that the mayor's opinion could have affected his decision. Thus, the ECtHR concluded that the decision to ban the applicants' right to freedom of

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<sup>136</sup> *Ibid.*, (para 70)

<sup>137</sup> *Ibid.*, (para 72)

<sup>138</sup> Article 11, European Convention on Human Rights (Article 11, ECHR)

<sup>139</sup> *Baczowski and Others v Poland* [2007], Application number 1543/06, European Court of Human Rights, 22<sup>nd</sup> May 2007 (para 83)

<sup>140</sup> *Ibid.*, (para 92)

<sup>141</sup> Article 14, European Convention on Human Rights (Article 14, ECHR)

assembly was discriminatory and constituted a breach of Article 14 and that violations occurred under Articles 11 and 13.<sup>142</sup>

Lastly, the Court was correct in arguing that such bans constitute interferences even if the assemblies were eventually held on the planned dates.<sup>143</sup> One could argue that the continuing struggle to establish Gay Pride across post-socialist states in Europe is “based on the idea that visibility of non-heterosexuals in social and public life is central to the maintenance of fundamental rights”.<sup>144</sup> Thus, the continuing attempts to suppress LGBTQI organizations and the social hostility toward public assemblies are evidence of the state’s continuing desire to erase homosexuality from the public and private spheres.<sup>145</sup>

### **2.2.3 Comparison of the approach made between Hungary and Poland pride discrimination cases**

The Polish governmental authorities have made a better effort to persuade the applicant that the march could not begin because they had not filled in the required traffic plan form, a requirement under article 57 of the Polish Constitution.<sup>146</sup> The Polish case displays similar patterns to the Hungarian point, which used an administrative requirement to block the march, including the traffic plan or the possibility of freedom of assembly concerning the disproportionate traffic disruption. Moreover, both state authorities had made discriminatory comments against this minority group in the events leading to their decision to ban the march. The Polish case demonstrates the extent to which state authorities chose to violate the ECHR

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<sup>142</sup> Article 11, 13, 14, European Convention on Human Rights (Article 11, 13, 14, ECHR)

<sup>143</sup> European Court of Human Rights, ‘*Guide on the case-law of the European Convention on Human Rights, LGBTI rights*’ [https://echr.coe.int/Documents/Guide\\_LGBTI\\_rights\\_ENG.pdf](https://echr.coe.int/Documents/Guide_LGBTI_rights_ENG.pdf) last accessed 22<sup>nd</sup> May 2022 p.g. 33

<sup>144</sup> Johnson, ‘*An Essentially Private Manifestation of Human Personality*’: Constructions of Homosexuality in the European Court of Human Rights <https://academic.oup.com/hrlr/article/10/1/67/602498?login=true> last accessed 23<sup>rd</sup> May 2022 p.g. 47

<sup>145</sup> *Ibid*, p.g. 94

<sup>146</sup> Article 57, The Constitution of the Republic of Poland 1997

articles to which they are bound, such as articles 11, 13, and 14, to openly discriminate against LGBTQI persons as they failed to remedy the situation which led to the case being sent up to the ECtHR.

In the Hungarian case, the domestic courts had remedied the situation created by the police, and therefore the case did not have to go up to the ECtHR. Thus, the Polish case can be considered less accepting of the LGBTQI movement. The scholar Gruszczyńska argued that the importance of pride marches “entering the public sphere as part of their fight to attain subject status for sexual minorities, LGBTQI activists are breaking a social contract based on gender and sexuality were not relevant identity categories in socialism”.<sup>147</sup> Hence, this attitude towards the LGBTQI movement can be linked to the context of Hungary and Poland as post-socialist states. To this day, Hungary and Poland have been and continue to experience rising levels of political homophobia where LGBTQI people are portrayed as “the ultimate other”.<sup>148</sup> Therefore, the Hungarian and Polish authorities believed they could take these steps to endorse these acts because “such instrumental use of homophobia seems to work best in societies where homosexuality remains in the realm of the taboo”.<sup>149</sup> Thus, both Hungary and Poland were expected to be more tolerant of LGBTQI rights instead of creating challenges towards the access to their fundamental human rights in the form of the freedom of assembly afforded under the convention.<sup>150</sup>

