

# **Between morality and discrimination by public administration: the case of so-called ‘LGBT free zones’ in Poland**

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*In recent years in Poland, local authorities were eager to express their views on ideological and moral issues. These statements were not mere declarations of a group of councilors (politicians) but administrative rule-making. The so-called LGBT-free zones have gained particular attention within the EU borders and abroad. These resolutions are of mixed i.e. normative and political characteristics. Moreover, the contribution seeks an answer to whether there is a legal basis for issuing such a resolution and whether it complies with EU law and the case law of the CJUE and ECHR. The analysis also covers a judicial review of resolutions issued by municipalities. Finally, it was described how the activities of the Polish accountability network contributed to a shift in EU policy regarding the protection of underrepresented groups.*

*Keywords: judicial review of administrative action, human rights, EU non-discrimination law, network of accountability, municipalities.*

## **1. Introduction**

In the modern world, it is increasingly difficult to find universally accepted moral patterns. People move, change environments, get to know new cultures, open to the models of life. They expect from the environment—including state and EU bodies—that their privacy is respected, and their freedom is not interfered with. The EU as a community of values harmonises not only legal systems, but also social attitudes in the spirit of non-discrimination on the way to building an inclusive

society and ensuring moral tolerance.<sup>1</sup> Conflicting with these expectations, the authorities of many municipalities in Poland have adopted resolutions which were declarations defining decencies they consider acceptable and worth supporting, and those which they perceive as reprehensible and requiring combating (resolutions establishing so-called LGBT free zones).

The activity of local self-government in this field triggered ambivalent opinions. Some see it as a form of discrimination and spreading hate speech,<sup>2</sup> others – as an opposition to ‘contemporary threats’. There are also those who do not attach much importance to it, not seeing the danger in resolutions characterised as non-binding ideological manifestations, difficult to apply and enforce. Against this background the working hypothesis is as follows: each action undertaken by a Member State aimed at determining which forms of behavior are unacceptable on the national forum (immoral behavior), when the same behavior is accepted, or considered natural (not leading to scandal) in another Member State, is not only a threat to the rights and freedoms of specific (singular) EU citizens, but above all—by creating barriers—it is not in compliance with the freedom of movement of people, services and capital secured under the Treaty on the Functioning of the European Union. Thus, it constitutes a real threat to integration processes. Especially this is the case in context of the freedom of movement and right to seek and take up employment, run a business or invest.<sup>3</sup>

In this paper, we are trying to determine whether the legal system provides grounds for actions on a local level which refers to *prima facie* non-legal criteria such as morality. The analysis of provisions, motives, and declared goals delivered by local self-government authorities will provide the legal characterization of those resolutions. To do so one should also analyze whether the private, state actors and/or EU institutions are vested with proper competencies to fight back administrative actions that are discriminatory. In this regard, the authors present the catalogue of legal institutions that were used to verify the legality of actions declaring that some behaviors are not accepted by the community based on morality and decencies.

The empirical material for the research includes EU regulations, Polish law, judgments of national administrative courts and European courts, and case statistics. We very much appreciate the feedback from ‘Atlas of Hate’ who provided us with detailed statistics and information. ‘Atlas’ is a non-profit group advocating for LGBT rights in Poland. In 2020 ‘Atlas’ was nominated for Sakharov Prize.

## 2. Resolutions regarding the locally oriented decencies

In the group of resolutions concerning the locally oriented decencies, the first to address are so-called policy resolutions, commonly known as acts establishing ‘LGBT-free zones’ in those units

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<sup>1</sup> J. Zajadło, *Prawo kontra obyczajowość*, in J. Zajadło & K. Zeidler (Eds.), *Fascynujące ścieżki filozofii prawa 2*, Wolters Kluwer Polska, Warszawa, 2021, p. 76.

<sup>2</sup> In the light of the jurisprudence of the ECtHR, state authorities not only cannot incite to spread hate speech, but also violate Art. 3, 8 and 14 of the Convention of November 4, 1950 for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) in the absence of an adequate response to hate crimes, see: *Sabalić v. Croatia* (App. no. 50231/13) ECtHR (2021) and *Association AC-CEPT and others v. Romania* (App. No. 19237/16) ECtHR (2021), including in particular when anti-minority statements come from active politicians see: *Chaprazow v. Bulgaria* (App. No. 12567/13) ECtHR (2021) and *Behar and Gutman v. Bulgaria* (App. No. 29335/13) ECtHR (2021). In these judgments, the ECtHR defined the criteria for assessing whether a single statement concerning minorities is so harmful that it affects the sense of identity of members of a certain minority community and their own assessment.

<sup>3</sup> Case 507/18, *NH v Associazione Avvocatura per i diritti LGBTI* [EU:C:2020:289].

of the administrative division of the country whose authorities issued them. The activity of local government in this area will serve as core of the analysis, due to the universality of the problem and the interest of the international community.<sup>4</sup> The activity of the bodies of Polish local government units which adopted the discussed resolutions resulted in a reaction at the European Union level, not only in the legal and economic, but also in the axiological and programmatic dimension.<sup>5</sup>

The discussed resolutions of local government units are not uniform. Already their titles let us distinguish, on the one hand, declarations on suppression of the ‘LGBT’ ideology by the local government community (“Local government free from LGBT ideology”), and on the other hand, Local Government Charter of the Rights of the Family.<sup>6</sup> The two types of acts also differ in terms of their content<sup>7</sup>. Only some declarations on the suppression of the ‘LGBT’ ideology by the local government community (“Local government free from LGBT ideology”) were reviewed by the administrative courts. Nevertheless, irrespective of the differences in nomenclature, content and quantity, the analysis of the jurisprudence of administrative courts allows for the reconstruction of a pattern of an illegal act related to locally oriented decencies. For this reason, conclusions will be formulated jointly.

In this paper, the anti-LGBT resolutions are understood as normative (obliging certain entities to specific actions) and non-normative (expressing the opinion of a group of councillors) statements of municipality authorities, referring at least indirectly to the sphere of privacy and sexual orientation of a person. These resolutions do not directly affect the political rights of the municipality inhabitants. As a result of their enactment, there is no, for example, exclusion or restriction of the active and passive voting rights of EU citizens in local elections. On the other hand, in praxis, they may constitute a form of discouragement. In view of the clear declaration of the representative body, the participation in local elections of a person whose sexual orientation does not fit into the preferred (or even only acceptable) pattern, often in a single-mandate system, may turn out to be pointless.

As mentioned above, the common denominator is that the statements of the municipality authorities, regardless of their ‘fulfilment’ with normative elements, belong to the sphere of morality (decency). They declare<sup>8</sup>, inter alia, that:

<sup>4</sup> L. Ash, *Inside Poland’s “LGBT-free zones*, BBC News, <https://www.bbc.com/news/stories-54191344> (26 June 2022); R. Picheta & I. Kottasová, *You don’t belong here. In Poland’s LGBT-free zones, existing is an act of defiance*, CNN, <https://edition.cnn.com/interactive/2020/10/world/lgbt-free-poland-intl-scli-cnnphotos/> (19 May 2023).

<sup>5</sup> EU was declared by European Parliament as “LGBTIQ Freedom Zone” <https://www.europarl.europa.eu/news/en/press-room/20210304IPR99219/parliament-declares-the-european-union-an-lgbtq-freedom-zone> (19 May 2023).

<sup>6</sup> [https://kartarodzin.pl/wp-content/uploads/2022/02/SKPR\\_commune\\_ENG.pdf](https://kartarodzin.pl/wp-content/uploads/2022/02/SKPR_commune_ENG.pdf) (19 May 2023) (hereinafter: the Charter).

<sup>7</sup> Importantly, the Charter violates the horizontal principles of obtaining European funds – information provided by ‘Atlas’. It is rightly pointed out that the EU per se does not prohibit this type of resolution, but local governments that undertake such actions will not receive funding – M. Makuchowska, deputy director of the Campaign Against Homophobia, said in an interview. D. Beker, *Samorządowa karta praw rodzin też dyskryminuje [WYWIAD]*, *Dziennik Gazeta Prawna*, <https://serwisy.gazetaprawna.pl/samorzad/artykuly/8495419,uchwala-anty-lgbt-samorzadowa-karta-praw-rodzin.html>. (7 November 2023); I. Jędrzejowska-Schiffaue & M. Łączak, *The Enforcement of Non-Discrimination Law and Sexual Minorities’ Rights in the EU: The Cases of Hungary and Poland*, *Adam Mickiewicz University Law Review*, Vol. 14, No. 1, December 2022, p. 202. “[...] some local governments have adopted so-called Charters of family rights, which in essence are anti-LGBT resolutions, albeit under the veil of protecting the constitutionally entrenched traditional family model.”

