

UCL
School of Slavonic and East European Studies

**LAWS IN ACTION OR ACTION WITHOUT LAWS?
UNDERSTANDING THE LEGAL AND POLICY
RESPONSES TO HATE CRIMES BASED ON SEXUAL
ORIENTATION IN POLAND**

Piotr Godzisz

A thesis submitted in fulfilment of the requirements for the degree of
Doctor of Philosophy

London
December 2017

DECLARATION

I, Piotr Godzisz, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed _____

ABSTRACT

Between 2005 and 2015 the Polish government stepped up efforts to counter violence based on sexual orientation, but the legal framework remained unchanged: Unlike in the case of racist violence, the homophobic motivation of a crime does not attract a higher penalty. Recognizing sexual orientation hate crime in some areas (e.g. police training) but refusing to legislate is unique in Europe, yet has not, so far, been an object of academic interest. For this reason, this dissertation seeks to understand why the passage of legislation providing higher penalties for sexual orientation hate crimes in Poland proved more difficult than for other forms of bias crimes. The thesis finds that the joint efforts of nongovernmental and international organizations resulted in the improvements in the handling and monitoring of hate crime. These actors, however, were too weak to garner the political support for a change in the law. The key reasons for this include weak external conditioning, suboptimal advocacy strategies, illiberal politicians, and the historicism of laws. The study uses a multi-method approach, with Poland selected as the key case study and additional insights gained through a quantitative comparative analysis of Council of Europe states. Data sources include legal and policy texts, interviews and observation. The findings are interpreted through a combination of social movement outcome theories in the context of Europeanization.

ACKNOWLEDGEMENTS

I would like to thank:

- my primary academic advisor – Dr Richard Mole – for his guidance, patience, timeliness, thoroughness, understanding, flexibility and availability;
- my secondary academic advisor – Dr Ronan McCrea – for his comments on the draft chapters;
- Dr Mark A. Walters – for his selfless help, guidance and comments on the draft chapters;
- Joanna Perry – for supporting my professional and personal growth;
- Dr Jasna Magić – for the bi-weekly writing support video calls;
- Jacek Mazurczak – for the many discussions about my theoretical approach;
- my interviewees – for agreeing to participate in the research;
- my friend and flatmate – Agnieszka Jasik, as well as other friends, for their patience and understanding;
- Aleš Giao Hanek, Dr Azra Junuzović and other colleagues at ODIHR – for supporting me during my internship there;
- colleagues from Lambda Warsaw, Campaign Against Homophobia and other organizations – for their support and friendship;
- Freddy Bonnard-Braunthal and Bonnard Trust trustees – for providing funding for my research;
- Professor Izabela Malinowska, Dr Kateřina Kolářová and Dr Tomasz Słomka – for their support during the PhD application process;
- SSEES administrators – for their helpfulness, particularly during my stay abroad;
- finally, my parents Krystyna and Kazimierz Godzisz and aunt Barbara Godzisz – for their love and support;

as well as many others.

IMPACT STATEMENT

This dissertation sought to understand why the passage of legislation providing higher penalties for sexual orientation hate crimes in Poland proved more difficult than for other forms of bias crimes. As the first theoretical work focused on this problem, it has the potential to impact future scholarship on this area. In fact, published outputs from this project (e.g. Godzisz 2015; Godzisz and Pudzianowska 2016) have already informed some studies (e.g. Schweppe, Haynes, and Walters 2018; Wójcik 2016).

Apart from scholarship, the findings of this research have an impact on policy and practice. Having identified several issues impeding the effectiveness of the anti-hate social movement, as well as several aspects that were conducive for the change in the policy area, it offers suggestions for future advocacy work. I believe that the number one priority for the movement should be to define basic concepts (hate crime and hate speech), craft new strategies, establish dedicated structures and prioritize claims. Next, the LGBT movement needs to prioritize hate crime advocacy vis-à-vis other collective claims, particularly recognition of same-sex unions. Ideally, advocacy in both areas should be separated. Instead, hate crime advocacy efforts should be linked with advocacy for better responses to racist and xenophobic crimes, perceived as 'legitimate' and rarely contested. Ideally, anti-LGBT hate crime issues would be incorporated ('hidden') within a broader strategy to respond to hatred.