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<sup>147</sup> Gruszczyńska, ‘When Homo-Citizens Go Marching In: Politicization of Sexuality and the Lesbian and Gay Movement In Poland’ [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1009982](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009982) last accessed 22<sup>nd</sup> May 2022 p.g. 13

<sup>148</sup> Graff, ‘Looking at Pictures of Gay Men: Political Uses of Homophobia in Contemporary Poland’ <https://read.dukeupress.edu/public-culture/article/22/3/583/31971/Looking-at-Pictures-of-Gay-Men-Political-Uses-of> last accessed 23<sup>rd</sup> May 2022 p.g. 32

<sup>149</sup> O’Dwyer and Vermeersch, ‘From Pride to Politics: Niche-Party Politics and LGBT Rights in Poland’ [https://link.springer.com/chapter/10.1057/978-1-137-48093-4\\_6](https://link.springer.com/chapter/10.1057/978-1-137-48093-4_6) last accessed 23<sup>rd</sup> May 2022 p.g. 55

<sup>150</sup> Johnson, ‘An Essentially Private Manifestation of Human Personality’: Constructions of Homosexuality in the European Court of Human Rights <https://academic.oup.com/hrlr/article/10/1/67/602498?login=true> last accessed 23<sup>rd</sup> May 2022 p.g. 71

## Chapter Three:

### **What is the EU's response to the current state of affairs that the LGBTQI people are facing within Hungary and Poland?**

#### **3.1 The EU's response to Hungary and Poland's state of affairs regarding the current socio-political and legal events that have taken place**

In this final chapter, a discussion will unfold on the EU's response to Hungary and Poland's current state of affairs regarding the recent legislative measures that have taken place that was mentioned in the first chapter. Further, there will be an analysis of the hostile environment LGBTQI people face and the EU tools available and the measures that have been taken to try to tackle these member states' deliberate actions. Paternotte and Kuhar emphasize the need to analyze the EU's response because "the developments in both countries are connected to the rise in right-wing populism and anti-gender campaigns have unfolded across central and eastern Europe".<sup>151</sup> This will include the extent to which the EU's response has been adequate to limit and prevent such situations from happening to improve the rights of LGBTQI people.

##### **3.1.1 The EU's response to Hungary's state of affairs regarding the current socio-political and legal situation for LGBTQI people**

Within this sub-section, there will be a discussion on the EU's response to the recent legislative change in 2020 regarding the ban of legal gender recognition and the legal decision taken after for the Act to no longer apply to ongoing cases. This will further include the actions of two civil society organizations that take very different routes to challenge the passing of this legislation.<sup>152</sup> Additionally, there will be a reference to the most recent referendum in 2022 and the extent to which the European Commission's actions can be viewed as a sufficient response.

<sup>151</sup> Paternotte and Kuhar, "Disentangling and Locating the Global Rights: Anti-Gender Campaigns in Europe. Politics and Governance" <https://doi.org/10.17645/pag.v6i3.1557> last accessed 25<sup>th</sup> May 2022 p.g. 31

<sup>152</sup> Article 33 Hungarian Constitution (The Hungarian Fundamental Law)



Significant repercussions arise from a government passing legislation that makes it impossible for transgender or intersex people to legally change their birth certificates. One could agree with the scholar's Knight and Gall that this “puts them at risk of discrimination, harassment, and violence in situations where identity documents are required”.<sup>153</sup> It should be noted that before this implementation, an individual could change their legal gender through forensic and medical evaluations; hence completely taking away trans people's rights proves that this legislation is a major step back. Therefore, it violates transgender and intersex people's fundamental rights within the EU.<sup>154</sup>