<sup>8</sup> The list below is based on the Istebna Commune Council of September 2, 2019. Elements of the act have been translated and paraphrased. It should be mentioned that the texts of the resolutions were uniform in the communes that adopted the declaration. The original (Polish) text was included in the footnotes—where necessary.

- a) in Poland, an undefined group of radicals (sic!) strives for a cultural revolution by attacking “freedom of speech, children’s innocence, family and school authority, and the freedom of entrepreneurs”<sup>9</sup> (declaration of councillors as natural persons; no normative meaning);
- b) self-government represented by the council is based on a centuries-old Christian tradition<sup>10</sup> (no normative content). This element of the resolution is important for its interpretation by referring to a specific system of values that consolidates one way of bringing up children and the family model tolerated in the community. The resolutions thought in this respect is illegal since it violates the obligation of public authorities to remain neutral in field of *e.g.*, religious matters. This obligation is prescribed under Polish constitution;<sup>11</sup>
- c) councillors declare not to interfere in the “private sphere of Polish families”<sup>12</sup> (moral and political declaration). The wording of the resolution is discriminatory since it does not refer to the term “a person living in a municipality,” but divides the members of the community into those who are protected and the rest. A contrario, therefore, this “private sphere of life,” regardless of its semantic core, will not be protected if it concerns EU citizens other than Poles;
- d) it is not acceptable to “employ guardians of political correctness in schools,”<sup>13</sup> which has to do with the issue of teaching about human sexuality. This content is normative because it creates the pattern of mandatory behaviour for authorities responsible for schooling and education;<sup>14</sup>
- e) councillors do not allow “administrative pressure to apply political correctness (sometimes rightly called homopropagadna”).<sup>15</sup> The normative nature of this provision resulted from the wording “administrative pressure,” as far as its relating to self-government bodies as a public entity, and thus acting in the name and for the benefit of the state. The pattern of behaviour derived from this element of the resolution means that the administration is to exert pressure, and thus use measures to support politically incorrect activities, which is illegal both from the point of view of national and the EU law;
- f) introduced to protect, inter alia, teachers and entrepreneurs “against imposing unprofessional criteria on them.”<sup>16</sup> It should be mentioned that in the case of vertical relationships, in case K 16/17 of 26 June 2019, the so-called<sup>17</sup> Polish Constitutional Tribunal ruled that the provision penalising the refusal to provide a service without just cause is inconsistent with the Polish Constitution. This ruling regard the refusal to provide the service of printing posters for the LGBT foundation. However, analogous solutions are not applicable horizontally. A municipality may neither oblige non-public entities to discriminate nor provide them – due to generally applicable provisions of law – legal protection. Therefore the resolution introduces a standard of conduct, which is perma-

<sup>9</sup> Pol. “Radykałowie dążący do rewolucji kulturowej w Polsce atakują wolność słowa, niewinność dzieci, autorytet rodziny i szkoły oraz swobodę przedsiębiorców.”

<sup>10</sup> Pol. “[...] deklarujemy, że samorząd który reprezentujemy – zgodnie z naszą wielowiekową kulturą opartą na wartościach chrześcijańskich [...]”

<sup>11</sup> Supreme Administrative Court, 2022, III OSK 4240/21.

<sup>12</sup> Pol. “[...] nie będzie ingerować w prywatną sferę życia polskich rodzin.”

<sup>13</sup> Pol. “Nie zgadzamy się na sprzeczne z prawem instalowanie funkcjonariuszy politycznej poprawności w szkołach (tzw. „latarników”).”

<sup>14</sup> Provincial Administrative Court in Kielce, 2020, II SA/Ke 382/20.

<sup>15</sup> Pol. “Nie pozwolimy wywierać administracyjnej presji na rzecz stosowania poprawności politycznej (niekiedy słusznie zwanej po prostu homopropagadną) [...]”

<sup>16</sup> Pol. “Będziemy chronili m.in. nauczycieli i przedsiębiorców przed narzucaniem im nieprofesjonalnych kryteriów działania [...]”

<sup>17</sup> Since 2015, there has been doubts in Poland as to whether the Constitutional Tribunal is a court, and therefore what the legal force of its judgments is. The above was confirmed in: *Xero Flor w Polsce sp. z o.o. v. Poland* (App. no. 4907/18) ECtHR (2021). For this reason, the study refers to the so-called Tribunal.

nently unenforceable due to an obvious contradiction to the law. Similarly, the Charter provides for a certification program for “businesses that have adopted family-friendly solutions”. The problem is that responsibility for this task is supposed to be laid with the local government. Not only could the certification process have a discriminatory effect, but there is also no legal basis for such actions by the authorities.

- g) an obligation has been imposed on executive bodies of the local government to take actions oriented on “specific measures aimed at protecting the rights of parents and the welfare of children in school and kindergarten.”<sup>18</sup> By this provision local self-government is declaring only certain ‘types’ of family life will be promoted and protected. The protection of one group is therefore to be carried out at the expense of the minority. Interestingly under this provision atypical affirmative action took place. This is to say the authorities will be positively discriminating with benefit for the group which is not underrepresented whereas, in a normal course of action, additional protection is linked with the others.
- h) it would not be allowed to grant public funds on projects (proposals, social initiatives) that undermine the constitutional identity of marriage as a union of a man and woman<sup>19</sup>. The normative (legally binding) nature of this declaration stems from the fact that in the reviewing process, competent authority will be obliged to determine whether the proposal compliances with all criteria including the ‘originalistic’ view on marriage and parenthood. By the way of example under Polish law NGOs may apply for various grants and subsidies. In the context of a declaration, the question arises whether they will be eligible for funding or not if their sole purpose is to promote equality but understood by some politicians as being against ‘constitutional identity of marriage.’

### **3. Role of administrative courts in Poland and the process of complaining against resolutions on locally oriented decencies**

#### **3.1. Administrative courts in Poland—characteristics**

In Poland the control over the resolution-making activity of local units of local self-government has been subject to the jurisdiction of administrative courts. For this reason, ‘anti-LGBT’ resolutions were complained against to administrative courts. Administrative courts in Poland were established, in particular, to provide legal protection to individuals, i.e. entities located outside the state administrative apparatus.

Polish administrative courts are European courts within the meaning of the Treaties, and the judges vested with power to verify public administration actions are EU judges. Therefore, a complaint to the court serves the implementation of the right to an effective remedy provided for in EU law and under the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). Due to the context of the application of EU law, the administrative court, also in the cases which are the subject of the analysis, thus fulfils its dual function as the Polish judicial authority and the court within the meaning of European regulations. For these reasons, in complaints against the so-called anti-LGBT resolutions, the ombudsman made a request to the court to consider whether the matter at stake should be submitted for a preliminary ruling to the CJEU<sup>20</sup>.

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<sup>18</sup> The Charter, p. 5.

<sup>19</sup> The Charter reads: “It is especially crucial to exclude any chance of allocating public funds and public property for projects that undermine the constitutional identity of marriage as a relationship between a man and a woman [...]”

<sup>20</sup> Jędrzejowska-Schiffaue & Łączak 2022, p. 202.



The Polish courts did not take this route<sup>21</sup> because as it turns out the national law creates sufficient grounds for annulment of the challenged acts of the municipality authorities.

The example of the ‘anti-LGBT’ resolutions showed, however, that the role of a complaint to the administrative court as an implementation tool for the right to an effective remedy provided for in EU law (Article 47 of the Charter) and based on the Convention (Article 6) may be questioned. The discussed issue is related with the scope of administrative courts’ jurisdiction. Namely, who can trigger the review and what administrative actions may be challenged before the court. No less important is the issue of the scope and effects of the judicial review on rule-making activities at the local level.

### 3.2. Subjective aspect of access to the administrative court (*locus standi*, standing)

The Polish system of judicial review of the activities of public administration is not based on the *actio popularis* formula. In cases in which the activity of municipal (city) councils consisting in issuing resolutions is to be reviewed, the following actors are entitled to file a complaint:

- a) private entities, *e.g.* resident of the municipality or local businesses; and
- b) institutional entities (advocates for supra-individual interest *e.g.*, a prosecutor, ombudsman, etc.) – whose standing is not based on their own legal interest but merely on formal criteria which in turn are related to the statutory scope of tasks assigned to them.