As there is little prospect for the change of law under the PiS government, the LGBT movement should use this time to mobilize and 'get ready' when political opportunities appear. Advocates should devise an action plan inclusive of not only goals, but also information politics. With support of legal scholars, advocates should prepare a new draft amendment accounting for the doctrinal critique of previous legislative initiatives. To provide evidence for the draft amendment, there is a need to collect strategic cases. For that, there is a need to increase efforts to encourage victims to report and share their testimonies, and to raise awareness of hate crime among the public, to build sympathy for the initiatives to change the law.

Finally, the last implication from this research concerns ensuring that whatever has been achieved over the past years in countering hate crime is not undermined by current and future governments. Activists, researchers and transnational organizations should think of ways of safeguarding the progress that was made, considering shrinking resources and an increasingly hostile political environment.

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LIST OF ABBREVIATIONS

ADL – Anti-Defamation League

CAT – Committee against Torture

CEDAW – Committee on the Elimination of Discrimination against Women

CEU – Council of the European Union

CoE – Council of Europe

CPK – *Centrum Praw Kobiet* (Centre for Women's Rights)

CRC – Committee on the Rights of the Child

CSO – civil society organization

EC – European Commission

ECHR – European Convention on Human Rights

ECRI – European Commission against Racism and Intolerance

ECtHR – European Court for Human Rights

EU – European Union

FKPR – *Federacja na Rzecz Kobiet i Planowania Rodziny* (Federation for Women and Family Planning)

FRA – European Union Agency for Fundamental Rights

FYR Macedonia – Former Yugoslav Republic of Macedonia

HCRW – Hate Crime Reporting Website

HFPC – *Helsinki Fundacja Praw Człowieka* (Helsinki Foundation for Human Rights)

HRC – Human Rights Council

HRCtee – Human Rights Committee

HRW – Human Rights Watch

ICCPR – International Covenant on Civil and Political Rights

IGO – intergovernmental organization

ILGA – International Lesbian, Gay, Bisexual, Trans and Intersex Association

ILGA-Europe – European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association

INHS – International Network for Hate Studies

ISHR – International Service for Human Rights

KPH – *Kampania Przeciw Homofobii* (Campaign Against Homophobia)

LGB – Lesbian, gay and bisexual

LGBT – Lesbian, gay, bisexual and transgender

LGBTI – Lesbian, gay, bisexual, transgender and intersex

LGBTQ – Lesbian, gay, bisexual, transgender and queer

MNW – *Stowarzyszenie Miłość Nie Wyklucza* (Love Does Not Exclude Association)

MoI → MSW

MoJ → MS

MS – *Ministerstwo Sprawiedliwości* (Ministry of Justice)

MSW – *Ministerstwo Spraw Wewnętrznych* (Ministry of Interior)
MSWiA – *Ministerstwo Spraw Wewnętrznych i Administracji* (Ministry of Interior and Administration)
NGO – nongovernmental organization
ODIHR – Office for Democratic Institutions and Human Rights
OHCHR – Office of the High Commissioner for Human Rights
OSCE – Organization for Security and Cooperation in Europe
PG – *Prokurator Generalny* (Prosecutor General)
PiS – *Prawo i Sprawiedliwość* (Law and Justice)
PO – *Platforma Obywatelska* (Civic Platform)
PTPA – *Polskie Towarzystwo Prawa Antydyskryminacyjnego* (Polish Society for Antidiscrimination Law)
RQ – Research question
SIP – *Stowarzyszenie Interwencji Prawnej* (Association for Legal Intervention)
SLD – *Sojusz Lewicy Demokratycznej* (Alliance of the Democratic Left)
SOC – *Sarajevski Otvoreni Centar* (Sarajevo Open Centre)
SOGI – Sexual orientation and gender identity
UEFA – Union of European Football Associations
UK – United Kingdom of Great Britain and Northern Ireland
UN – United Nations
US – United States of America
WW2 – Second World War