In response to the ban contained in Section 33 in 2020, Hungary's leading LGBTQI civil society organizations' the Háttér Society and Transvanilla Transgender Association, have continued to take steps toward challenging this discriminatory legislation through the process of litigation. Háttér Society has been exhausting domestic remedies to gain transgender and intersex applicants legal gender recognition even before this legislation was enforced. One example of this challenge can be seen through a case that reached the Budapest Court of Appeal. The issue within this case began in 2019 when a transgender man applied for legal recognition, which the local registrar rejected in June 2020 concerning article 33.<sup>155</sup> In response, the Hatter Society assisted in compiling the petition and the statements filed during the lawsuit and gave the argument that legal gender recognition should be granted notwithstanding the entry into force of Section 33, or alternatively, that the Debrecen Court of Appeal suspend the case and request the Constitutional Court to review the constitutionality of

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<sup>153</sup> Knight and Gall, 'Hungary Ends Legal recognition for Transgender and intersex people' <https://www.hrw.org/news/2020/05/21/hungary-ends-legal-regognition-transgender-and-intersex-people> last accessed 2nd June 2022 p.g. 8

<sup>154</sup> *Ibid*, p.g. 6

<sup>155</sup> Háttér Society, 'Article 33. Legal gender recognition (2020)' <https://en.hatter.hu/what-we-do/legal-aid/significant-cases/article-33> last accessed 3rd June 2022

article 33.<sup>156</sup> This lawsuit is pending even two years after the legislation was enforced. Therefore, it can be contended that the challenges of putting pressure on the government have not been a successful strategy. Additionally, this is emphasized by the fact that several cases have pushed through litigation to exhaust the domestic remedies first. As such, from fifty-two cases, one case has won, but even this one has an appeal pending. Further, it is essential to note that all these cases seem to take a minimum of a couple of years for an outcome to be made. As such, the effectiveness of the amount of time it takes to exhaust the domestic remedies has been argued ineffective. However, it is important to note that because it has an admissibility requirement under the ECHR, all domestic remedies are required to be exhausted, or the complaint in Strasbourg could be thrown out.

The possibility of bringing such cases up to the European Court can be argued to result in a better attempt to overturn article 33. Transvanilla Transgender Association has taken cases to the ECtHR in Strasbourg to decide on this matter and has asked the Court to “declare that the law should be annulled”.<sup>157</sup> Although a decision has not been made, it must be noted that there is a greater sense of hope for legislative change if the ECtHR decides that Section 33 violates the ECHR in comparison to cases being exhausted through the domestic courts within Hungary.

Lastly, it can be contended that the EU’s response of launching an ongoing infringement procedure against Hungary over the anti-LGBT legislation (otherwise known as the propaganda law) ACT LXXIX of 2021 regarding the banning of showing content on homosexuality or gender change to minors in school education programs or the media that

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<sup>156</sup> Hátér Society, ‘Article 33. Legal gender recognition (2020)’ <https://en.hatter.hu/what-we-do/legal-aid/significant-cases/article-33> last accessed 3rd June 2022

<sup>157</sup> Tris Reid-Smith, ‘Trans activists take Hungary’s new law banning gender recognition to Constitutional Court’ <https://www.gaystarnews.com/article/trans-activists-take-hungarys-new-law-banning-gender-recognition-to-constitutional-court/> last accessed 2<sup>nd</sup> June 2022 p.g. 32

reaches minors is a positive step towards possible change.<sup>158</sup> The European Commission had responded to this legislative change by launching legal action against Hungary over LGBTQI legislation one month after it was passed in 2021.<sup>159</sup> In response, Fidesz had called for a referendum to show the EU that the legislation was what the Hungarian people had wanted. Although less than half of the eligible voters cast valid ballots, it rendered the vote non-binding even though more than 90 per cent voted in line with the government campaign. Thus, although the EU did not hold precedence over this outcome, its ability to launch a legal action created political pressure for the Fidesz government to hold a referendum.