Under applicable laws<sup>22</sup> the right to file a complaint in cases where the subject of the complaint is a general act, *e.g.* a resolution of the municipality council declaring a ‘LGBT free zone’ – having standing to challenge such an act before administrative court means proving a violation of the legal interest or right of the complainant, and thus manifesting that the resolution is affecting to the legal situation of the complainant<sup>23</sup>. In the context of discussed resolutions, it will mean that the complainant were obliged to demonstrate belonging to a social group to which the provisions of the resolution refer, and therefore disclosure of sensitive data within the meaning of the GDPR<sup>24</sup>, relating to *e.g.* sexual orientation. We argue that the mere formulation of questions before a court of law relating to a private sphere of life must raise objections. What is then the optimal model of standing? One should bear in mind that the core component of the democratic states of law is the principle of equality of all citizens before the law.<sup>25</sup> If so the right to bring an action before the administrative court should have each person who invokes fundamental rights *e.g.*, the right to privacy or inherent dignity. Such an interpretation will however be problematic in light of Article 101 (1) of the Municipal Self-Government Act, under which the conditions for access to administrative court were laid down. Thus, it is only a proposal for future changes and therefore the question then remains the same whether social ‘sensitivity’ of the administrative action justifies per se the modification of the given institution.

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<sup>21</sup> *e.g.* Voivodeship Administrative Court in Gliwice, 2020, III SA/GI 15/20.

<sup>22</sup> Act of March 8, 1990 on municipal self-government. Hereinafter: “Municipal Self-Government Act” and Act of August 30, 2002, Law on proceedings before administrative courts. hereinafter: LAC.

<sup>23</sup> Municipal Self-Government Act, Art. 101 (1) states: “Anyone whose legal interest or entitlement has been violated by a resolution or order adopted by a municipal body in a matter related to public administration may appeal against the resolution or order to an administrative court.”

<sup>24</sup> Regulation of the European Parliament and of the Council (EU) 2016/679 of 27/04/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 94/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

<sup>25</sup> M. Doherty, *Public Law*, 2nd edn., Routledge, Milton Park, 2018, p. 304.

The legal limitations of access to court by private entities results in an increase in the importance of the collective interest advocates such as the Ombudsman, who have been granted the right to initiate administrative court proceedings<sup>26</sup>. In Poland, this special status is related to the prosecutor, the Ombudsman, the Ombudsman for Children, the Ombudsman for Small and Medium-sized Entrepreneurs, and when the subject of the complaint is a resolution of local government bodies – also the voivode (Pol. *wojewoda*)<sup>27</sup>, as a supervisory authority. The complaint of such advocates cannot be rejected due to the lack of a standing.

To sum up the individual (*e.g.*, inhabitant of city, village etc.) could have difficulties in demonstrating the standing in proceedings regarding legality of anti-LGBT resolutions<sup>28</sup>, which does not seem to be in compliance with Article 47 Charters and Art. 6 of the Convention<sup>29</sup>. Only the complaints filed by the advocates of the collective interest were admissible in this respect.

One type of actor involved in the protection of LGBTQ rights was omitted meaning non-governmental organizations which are called under Polish law ‘societal organizations’. Further on we will discuss their input to the accountability network in Poland. For now, it is worth mentioning that their standing is also limited. Although they cannot challenge resolution before an administrative court, they can, under court decision, participate in the proceedings as an entity with the rights of a party. In the analysed cases, several NGOs reported such participation *e.g.*, *Sings of Equality*, pol. *Federacja “Znaki Równości”*.

### 3.3. Subject of the complaint to the administrative court

The standing of collective interest advocates, in particular the Ombudsman, to challenge anti-LGBT resolutions were not questioned. However, these entities are not entitled to challenge all resolutions of local government units, but only those adopted in public administration matters<sup>30</sup> which led to another legal question. Namely, the administrative court was to determine whether the resolution issued by municipality X adopting the declaration on “detering LGBT ideology by the local government community” (“Local government free from LGBT ideology”) falls under the statutory requirement of being passed in “a public administration matter”. For example, in its judgment of 23 June 2020, III SA/Kr 105/20, the Voivodship Administrative Court in Kraków ruled that the challenged resolution of the municipality council “does not apply to a case in the field of public administration, as it does not constitute the implementation of a public task assigned to this local government body by law, it does not impose an obligation, does not state a right or obligation, and

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<sup>26</sup> LAC, Art. 8 reads: The Prosecutor, the Ombudsman, the Ombudsman for Children, the Ombudsman for Small and Medium-sized Entrepreneurs may take part in any ongoing proceedings, as well as submit a complaint, a cassation appeal, a complaint and a complaint to reopen the proceedings. In such a case, they have the rights of a party.

<sup>27</sup> Municipal Self-Government Act, Art. 93 (1) reads: After the deadline specified in Art. 91 (1), the supervisory authority cannot, on its own, declare the resolution or order of the municipality body invalid. In this case, the supervisory authority may challenge the resolution or order before the administrative court.

<sup>28</sup> Administrative courts found inadmissible complaints filed by private actors due to lack of standing, *e.g.*, the decision of the Provincial Administrative Court in Białystok of October 10, 2019, II SA/Bk 651/19; the decision of the Provincial Administrative Court in Poznań of April 16, 2020, II SA/Po 188/20; the decision of the Provincial Administrative Court in Poznań of December 2, 2020, II SA/Po 767/20.

<sup>29</sup> It should be emphasized that the administrative courts also declare inadmissibility of complaints due to lack of standing in the case of anti-discrimination resolutions *e.g.* decision of the Provincial Administrative Court in Gdańsk of September 10, 2018, III SA/Gd 636/18.

<sup>30</sup> LAC, art 3. (2) point 6 reads: Control of public administration activities by administrative courts includes adjudicating on complaints against [...] acts of local government bodies and their associations, other than acts of local law adopted in public administration matters.

does not create or cancel an existing legal relationship. In the opinion of the court, the submitted declaration “does not belong to the category of cases referred to in Article 18 of the Municipal Self-Government Act.”

The above line of jurisprudence has met with criticism in the literature.<sup>31</sup> As a result of the ombudsman’s cassation appeal, the Supreme Administrative Court, by its decision of 2 July 2021, III OSK 3353/21, repealed the decision of the Voivodship Administrative Court in Kraków and referred the case to the court of first instance for reconsideration. The Supreme Administrative Court pointed out that each resolution adopted by a municipality body is subject to complaint to an administrative court even if it is not an act of local law unless it has direct effects under civil law. Such ‘civil’ resolutions may be challenged before common courts.

The Supreme Administrative Court adopted the broadest possible interpretation of statutory admissibility requirements. The extensive view of what falls under the “public administration matter” constitutes the optimal access to judicial verification of general acts of the municipality.<sup>32</sup> This stand can be described as ‘pro-constitutional’. On the one hand, it emphasizes the function of a complaint to an administrative court as a judicial mean of protecting human rights. On the other hand, the Supreme Administrative Court secured the systemic primacy of the administrative courts over review of administrative actions (presumption of legal route).<sup>33</sup>

## **4. Assessment of the legality of the challenged resolution resolutions on matters of preferred morality**

### **4.1. Assessment of the legality resolutions on matters of preferred morality?**

As a rule, in Poland the criterion for judicial review of administrative actions is legality. Therefore purposefulness, rationality, or morality are excluded from the court’s jurisdiction but also and as such constitute prohibited indicators and reasons for review of administrative action. The challenged resolution may be annulled only when the administrative court finds a significant (substantial, serious) violation of the law<sup>34</sup>. This, in turn, may occur on one of the two levels. Firstly, at substantive level, relating to the matter regulated by the act, and in other words – the subject of its regulation. Secondly, at formal level concerning the method of reaching the adoption of a resolution and/or the procedure.

The verification of the administrative court consists in comparing ‘as is’ with ‘as it should be,’ and therefore the resolution is compared with the review pattern. The review pattern, in turn, consists of positive conditions that must be met in order for the resolution to be adopted by the municipal-

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<sup>31</sup> M. Hadel, *Problematyka aksjologicznego nadużycia kompetencji w kontekście tzw. uchwał „antyLGBT”*. Rozważania na kanwie aktualnego orzecznictwa sądów administracyjnych, Samorząd Terytorialny, No. 12, 2020, pp. 7-8.