From these ongoing cases, it is evident that the Hungarian Court's decision to make section 33 not apply to ongoing legal gender recognition cases is yet to make a difference. Nonetheless, the EU's response to Hungary's actions can be considered weak for one because of the amount of time it takes for a decision to be made, the small achievements that usually come from cases heighten political pressure, which can be pushed onto a state. Therefore, small victories can be celebrated as it gives us hope that change can still happen.

### **3.1.2 The EU's response to Poland's state of affairs regarding the current socio-political and legal situation for LGBTQI people**

Within this sub-section, there will be a reference to the steps taken by the Polish municipalities in 2019 when they began to declare themselves as 'LGBT-free zones' under the encouragement of PiS. The reason for this was to promote family values which are how the spread of LGBT-led events took place. The scholar Asmussen notes that "by the end of 2020, over 100 zones had made the change, and the re-election of the conservative President Duda made the situation

<sup>158</sup> ACT LXXIX of 2021, The Fundamental Law of Hungary 2011 (ninth amendment)

<sup>159</sup> Eszter Zalan, 'EU Commission still assessing Hungary's anti-LGBTI law' <https://euobserver.com/rule-of-law/154758> last accessed 2nd June 2022 p.g. 55

more dire”.<sup>160</sup> President Duda has repeatedly made vows to never allow same-sex marriage and adoption in the country and had claimed that this mindset is “a result of foreign ideology”.<sup>161</sup> One could argue that by denying the existence of LGBTQI people within Poland, President Duda aims to stigmatize and strip away sexual minorities’ fundamental human rights. Due to the homophobic and transphobic rhetoric within the socio-political sphere, the Polish Commissioner for Human Rights reported a visible decrease in acceptance of non-heteronormative people in 2019.<sup>162</sup>

There has been a continuous debate about whether the legislative road is slow and ineffective or whether the small achievements in the form of queer legislative battles are essential to make visible in the public discourse. In March 2021, the European Parliament responded to the LGBT rights infringements in Poland and Hungary by declaring that the “EU is a Freedom Zone”, two years after Poland declared itself as an “LGBT-free zone”.<sup>163</sup> The European Parliament had further conveyed that the increasing number of attacks based on discrimination towards sexual minorities “is part of a broader context where public authorities and elected officials promote hate speech and discrimination against LGBT people”.<sup>164</sup> Moreover, respondents to the FRA 2020 equality survey emphasize a “negative public discourse by politicians and/or political parties”, a “lack of enforcement of existing laws or policies”, and a “lack of visibility for LGBTI persons” as key contributing factors to the decline in acceptance

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<sup>160</sup> Marte Soland Asmussen, ‘*Dealing with LGBTQ Right Infringements: The EU’s Response to the violation of LGBTQ rights in Poland and Hungary*’ <https://ntnuopen.ntnu.no/ntnu-xmlui/bitstream/handle/11250/2775759/no.ntnu%aainspera%3a80491188%3a46845677.pdf?sequence=1&isAllo wed=y> last accessed 1<sup>st</sup> June 2022 p.g. 12

<sup>161</sup> *Ibid*, p.g. 13

<sup>162</sup> Council of Europe, ‘*Poland should stop the stigmatization of LGBTI people*’ <https://www.coe.int/en/web/commissioner/-/poland-should-stop-the-stigmatisation-of-lgbti-people> last accessed 1<sup>st</sup> June 2022 p.g. 23

<sup>163</sup> News European Parliament, ‘*Parliament declares the European Union an ‘LGBTIQ Freedom Zone’*’ <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtiq-freedom-zone> last accessed 1<sup>st</sup> June 2022 p.g. 31

<sup>164</sup> *Ibid*, p.g. 34

towards sexual minorities.<sup>165</sup> Therefore, this brings to light that the legislative road is slow, but small victories must be highlighted and made visible in the public discourse.

Another issue relates to the EU tool of the infringement procedure used to tackle the Polish anti-LGBT bill that the municipalities had implemented, the impact of funding limitations on the municipalities, and the extent to which limiting the EU funding would have affected the municipalities. Although the EU/EEA funding for Polish towns which adopted the LGBT-free zones was rejected by the Commission, the European Parliament pressed the Commission to use all available legislative tools to address this violation of the fundamental rights of LGBT people in the EU. The reference to the rule of law principle should be briefly discussed regarding the European Parliament's expectation that it should hold EU states accountable for the violations enacted against, in this case, sexual minorities. Milojkovic and Garner imply that in the context of the infringement proceedings, "Article 7 Treaty of the Functioning of The European Union (TEU) and the recently adopted mechanism on the Rule of Law aims to sanction the rule of law violations and protect values such as fundamental rights should be used".<sup>166</sup> The rule of law principle was discussed in 2020 after EU leaders were required to compromise with Poland and Hungary after "they had vetoed the bloc's budget and stimulus plans over threats that they would lose access to funds".<sup>167</sup> It should be understood that the budget had built-in measures to ensure that member states would have to adhere to the rule of law standard to receive funds. A member state who challenges the CJEU's infringement

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<sup>165</sup> FRA European Union Agency For Fundamental Rights, 'A long way to go for LGBTQI equality' [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2020-lgbtqi-equality-1\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbtqi-equality-1_en.pdf) last accessed 2nd June 2022 p.g. 13

<sup>166</sup> Milojkovic and Garner, 'Democracy Institute Events Offers Debate on the Rule of Law in Europe, Central European University' <https://www.ceu.edu/article/2021-01-26/democracy-institute-event-offers-debate-rule-law-europe> last accessed 2nd June 2022 p.g. 24

<sup>167</sup> Struzik, 'Framing Queer Activism in Poland: From Liberal Values to Solidarity'; Buyantueva and Shevtsova, 'LGBTQ+ Activism in Central and Eastern Europe' <<https://ntnuopen.ntnu.no/ntnu-xmlui/bitstream/handle/11250/2775759/no.ntnu%ainspira%3a80491188%3a46845677.pdf?sequence=1&isAllo wed=y>> last accessed 2nd June 2022 page 265-288

procedure leads to considerable delays in releasing funding to the municipalities. As such, the rule of law mechanism improves the ability to hold EU states accountable.<sup>168</sup>

The limitation of the EU funding to Poland halts the economic recovery of its municipalities. Ciobanu points out that the “PiS dominated regional assembly of Malopolska voted “to maintain its anti-LGBT resolution despite the European Commission telling Poland it was halting talks over a 2.5-billion-euro fund for the region until the resolution is withdrawn”.<sup>169</sup> This money would have come from ‘REACT EU’, which topped up the 2014-2020 EU budget and further complemented 2021-2027.<sup>170</sup> Ciobanu emphasizes that 9 billion euros went to the regional funds to the Polish municipalities that chose not to remove the anti-LGBT resolution. Therefore, due to the threat of the infringement procedure, billions of euros in Cohesion Policy Funds for the 2021-2027 period could have been lost.<sup>171</sup> In light of the seriousness that the economic loss would have caused to the municipalities, “the Polish government had reached an agreement with the EU over the national Recovery Plan which paved the way for Poland to obtain money from the EU Recovery Resilience Facility finally”.<sup>172</sup> Therefore, the EU’s response in the form of an infringement procedure can be deemed successful in reversing the violations caused by the municipalities that had implemented this anti-LGBT bill.