<sup>32</sup> A. Kwaśniak, *Stwierdzenie nieważności uchwały rady gminy w przedmiocie „strefy wolnej od LGBT”*. Glosa do wyroku WSA z dnia 14 lipca 2020 r., III SA/GI 15/20, Orzecznictwo w Sprawach Samorządowych, No. 4, 2020, pp. 105, 108.

<sup>33</sup> B. Dolnicki, *Pojęcie sprawy z zakresu administracji publicznej. Glosa do postanowienia Naczelnego Sądu Administracyjnego z dnia 2 lipca 2021 r., III OSK 3353/21*, Orzecznictwo Sądów Polskich, No. 7-8, 2022, p. 220.

<sup>34</sup> Municipal Self-Government Act, Art. 91 (4) reads: In the event of an insignificant violation of the law, the supervisory authority does not declare the resolution or order invalid, limiting itself to indicating that the resolution or order was issued in violation of the law.



ity's body, and negative conditions, i.e. the occurrence of which makes it impossible to adopt a resolution, even if the positive conditions are met beforehand. In this area, the analysis will therefore cover:

- a) interplay between decencies (morality) and rights and freedoms of individuals in the local community, i.e., the question of the legal basis for adopting a resolution (positive condition)
- b) assessment of the negative conditions for adopting a resolution, and therefore determining whether the content of so-called 'anti-LGBT' resolutions violate Polish and/or EU law?

## **4.2. Decencies and personal rights and freedoms in the local community (positive conditions for adopting a resolution)**

### *4.2.1. Polish and EU perspective*

The formal legality of an act is conditioned by the existence of a legal basis for its adoption. One should determine whether the municipality's action concerning the locally oriented decencies falls within the scope of statutory prescribed competences. To do so it's necessary to compare the legislative activity at hand with the Article 18 (1) of the Municipal Self-Government Act which constitute the catalogue of the municipality's task and activities. Nevertheless, this assessment must be preceded by general comments on the admissibility of introducing such authorization into the legal system. In other words, is it possible to authorize the commune to act in the sphere of morality and who is competent in this field.

The rights to privacy and family life, freedom of thought, conscience and religion, and freedom of expression, covered by the Convention, are not absolute. The necessary limit to the exercise of these rights must be determined considering the exercise of the same rights and freedoms by other members of the community. Interference by public authority in the exercise of the right to privacy may be justified in cases provided for by law and necessary in a democratic society due to state security, public safety or economic well-being of the country, protection of order and crime prevention, protection of health and morals or protection of the rights and freedoms of others (Article 8(2) of the Convention). The same circumstances are listed in Article 31 (3) of the Constitution of the Republic of Poland, as they may justify restrictions on the exercise of constitutional freedoms, with the reservation, however, that the established restrictions may not violate the essence of freedoms and rights.

Both in the light of the Convention, and the Polish constitution, restrictions on the exercise of personal rights and freedoms may be treated as justified after their establishment by a decision of the competent authority ("in cases provided for by law")<sup>35</sup>, and besides, they must be justified with regard to the purpose of the introduction, and therefore the value they are intended to protect ("due to..."). In Polish conditions, the powers to legislate universally binding law were established at the national level for the benefit of the parliament; however, the law applicable locally may also be created by local government units. The Convention (*e.g.*, Article 8(2)) and the Polish constitution

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<sup>35</sup> As explained by the ECtHR in its judgment *Weiser i Bicos Beteiligungen GmbH v. Austria* (App. no. 74336/01) ECtHR (2007), an interference with privacy cannot be considered "prescribed by law" if it does not have, above all, some basis in national law. In meaning of Article 8 (2) of the Convention, the term 'law' should be understood in a 'substantive' and not 'formal' sense. In the field covered by written law, the 'act' is a binding legal act as interpreted by the competent courts.

(Article 31(3)) mention the protection of morality as a justification for the establishment of restrictions on the exercise of personal rights and freedoms. Morality, identifying and bringing together the values recognized by members of society, the realization of which—as good—they should strive for in their attitudes and the evil that they should avoid, is one of the social normative systems. Moral norms have a religious and philosophical origin, and the rules of conduct derived from them are subject to certain changes over time and in cultural conditions. Yet many of them have a permanent and universal dimension. However, not only such norms are addressed to us. In the process of socialization, our attitudes are also shaped by moral norms adopted in the community in which we function. The content of these norms should not be controversial. Therefore, morality seems to be something else than preferences in terms of decencies.

The discussed matter is sensitive, and the approach to it may differ among the Member States of the EU to such an extent that moral issues may be addressed with restraint by European law and authorities including judiciary branch of governance.<sup>36</sup> Interestingly the right to respect for private and family life, home and communications prescribed under the Article 8 of the Charter was implemented into national legal systems without any reservations whereas the right to marry and to found a family will be guaranteed in accordance with the national laws governing the exercise of these rights (Article 9 of the Charter), and the right to refuse to act against one's conscience, is to be exercised in accordance with the national laws governing the exercise of this right (Article 10 of the Charter).

In the judgment of July 16, 2019<sup>37</sup>, the ECHR, referring to its earlier jurisprudence, reminded that public authorities are obliged to guarantee appropriate space for action and gathering, without being exposed to violence from opponents to members of associations representing minority views on decencies. In the case of discrimination based on sexual orientation, the State's margin of discretion to introduce a difference in treatment is narrow, and its application requires convincing and compelling reasons.<sup>38</sup>

In this context, it is also worth noting the EU's stand to the discussed matters. Undoubtedly on the political and symbolic level, actions are being taken to intensify the protection of LGBTQ rights. As an exemplary would serve the legislative proposals related to so-called 'rainbow families.'<sup>39</sup> In turn, the analysis of the CJUE jurisprudence shows that the court is quite moderate to comment on issues that are objectively human rights but may, from a national perspective, raise questions about the conflict of law, morality, and worldview. The court shows a high degree of deference towards the Member States and the national laws. Let us take as an example the judgment of the Court (Grand Chamber) of 14 December 2021 in case 490/20, *V.M.A. v Stolichna obshtina, rayon "Pancharevo"*, [EU:C:2021:1008]. In Recital 52, the CJUE states that: "The Member States are thus free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. Nevertheless, in exercising that competence, each Member State must comply with EU law, in particular, the provisions of the FEU Treaty [...]". Importantly, however, the ideological factor does not constitute a proper justification for establishing a legal basis at the national level for discriminatory actions that may result in hate speech, and which will lead to the

<sup>36</sup> e.g. *Orlandi v. Italy* (App. no. 26431/12) ECtHR (2017); Case 673/13, *Commission v. Stichting Greenpeace Nederland and PAN Europe*; Case 528/13, *Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du san*, [EU:C:2015:288].

<sup>37</sup> *Zhdanov and others v. Russia* (App. no. 12200/08) ECtHR (2019).

<sup>38</sup> *X and others v. Austria* (App. no. 19010/07) ECtHR (2013).

<sup>39</sup> Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

violation of human rights.

Also in Poland, there are instances of rather ambivalent interpretation of LGBTQ rights. By the way of example, the judgment of the Supreme Administrative Court of July 6, 2022, II OSK 2376/19, gained media publicity. On the one hand, the court declared the legality of the authority's refusal to transcribe a same-sex marriage certificate. On the other hand, court, in the context of the constitutional provision on marriage, pointed out the following: "[t]his provision does not mean that it is impossible to legally regulate same-sex relationship [...]. The court of first instance shared the applicants' position that the above constitutional principle results not so much in the constitutional understanding of the institution of marriage, but in the guarantee of special protection and care of the state for the institution of marriage, but only on the assumption that it is a relationship a woman and a man. For this reason, as rightly noted by the court of first instance, the content of Article 18 of the Constitution could not constitute an independent obstacle to transcribing a foreign marriage certificate if the institution of marriage as a union of persons of the same sex was provided for in the national order. As indicated above, the discussed provision of the Constitution does not prohibit the statutory regulation of same-sex relationships. Currently, the Polish legislator has not decided to establish this type of solution." In the literature, the judgment was criticized<sup>40</sup>. Indeed, the justification is not coherent.

#### 4.2.2. *The role of local government communities in Poland in the 21st century*

Since restrictions on the exercise of personal rights and freedoms may be treated as justified after they have been established by a decision of an authorized authority, it is also necessary to consider whether such authorities are the bodies of Polish self-government communities, and if so, what is the scope of their independence and empowerment in a unitary state, such as Poland, to encroach on personal rights and freedoms, whether such interference is admissible at all or under what conditions. The characteristics of the role of self-government communities in Poland are of key importance for the answer to this question.