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<sup>168</sup> Marte Soland Asmussen, ‘*Dealing with LGBTQ Right Infringements: The EU’s Response to the violation of LGBTQ rights in Poland and Hungary*’ <https://ntnuopen.ntnu.no/ntnu-xmlui/bitstream/handle/11250/2775759/no.ntnu%aainspera%3a80491188%3a46845677.pdf?sequence=1&isAllo wed=y> last accessed 1<sup>st</sup> June 2022 page 21

<sup>169</sup> Claudia Ciobanu, ‘*Poland Set To Lose Billions In EU Funds Over Anti-LGBT Zones*’ <https://balkaninsight.com/2021/08/23/poland-set-to-lose-billions-in-eu-funds-over-anti-lgbt-zones/> last accessed 2<sup>nd</sup> June 2022 *Ibid*, p.g. 3

<sup>170</sup> *Ibid*, p.g. 5

<sup>171</sup> *Ibid*, p.g. 6

<sup>172</sup> Alexandra Krzysztozek, EURACTIV.pl, ‘*Poland to soon receive EU recovery funds after striking deal with Commission*’ [https://www.euractiv.com/section/politics/short\\_news/poland-to-soon-receive-eu-recovery-funds-after-striking-deal-with-commission/](https://www.euractiv.com/section/politics/short_news/poland-to-soon-receive-eu-recovery-funds-after-striking-deal-with-commission/) last accessed 12<sup>th</sup> June 2022

Nonetheless, the issue remains whether the EU's actions have effectively responded to this violation. More specifically, whether the infringement procedure has entirely halted Poland's plan to violate sexual minorities' rights within the state by threatening to refuse to fund. It can be suggested that the threat to limit funding has slowly but successfully worked to alter the actions of the municipalities that continued to vote to remain an LGBT-free zone because, by mid-September of 2021, four out of the five Polish regions repealed the LGBT-free zone resolutions. Moreover, the EU's actions of threatening to restrict funding were effective in reversing the violations that some of the municipalities within Poland had enforced. Nonetheless, despite the EU institutions having started to take these actions, these plans and measures did not come until two years later, after the Polish authorities had declared themselves LGBT-free zones. Asmussen contends that these types of measures are "too late and are not a game-changer".<sup>173</sup> However, one could conclude that although the EU's response to the violation of LGBTQI rights in Poland was too late, more attention should be given to the importance of small steps toward sexual minority victories.

### **3.1.3 A comparison between the EU's response to the current state of affairs that LGBTQI people are facing in Hungary and Poland**

In this chapter, there has been an analysis of the EU tools available to respond to Hungary and Poland's state of affairs regarding the legislative measures that have been mentioned in chapter one. The EU's response to Poland's actions with an infringement procedure can be argued to be more effective. This effectiveness stems from the use of political pressure to threaten and withhold funding in the form of a national recovery plan to the municipalities that had kept the anti-LGBT bill. In comparison, even before the implementation of article 33, the cases from

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<sup>173</sup> Marte Soland Asmussen, 'Dealing with LGBTQ Right Infringements: The EU's Response to the violation of LGBTQ rights in Poland and Hungary' <https://ntnuopen.ntnu.no/ntnu-xmlui/bitstream/handle/11250/2775759/no.ntnu%aainspera%3a80491188%3a46845677.pdf?sequence=1&isAllo wed=y> last accessed 1<sup>st</sup> June 2022 p.g. 23

Hungary which were sought on the domestic level through exhausting domestic remedies to gain transgender and intersex applicant's legal gender recognition were too easily challengeable and ended up getting rejected. Taking the Hungarian case outside of the domestic level to the Constitutional Court amounts to a better attempt to overturn article 33 as there may be a more significant amount of unbiased consideration to annul this legislation. However, a negative side to litigation is that both routes take a lot of time, with a minimum of one and a half years for a judgement to be established.