The role of a national legislator in designation of the place for local territorial government in the organisational structure of a state is described in the European Charter of Local Self-Government 1985, which in Article 4 (2) and Article 4 (1) first sentence states that: "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority," and "The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute."

According to Article 165 (2) of the Polish Constitution, local self-government is independent in its operation, which is expressed, inter alia, in the fact that it performs the public tasks assigned to it on its own behalf and under its own responsibility.

In the Polish three-tier model of local government, the basic structures are municipalities operating pursuant to the Municipal Self-Government Act of 8 March 1990. It follows from the systemic regulations determining the place of a municipality in the organisational structure of the state, its tasks and competences of the organs implementing them, that the municipality as a subject of public law is not autonomous, but only relatively independent (self-governing).<sup>41</sup> It has the right to perform

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<sup>40</sup> B. Wojeciechowski, *Refleksje na temat dynamiczności i deliberatywności wykładni trudnych przypadków na przykładzie spraw dotyczących osób LGBTQ+*, *Archiwum Filozofii Prawa i Filozofii Społecznej*, Vol 33, No. 4, 2022, p. 30.

<sup>41</sup> D. Dąbek & J. Zimmermann, *Decentralizacja poprzez samorząd terytorialny w ustawodawstwie i orzecznictwie pokonstytucyjnym*, in P. Sarnecki (Ed.), *Samorząd terytorialny. Zasady ustrojowe i praktyka*, SGH, Warszawa, 2005,

administrative functions derived from the state. When exercising its competences in the field of public administration, it acts in compliance with the common state legal order, and the effectiveness of its actions is also secured by state coercion. These statements are confirmed in Article 7 in connection with Article 2 of the Polish Constitution, in the light of which public authorities operate on the basis and within the limits of the law.<sup>42</sup>

Article 6 of the Municipal Self-Government Act implies that the scope of the municipality's activity includes all public matters of local importance, not reserved by statutes for other entities, including adjudication in individual cases on such an issue. The tasks of a municipality defined in this way include, as its own task, satisfying the collective needs of the community, and activity in this field includes, among others, meeting the basic living needs of residents (energy supply, water, sewage collection), care for spatial order, communication and public transport, environmental protection, but also supporting families and satisfying the health, cultural and educational needs of the residents.

In the light of Article 1 (1) and Article 11 (1) of the Municipal Self-Government Act the basic substrate of the municipality, its 'building blocks,' are the inhabitants, because they form the self-governing community.<sup>43</sup> They are responsible for making decisions in universal voting (by elections and referenda) or acting through municipality bodies. This means that municipality brings together the inhabitants of the area assigned to it, but on the other hand, the activities of its organs should be undertaken after learning the opinions and postulates of community members, considering their interests and goals. Therefore, municipality authorities should seek information on the needs of community members, and they should choose solutions of which they can reasonably claim that they serve them optimally.

A self-government community is perceived as an organiser of social life located closest to its members. Living in the same area usually results in certain circumstances uniting its inhabitants. The properties of the land (shaped, for example, by geographic location, climate, soil, management) have an impact on the occupation of its inhabitants; historical tradition and shared experiences bring a certain community of values important to people who make up a local government unit, but also an awareness of the needs and aspirations of these people. Therefore, the local authorities should seek information about the needs of community members, and in their choices, they should prefer those solutions that they can reasonably say that they optimally serve them.<sup>44</sup>

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pp. 9-10.

<sup>42</sup> As rightly noted by W. Skrzydło, in a democratic state governed by law, organs of public authority may be established only on the basis of the law, and legal norms must define their competences, tasks and procedures, thus setting the limits of their activity. These organs can only function within these limits. While the individual is free to act in accordance with the principle that what is not expressly prohibited by law is permitted, public authorities may only act where and insofar as the law authorizes them to do so, and the citizen may always demand that there be grounds for legal area in which the authority undertook specific activities. W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Wolters Kluwer Polska, Warszawa, 2013, p. 21). In a democratic state, the principle that everything that is not prohibited is allowed does not apply to entities of public authority; instead the opposite principle applies: everything that is not allowed is prohibited. M. Kamiński, *Mechanizm i granice weryfikacji sądownoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja*, C.H. Beck, Warszawa, 2016, p. 61; J. Alder, *Constitutional and Administrative Law*, Palgrave Macmillan Law Masters, London, 2005, p. 127; and: Polish Constitutional Tribunal, 1994, W 7/94. Those arguments serve as part of justification for declaring by administrative courts that resolutions proclaiming 'LGBT-free zones' were null and void.

<sup>43</sup> With the inhabitants having such a creative meaning for the municipality, it can be perceived as a legal entity of a corporate nature. Z. Niewiadomski, *Samorząd terytorialny*, in R. Hauser & Z. Niewiadomski & A. Wróbel (Eds.), *System prawa administracyjnego*, t. VI, Podmioty administrujące, C.H. Becki, Warszawa, 2011, p. 116.

<sup>44</sup> The instruments allowing to obtain this knowledge are forms of direct democracy, namely elections (of councilors, mayor, and village leader), commune referendum and other forms of obtaining information by the municipality author-

The static perception of a local government unit as an area for years inhabited by the same community of people requires correction in the modern world, where the ideas of free movement of people and capital are realised, and in a society whose members are increasingly mobile, they are associated with a specific place not for a lifetime, but for the time of study, work or performance of certain social tasks, and according to their needs they move to other places.<sup>45</sup>

In their daily activities, municipalities do not use forms of direct democracy, and exercise powers by acting through bodies. All matters within the scope of the municipality's activities belong to the jurisdiction of the municipality council<sup>46</sup> (Article 18 (1) of the Municipal Self-Government Act), which is a collegiate body, derived from elections. In Article 18 (2) of the Municipal Self-Government Act the legislator listed matters relating to the municipality, which fall within the exclusive competence of the council. They can be generally considered organisational and financial.

On the basis of statutory authorisations, in the form of resolutions, the municipality council may pass acts of local law (Article 41 (1) and Article 40 (1) of the Act), with the binding force limited to the boundaries of the municipality. The subject of this law can only be a matter that the legislator has explicitly transferred to the municipality, leaving it with a limited freedom as to the manner of its regulation.<sup>47</sup>

#### *4.2.3. Communes in Poland do not have a legal basis to adopt 'anti-LGBT' resolutions*

As far as 'anti-LGBT' resolutions are concerned, the Polish legal system does not create the explicit and concrete legal grounds authorizing the municipality council to adopt such resolutions. For this reason, municipalities, or more precisely their legislative bodies (councils), adopting anti-LGBT resolutions, referred to Article 18 (1) of the Municipal Self-Government Act. This provision does not mention delegating the authority to formulate statements on ideological and moral issues to the municipality council. Also, in the statutory catalogue of the matters that may be regulated by local law, there is no question of establishing any rules of morality and decency, which – due to the spatial boundaries of binding acts originating from local government – should be local in nature. For these reasons, administrative courts declared that 'anti-LGBT' resolutions are invalid since they are lacking the legal ground to adopt them.<sup>48</sup>

The municipality, as well as the state and all its organs, must respect the constitutional and statutory order, including the principle of legality which should be understood that public entities are not

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ities about the needs and preferences of various groups of commune residents.

<sup>45</sup> The above factors mean that more and more people do not live in one place, but divide their time between different places with which they feel equally connected not only because of their physical stay for some time a year and a certain emotional relationship to them, but also because in all these places they pay taxes, participate in social life and have their own expectations as to how the functioning of these communities will be organized. De lege lata, the problem is that the form of direct democracy, which boils down to participation in elections to the commune's representative bodies, can only be used by its registered inhabitants, and each natural person can have only one place of residence. This means that each adult citizen has an influence on appointing a representative body in only one municipality in the country, regardless of how closely he is associated with it.

<sup>46</sup> In municipalities with the status of cities—city council.

<sup>47</sup> These are: the internal structure of the municipality and auxiliary units, the organization of municipality offices and institutions, the rules of managing municipality property, the rules and procedure of using municipal public utility facilities and devices Municipal Self-Government Act, Art. 40 (2).

<sup>48</sup> e.g. Voivodeship Administrative Court in Lublin 2020, III SA/Lu 7/20, ruled that resolution is invalid since it is missing legal basis and in turn municipality violated the principle of legality prescribed under Article 7 of Polish constitution.



allowed to do everything, but only such activities as authorized by the law. This means that even under the law on petitions<sup>49</sup>, the municipal authorities cannot express their opinions on any freely chosen topic on their own behalf. If, however, they breached this rule, as was the case with the adoption of anti-LGBT resolutions, the resolution adopted by them will be the view of a particular political majority, which was so numerous that it was able to fill a council of a specific municipality, but not sufficiently numerous to push their agenda and amend the Constitution. Of course, people who are members of the municipality council and who would like to inform the community about their preferences in moral matters may do so by signing a joint statement. However, this will be an expression of their individual views, under which they should put their own name, without using the municipality council sign, which they may use only when they act based on statutory competences and within its limits. Regardless, it is doubtful that the statement written by a few or a dozen people, usually unknown outside the municipality community in which they operate, and being a manifestation of their moral preferences, would interest the public. The situation is different when these people make such a manifestation using the sign of the municipality council.

Not only state authorities are not entitled to push ideological agenda but are under obligation to counteract homophobic actions of public officials, and in the event of taking such actions—to efficiently remove their effects and eliminate the causes of.<sup>50</sup> They are responsible for omissions in this respect.

At this point, it is necessary to highlight the difference between declarations on “detering LGBT ideology” (“Local government free from LGBT ideology”), combating homophobia, and promoting non-discrimination attitudes by the local government community. The first action lacks legal basis and as such is illegal. The second action is mandated by law. In turn, the municipality’s actions in the affirmative sphere are legally indifferent. On the one hand, those activities as a rule are not mandated by law. On the other hand, they seem to be legal since the aim is to promote human rights. Namely, the activity aims at informing and promoting, not creating laws. The Polish example of such initiative is provided by the city of Gdańsk, where the “Model for Equal Treatment” was adopted and challenged by voivode before administrative court. The Provincial Administrative Court in Gdańsk, in the judgment of December 20, 2018, III SA/Gd 718/18, declared that the resolution was partially invalid for formal reasons. Nevertheless, some arguments are worth emphasizing as follows:

- a) validity of legal basis for adopting the resolution. The court argued that “a sufficient legal basis for the contested resolution, which is not an act of local law, is Article 18 (1) Municipal Self-Government Act and Article 18 (2) point 15 of the Municipal Self-Government Act, according to which the competence of the municipal council includes deciding on other matters reserved by statute to the competence of the municipal council.
- b) the city council’s directives (guidelines) which are making the mayor (city president) responsible for taking non-discrimination measures are legal. However, according to the court, the way the resolution was to be implemented was specified in too much detail, which led to a violation of Art. 18 (2) point 2 Municipal Self-Government Act.
- c) introducing into the resolutions “conceptual categories related to the phenomenon of discrimina-

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<sup>49</sup> In the Polish legal system, everyone is entitled to submit complaints and requests regarding the activities of public administration. Therefore, a citizen’s complaint about the mayor’s negligence in field of local morality cannot be ruled out. The situation caused by such a complaint is sensitive. On the one hand, the authority is under legal obligation to ‘respond’ to the complaint. On the other hand, is forbidden to make moral judgments. Therefore, competed authority should refer to the scope of the municipality’s activities. Formalism in this case protects against moralizing and, at the same time, illegal activities.

<sup>50</sup> *Aghdgomelashvili and Japaridze v. Georgia* (App. no. 7224/11) ECtHR (2020).

tion” and taking “from the achievements of social sciences and the jurisprudence of the Court of Justice of the European Union” is legal.

- d) the phenomenon of discrimination is nationwide, however, several problems diagnosed on a macro scale are also important for the local community (the city of Gdańsk). Under Polish law the legality of the resolution is conditioned by the ‘local’ character of the rulemaking activity.

Incidentally, it should be noted that the complainant in this case was the voivode. Therefore, we are dealing with a different situation than in the case of complaints against the so-called ‘anti-LGBT’ resolutions. Voivode is a supervisory body for local self-government, so ideally, the complaint should be based on the fact that the resolution is violating the legal order. However, from a practical perspective, due to the political status of the voivode,<sup>51</sup> by lodging the complaint with administrative court instrumentalization of supervision may have taken place. This would be evidenced by the initiation of administrative court proceedings not so much to remove an illegal act from legal order, but to annul the resolution that is not in line with the state policy implemented in a given period. The de facto ‘inaction’ of voivodes when it comes to challenging the declarations “detering LGBT ideology” (“Local government free from LGBT ideology”) by the local government seems to make this hypothesis more probable.

The case from Gdańsk is no exception here. Also, in court proceedings regarding declarations “detering LGBT ideology” (“Local government free from LGBT ideology”) an atypical arrangement arises in court.<sup>52</sup> Interestingly, the convergence of views on the legality of the complained resolutions occurred in the group composed of inter alia the prosecutor and the municipality, while the opposition included the complaining ombudsman and anti-discrimination organizations (e.g. Sings of Equality, Polish “Znaki Equality” Federation). In this context, it cannot be ignored that some judgments of provincial administrative courts declaring the invalidity of the so-called ‘anti-LGBT’ resolutions were appealed to the Supreme Administrative Court by a prosecutor of the National Prosecutor’s Office<sup>53</sup>.

#### 4.3. Whether the content of ‘anti-LGBT’ resolutions violate Polish and/or European law?

The analysis shows that, as a rule, Polish law does not provide for general competence of public authorities to express opinions in matters of local decencies, unless there is an explicit basis for the right to refer to the issue of morality in connection with the protection of other socially relevant values. However, what makes cases concerning complaints about the so-called anti-LGBT resolutions interesting is that despite the lack of a legal basis for adopting them, the courts undertook a review of actions in terms of their content and discriminatory nature, although due to the lack of a legal basis for the challenged action, it was mandated for courts to declare such a resolution null and void.

What Polish administrative courts have done was of the educational importance and as a such serves as a tool for building the legal awareness of the society and may be seen as precaution for

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<sup>51</sup> Pursuant to Article 22 of the Act of January 23, 2009, on the voivode and government administration in the voivodeship, the voivode is responsible for implementing the policy of the Council of Ministers in the voivodeship. The literature indicates that from a practical point of view, policy acts are de facto binding. M. Pacak & K. Zmerek, *Ustawa o wojewodzie i administracji rządowej w województwie. Komentarz*, LexisNexis 2013, Art. 22, para. 3. It is the voivode who adapts the government’s policy to local (provincial) conditions. P. Sadowski, *Relacje administracji samorządowej i rządowej w świetle kompetencji marszałka województwa i wojewody*, Przegląd Prawa Publicznego, No. 5, 2019, p. 80.

<sup>52</sup> The above findings were based on the analysis of case law and data provided to the ‘Atlas of Hate’.

<sup>53</sup> Jędrzejowska-Schiffaue & Łączak 2022, p. 202.

other municipalities. So, the effects of possible implementation<sup>54</sup> of the legal basis for so-called anti-LGBT resolution (*e.g.*, by amending to Municipal Self-Government Act) were assessed by the judiciary in an anticipatory manner. That being said the answer seems to be unequivocal. Such a resolution would still be illegal. Negative premises for the adoption of the resolution stems from both national and European law.

On the national plate<sup>55</sup> the so-called anti-LGBT resolutions violated:

- a) the principle of ideological neutrality (impartiality) of public authorities (Article 25 (2) of the Constitution of the Republic of Poland);
- b) freedom of conscience and religion of individuals (Article 53 of the Polish Constitution);
- c) the principles of respecting the dignity of the human person (Article 30 of the Polish Constitution);
- d) the principle of equality before the law (Article 32 of the Polish Constitution);
- e) the principles of a democratic state ruled by law (Article 2 of the Constitution of the Re-public of Poland).

However, we must also observe the supranational aspect of the case. The states parties of the Convention undertook obligation to ensure to every person subject to their jurisdiction the rights and freedoms specified therein, including respect for private and family life (Article 8(1)), freedom of thought, conscience, and religion (Article 9(1)), to freedom of expression (Article 10(1)). The exercise of these rights and freedoms is to be ensured without discrimination on grounds such as *e.g.*, sex, race, political or other opinion, (Article 14).

The European Union, of which Poland has been a member since 1 May 2004, has also acceded to the Convention, within the limits of its competences defined in the Treaties. Fundamental rights, guaranteed in the Convention and resulting from the constitutional traditions common to the Member States, were recognized by the European Union as part of EU law as general principles of law (Article 6(2) and (3) of the 1992 EU Treaty).