Furthermore, in the context of the EU's tools, the rule of law mechanism of an infringement procedure can be deemed a successful EU tool to sanction the anti-LGBTQI measures these states have used. In the context of Hungary, this mechanism was used for the first time to warn Hungary that it could lose out on EU funds. As such, the Hungarian government was given a time limit to respond to the letter sent by the Commission by the end of April. Although there has been no further development on this in the context of Hungary, the infringement procedures that have been made within these two states can be contended not to be a light tool at the hands of the European Commission.



## CONCLUSION

This thesis makes an important contribution to the examination of Hungary and Poland's illiberal turn by attacking LGBTQI persons' fundamental rights. It has established that Hungary and Poland's populist ruling parties have taken extremely hostile socio-political and legal actions, which have rightfully been labelled to illustrate their illiberal turn. These states were more tolerant towards LGBTQI rights before the Fidesz and PiS ruling parties took power in 2010 and 2015. Since then, they have regressed and continue to take steps to support their illiberal playbook. Instead, there is an expectation for member states to adhere to the rights enshrined within the CoE framework, such as the rights within the Convention, and this includes respecting their domestic anti-discrimination legislation.

The comparative analysis of Hungary and Poland's case law in the second chapter demonstrates specific actions and justifications by member states to discriminate against the LGBTQI people. Further, it questions the extent to which the state authorities on the domestic scale violate their anti-discrimination legislative framework alongside legislation that falls within the international CoE framework. This has been observed in the comparison of pride discrimination cases in Hungary and Poland, where both authorities used an administrative requirement to block the march, and both states had made discriminatory comments on sexual minorities in the events leading up to the decision to ban the march. Further, the Polish authorities demonstrate the extent to which they ignore their domestic anti-discrimination legislation by failing to remedy the situation which led to the case being sent up to the ECtHR. In contrast, Hungary had paid more attention to the contents of its anti-discrimination legislation because the Hungarian courts had remedied the situation, which meant that the case did not have to go up to the ECtHR. Therefore, one could infer that the Polish authorities are less accepting of the LGBTQI movement than the Hungarian authorities, who had correctly

remedied the situation on the domestic level. Additionally, the level of resistance LGBTQI persons face can be observed in Hungary and Poland's trans rights cases. Although these cases are not directly similar, both state authorities challenged the rights of trans people to have their legal gender recognized on important documents after the applicants had legally changed their names. It has become evident from these cases that although states enjoy a wide margin of appreciation that the state authorities' actions towards trans rights are more hostile in Hungary than in Poland.

Lastly, the EU's ability to respond by using threats and issuing an infringement procedure towards member states of the CoE, such as Hungary and Poland's socio-political and legal state of affairs, can be labelled effective to an extent. It is easy to criticize such tools as weak because of the extent to which it is ineffective in forcing a state to make a change directly. Nonetheless, in the Polish case, the response to political pressure pushed the withdrawal of EU funding and the use of the infringement procedure, which proved to be an effective step. In the context of Hungary and Poland, it has become clear that most of the time, decisions made on the domestic level within the court are less effective for overturning legislation. Hence, when the domestic remedies are exhausted and the case becomes admissible under the ECtHR, the decisions made within this court hold a higher possibility of overturning such legislation. Further, civil society organizations play a significant role in overturning such discriminatory legislation. Political pressure through protests and comments by influential pro-EU members has been effective. Therefore, civil society organizations should continue to take the two forms of litigation to challenge discriminatory legislation such as article 33 and exhaust domestic remedies to gain transgender and intersex applicants' legal gender recognition.

Thus, it should be reaffirmed that although the response to Hungary and Poland's discriminatory actions is considered slow, the small achievements made, such as through case proceedings and the threat of the rule of law mechanism, can launch political pressure successfully, which can be pushed onto a state. Therefore, these responses should be celebrated as small victories because they give us hope that there is still a chance for change.

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## Legislation

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### Equal Treatment Act

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### European Convention on Human Rights

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## **Polish Constitutional Law**

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## **Hungarian Constitution Law**

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