In the light of the EU Charter of Fundamental Rights of 7 December 2000, which has the legal force of the Treaties, human dignity is an inviolable value that requires respect and protection (Article 1). The Charter guarantees everyone the right to respect for private and family life, home and communications (Article 7).

The European Union, based on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including the rights of persons belonging to minorities, as values common to the Member States in a society based on pluralism, non-discrimination tolerance, justice, solidarity and equality between women and men, declares to provide its citizens with an area of freedom, security and justice without internal borders, in which the free movement of people is guaranteed. Implementation of the free movement of people as one of the four fundamental freedoms in the EU<sup>56</sup>, as well as declared in Art. 15 of the Charter, the right to

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<sup>54</sup> The symptomatic phenomenon of ‘correcting’ judicial decisions by the legislator has been identified based on the rights of non-heteronormative persons in the context of the law of entering into marriage in the USA which was analysed by S. Zschirnt, *Gay Rights, the New Judicial Federalism, and State Supreme Courts: Disentangling the Effects of Ideology and Judicial Independence*, Justice System Journal, Vol. 37, Nov. 4, October – December 2016, p. 348. See also Voivodeship Administrative Court in Kielce, 2020, II SA/Ke 382/20.

<sup>55</sup> Jędrzejowska-Schiffaue & Łączak 2022, pp. 200-201.

<sup>56</sup> Also Directive 2004/38/EC on the legal right of the Union and their family to move and reside freely within the

take up work and pursue a freely chosen or accepted occupation (paragraph 1), the freedom to seek employment, to pursue work, to exercise the right of establishment and to provide services in any Member State (Article 15(2)) is possible on a non-discriminatory basis environment. In Art. 21 sec. 1 of the Charter prohibits any discrimination against subjects subject to EU law, in particular on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

The resolutions in question not only limited the right to free movement of EU citizens or were a tool of discrimination in employment but also operated on a quasi-censorship mechanics. Against this background case-based argumentation may serve as a subsidiary tool for demonstrating the lack of legality of the actions of some Polish local governments. On the one hand, the mere announcement of the exclusion of a person or a specific group of people from the community is not as clear a manifestation of discrimination as the refusal to issue an ID card or passport due to the sexual orientation of the parents.<sup>57</sup> Nevertheless, the effect is the same. The message from public authorities is: ‘You are not welcome.’ This, however, undoubtedly constitutes a publicly made announcement of discrimination at the recruitment stage of employment.<sup>58</sup> It should be emphasized that municipalities are employers.<sup>59</sup> In turn, the fact that a given commune was not conducting any recruitment at a given time has no legal significance.<sup>60</sup> On the other hand, deterring only selected worldviews while preferring others leads to violation of freedom of expression.<sup>61</sup>

## 5. Public administration in relation to LGBT community in Poland

As it was mentioned above Polish administrative courts did not limit their arguments to domestic law—although there were grounds for doing so. Administrative courts boldly referred to the

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territory of a Member State. See: Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, [EU:C:2002:493].

<sup>57</sup> Case C 490/20, *V.M.A. v Stolichna obshtina, rayon „Pancharevo“*, [EU:C:2021:1008]. In recital 64, the CJUE indicated that: “[...] for the child, the principle of non-discrimination, which requires that that child is to be guaranteed the rights set forth in that convention, which include in Article 7 the right to be registered immediately after birth, the right to a name and the right to acquire a nationality, without discrimination against the child in that regard, including discrimination on the basis of the sexual orientation of the child’s parents.” Court also argue as following: “It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected.” Case 673/16, *Coman and Others*, [EU:C:2018:385], para. 47.

<sup>58</sup> Case C507/18, *NH v. Associazione Avvocatura per i diritti LGBTI*, [EU:C:2020:289]. In recital 58, the CJUE indicated that: “[...] the concept of “conditions for access to employment ... or to occupation” in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.”

<sup>59</sup> Supreme Administrative Court, 2022, III OSK 4028/21.

<sup>60</sup> A. Tryfonidou, *Case C-507/18 NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford: Homophobic speech and EU anti-discrimination law*, *Maastricht Journal of European and Comparative Law*, Vol. 27, No. 4, September 2020, p. 517.

<sup>61</sup> *Macaté v. Lithuania* (App. no. 61435/19) ECtHR (2023). To the extent that the so-called anti-LGBT resolutions limited access to information in schools seeking to influence the curriculum.

provisions of the Constitution of the Republic of Poland<sup>62</sup>, EU law<sup>63</sup>, the jurisprudence of the CJEU<sup>64</sup> and the ECtHR.<sup>65</sup> This proves that the problem of ‘anti-LGBT’ resolutions was not only Polish (national).<sup>66</sup> The municipalities actions were in fact a declaration of freedom not so much ‘from’ ideology, but paradoxically from the basic principles anchored in the legal order.

Subsequent studies confirm that the issue of discrimination against the LGBTQ community is not a Polish specialty. However, the Polish experience can serve as a negative example. All actions of state authorities, whether individual or general, which would result in the exclusion of a person from the community are illegal. On the bright side, one can get the impression that, paradoxically, the actions of the Polish local government accelerated the process of formalizing the protection of the rights of LGBT people at the EU level.

Polish experience also proves that the EU is moving away from the market model in the area of human rights. Just a few years ago such a shift was not obvious at all.<sup>67</sup> Nevertheless, the main argument for the protection of the rights of LGBTQ people remains the free movement of people<sup>68</sup>, which is also confirmed by the Romanian<sup>69</sup> and Bulgarian<sup>70</sup> cases. Free movement is guaranteed to everyone, regardless of their identity. Public authority in the EU cannot create barriers, even if only of a political nature. This is also the case under Article 8 of the Convention.<sup>71</sup>

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<sup>62</sup> In the opinion of the courts, the introduction of resolutions constituted a violation of the right to education. Article 70(1) and Article 73 of the Constitution; and a restriction of freedom of expression Article 54(1) of the Constitution. Judgment of the Voivodeship Administrative Court in Gliwice, 2020, III SA/GI 15/20; and the right to bring up children in accordance with one’s own beliefs. Article 48 of the Constitution. Judgment of the Provincial Administrative Court in Kraków, 2022, III SA/Kr 975/21.

<sup>63</sup> Voivodeship Administrative Court in Warsaw, 2020, VIII SA/Wa 42/20: the appealed resolution establishing an LGBT-free zone violates Art. 21 sec. of the Treaty on the Functioning of the EU by limiting the freedom of movement, by discouraging EU citizens who identify as LGBT from staying in the commune. Also: Supreme Administrative Court, 2022, III OSK 4240/21.

<sup>64</sup> e. g., Supreme Administrative Court, 2022, III OSK 4028/21—in its argumentation, refers to: Case 507/18, *NH v. Associazione Avvocatura per i diritti LGBTI*, [EU:C:2020:289].

<sup>65</sup> For example: Supreme Administrative Court, 2022, III OSK 4240/21, indicated: *Handside v. Great Britain* ECtHR (1976)—in the case of does not cover the situation of expressing a worldview by a commune. Similarly Supreme Administrative Court, 2022, III OSK 4041/21.

<sup>66</sup> Supreme Administrative Court, 2022, III OSK 4041/21: which indicated that Poland is a party to a number of international agreements on human rights, including the ECHR and the EU Charter of Fundamental Rights, it has also transposed EU directives against discrimination in employment, including on grounds of sexual orientation. Therefore, public authorities are legally obliged to protect the rights of Polish citizens, in particular those belonging to various types of minorities.

<sup>67</sup> S. Douglas-Scott, *The European Union and Fundamental Rights*, in R. Schütze & T. Tridimas (Eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I*, Oxford University Press, Oxford, 2018, p. 419.

<sup>68</sup> Jędrzejowska-Schiffaue & Łączak 2022, p. 189: “The absence of protection of sexual minorities in salient socio-economic areas is also partly compensated by the safeguards provided under the freedom of movement within the EU territory.”

<sup>69</sup> Case 674/16, regarding marriages.

<sup>70</sup> Case 490/20, regarding parenthood and child right who is minor and EU citizen.

<sup>71</sup> *Novruk and Others v. Russia* ECtHR (App. no. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14) (2016), § 83; *Taddeucci and McCall v. Italy* (App. no. 51362/09) ECtHR (2016), § 83.



## 6. Restitution of legality in field of LGBTQ right – mechanics and model

The legal system is composed of various tools aimed at coping with the discriminatory actions of public authorities. Violation of the principle of non-discrimination is sanctioned in legal or financial forms. The sanctions also take on an informal character—criticism of public, international organizations, media, and experts.

Adoption so-called LGBT-free zones, triggers the reaction of civil society institutions, ombudsman, national courts, EU institutions (European Parliament,<sup>72</sup> European Commission<sup>73</sup>), Council of Europe,<sup>74</sup> or even foreign partners, including twinning programs.<sup>75</sup> The sum of these activities over the years has brought an improvement in the situation. What is more, in the agreement with the European Commission under the Recovery and Resilience Plan, the Polish government undertook the obligation to respect the principle of non-discrimination.<sup>76</sup> In legal paper it is impossible to assess which of the measures were more effective. It seems that in this case a network approach should be used.

The activity of non-governmental organizations, hosts of cities opposing declarations of freedom from LGBT and the media resulted in assigning a high rank to the problem. Without the ombudsman, court proceeding would be inadmissible. As for the courts, let us remember that some of them rejected the complaints, but the Supreme Administrative Court acted as an advocate of the rule of law. The result of these actions was the annulment of the challenged resolutions. Yet legal actions are of an individual nature. They concern a specific local government unit and a specific resolution (micro scale). It must be however stressed that courts must have specific tools to act as promoters of non-discrimination. Therefore, the regulation at the EU level is absolutely necessary.<sup>77</sup>

On a macro scale, the dynamics of the analyzed process followed slightly different paths. A court ruling may establish an order of conduct, but only with respect to a specific municipality, i.e., the one whose resolution was challenged before administrative court. The courts however have created a pattern of illegal behaviour. Namely the presumption of lawfulness of resolutions has been weakened by the power of the court's authority. Having an argument based on court judgments, the Ombudsman could act against the municipalities. In this case, he petitioned the authorities to reverse the resolutions on their own.<sup>78</sup> A similar modus operandi was adopted by NGOs.

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<sup>72</sup> European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)). T.3.: “Strongly condemns [...] as well as the recent declarations of zones in Poland free from so-called ‘LGBT ideology’, and calls on the Commission to strongly condemn these public discriminations”.

<sup>73</sup> On 15.07.2022 European Commission launched infringement procedure against Poland [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3668](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668) (7 November 2023).

<sup>74</sup> Ibid

<sup>75</sup> E. Kalitta, *Strefy wolne od LGBT a aksjologiczny aspekt partnerstwa miast*, Samorząd Terytorialny, No. 11, 2021, pp. 26-33; Z. Wanat, *Polish towns pay a steep price for anti-LGBTQ views*, Politico, <https://www.politico.eu/article/poland-lgbtq-steep-price/> (7 November 2023).

<sup>76</sup> Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, Brussels, COM(2022) 268 final.

<sup>77</sup> e.g. Regulation on the recognition of parenthood between Member States. Document Ares(2021)2519673; Jędrzejowska-Schiffaue & Łączak 2022, p. 198. “[...] standards in Central and Eastern Europe has shown that the Union is to a large extent powerless in the face of a defiant Member State refusing to take the values of Article 2 TEU seriously.”

<sup>78</sup> Detailed information is available on the website of the Polish Ombudsman. <https://bip.brpo.gov.pl/pl/content/rpouchwaly-anty-lgbt-samorzady-odpowiedzi-kolejne> (7 November 2023).

The third effect was caused by the actions of EU<sup>79</sup> institutions and supranational initiatives (e.g., European Economic Area Financial Mechanism<sup>80</sup>), which are not in power to declare that such resolutions are null and void. Interestingly, the EU institutions acted prior to the judgments issued by Polish courts.

The sum up these activities resulted in withdrawal by some local governments from previous declarations. Local authorities have realized that it is not profitable<sup>81</sup> to maintain the discriminatory status quo.<sup>82</sup>

## 7. Summary. Forecast for the future

The practice has shown that despite extensive guarantees of civil rights and freedoms in a country declaring ideological neutrality, no one else but the public authorities recognized that they are competent to declare the lack of acceptance for certain people due to their sexual preferences and way of life. It also showed that the protection of violated and endangered values can be ensured using instruments available in the national legal order in the form of court-administrative verification. It seems that system at least worked. Administrative courts granted legal protection, some local governments withdrew from previous declarations and the European Commission on 26.01.2023 closed the infringement procedure against Poland regarding violation of the principle of sincere cooperation by Poland for failing to fully answer questions on the so-called 'LGBT ideology free zones' resolutions (INFR(2021)2115).<sup>83</sup> Does it mean that the issue discussed in this article is no longer relevant? Well, from a legal perspective, new challenges are on the horizon. Firstly, we must remember that not all local governments withdrew the declarations (resolutions). There is still much work to be done in this area. Especially the public law academia must consider how to restore legality as quickly as possible. Secondly, the new challenges for LGBT rights arrived. These solutions were modelled on a disturbing legislative and administrative trend recognized, among others, in some US states or in Russian Federation.

Additionally, for some time, efforts had been made to ensure that some provisions of the so-called 'anti-LGBT resolutions' become part of the legal order.

Firstly, in October 2021, the Sejm of the Republic of Poland received a bill "Stop LGBT"<sup>84</sup> promoted by Kaja Godek, providing for far-reaching restrictions on the rights of LGBT persons. It assumes, among others: the prohibition of organising 'equality parades,' questioning marriage as a relationship between a man and a woman, promoting same-sex relationships, extending the defini-

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<sup>79</sup> Jędrzejowska-Schiffaue & Łączak 2022, p. 198: "On 27 May 2020 the Commission addressed a letter to five local government authorities [...] The EC called on the local authorities to ensure compliance with EU law and to ensure non-discriminatory access to activities financed by cohesion policy".

<sup>80</sup> R. Savage, *Norway, Iceland, Lichtenstein cancel grant to Polish 'LGBT-free zone'*, Reuters, <https://www.reuters.com/article/us-poland-lgbt-norway-trfn-idUSKBN2A22MD> (7 November 2023).

<sup>81</sup> Jędrzejowska-Schiffaue & Łączak 2022, p. 199. "The financial sanction proved to be effective and some local governments have already repealed the resolutions in question."

<sup>82</sup> Which is documented by press reports: A. Karwowska, „*Strefy wolne od LGBT*” bez pieniędzy z Unii, Wyborcza, <https://wyborcza.pl/7,75398,29769197,zadnych-pieniedzy-bez-poszanowania-wartosci-tzw-strefy-wolne.html> (7 November 2023).

<sup>83</sup> Information available via this search form: [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang\\_code=en](https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en) (7 November 2023).

<sup>84</sup> *Bill "Stop LGBT" in the Sejm. MEPs debate during first reading*, PolishNews, <https://polishnews.co.uk/bill-stop-lgbt-in-the-sejm-meps-debate-during-first-reading/> (7 November 2023).

tion of marriage to persons of the same sex, promoting the definition of gender as an independent phenomenon from biological conditions. Unlike the commented resolutions, this act would have binding force throughout the country and must be implemented by the authorities.

Secondly, in May 2023, the Madam Speaker (Marshall) of the Sejm and the leader of the then ruling party announced a law aimed at modifying the rules under which NGOs may operate in schools. The proposal was about preventing the 'exualization of children'. This initiative de facto means the introduction of one of the elements of anti-LGBT resolutions to the statutory level. Interestingly values such as inclusion and diversity are also 'taken out of schools' in the USA, e.g. in the state of Florida.<sup>85</sup>

On October 15, 2023, general elections were held in Poland. As of the date of submitting the article, everything indicates that the government will be taken over by the democratic opposition (this is how a group of parties other than Law and Justice and the United Right describe themselves). The parties forming the government declare that they will introduce mechanisms for restoring the rule of law in Poland including the equality and non-discrimination laws. The basic area of regulation will concern the judiciary. Nevertheless, we cannot forget about the rights of LGBT people and the analyzed resolutions. One of the lessons of the 2015-2023 period would be the empowerment of the nodes within the network aimed at advocating for human rights. The atomized actors (private, official, and courts) had the same goal which was the restoration of human dignity. These mechanisms should be strengthened so that in the future no authority publicly declares the exclusion of anyone from the community.

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<sup>85</sup> N. Nehamas, *DeSantis Signs Bill Defunding Diversity Spending in State Schools*, The New York Times, <https://www.nytimes.com/2023/05/15/us/politics/ron-desantis-dei-bill.html?smid=nytcore-ios-share&referringSource=articleShare> (7 November 2023).