1

INTRODUCTION

*'Hate crime is such a big problem.
Good that we don't have it in our region.'*

THESE are the exact words I heard from a public prosecutor from one of the Central and Eastern European countries during an international hate crime training session in 2015. She spoke in good faith, but her words were symptomatic of how misunderstood the issue of hate crime often is. Violence based on sexual orientation is prolific in Europe. Data gathered by intergovernmental human rights bodies are alarming. The survey documenting how LGBT¹ people in Europe experience bias-motivated violence and harassment, conducted by the EU Fundamental Rights Agency (FRA) (2013)² found that, in the five years preceding the research, over a quarter (26 per cent) of all respondents had been attacked or threatened with violence. Successive annual reports of the OSCE Office of Democratic Institutions and Human Rights (ODIHR) (n.d.) also confirm that the problem of anti-LGBT hate crime persists across the OSCE region. For example, in 2014, civil society organizations reported 478 cases of violent attacks, 101 threats and 22 attacks targeting property. At the same time, the cases gathered by civil society organizations are just the tip of the iceberg, as most attacks are never reported to law enforcement agencies. For example, only 17

¹ In this thesis, I am concerned with violence based on sexual orientation. To describe it, I use the terms 'sexual orientation hate crime' (or 'hate crime based on sexual orientation'), interchangeably with 'anti-LGB hate crime'. Scholars, policy makers and practitioners use a variety of terms to refer to people who may be targets of violence because of their (perceived) diverse sexualities. The acronym 'LGB' stands for lesbians, gay men and bisexual people. While this research is concerned with sexual orientation (anti-LGB) hate crime, I recognize that, increasingly more often, transgender (T), queer (Q), intersex (I) and asexual (A) people are included in the acronym, making it 'LGBT', 'LGBTQ', 'LGBTQI' or 'LGBTQIA'. In Poland, for example, organizations at the forefront of the movement identify themselves as LGBT rights organizations; this acronym is also commonly used in the media and political debates. The European Commission, on the other hand, adopted the LGBTI abbreviation (for example, in the *List of actions by the Commission to advance LGBTI equality* (European Commission 2015b). Binnie and Klesse (2012) write about the 'LGBTQ politics' in Poland. When citing other studies and primary sources, I use the preferred terminology of the author(s)/speaker(s), which means that I refer to, *inter alia*, 'anti-gay' or 'homophobic' violence or 'LGBT rights' and 'LGBT movement'. Therefore, the use of various acronyms is not a sign of inconsistency, but rather an attempt to reflect the complex and sometimes confusing ways in which these categories are used in academic, activist and policy contexts.

² I use the American Sociological Association referencing system, which does not use *ibidem* for repeated citations (American Sociological Association 2010:49).

per cent of victims in the FRA survey (2013) reported the incident. In consequence, victims suffer in silence, without access to justice or support services.

Research on anti-LGB hate crime as a policy issue across most of Europe is embryonic. In the context of North America and the United Kingdom (UK), the question of 'how the concept of hate crime emerged, how its meaning has been transformed across multiple segments of the policy domain, and how it became institutionalized' (Jenness and Grattet 2001:7) has been studied for decades. In Europe, where the concept has arrived only recently, the number of countries introducing hate crime laws grows much more quickly than the number of academic studies on the issue. A decade ago, only 10 out of the then 25 EU member states classified homophobic intent as an aggravating circumstance in penal law (FRA 2008:126). In 2015, this number rose to 17 out of 28 countries (ILGA 2016:47–48). The patterns of adoption of the law across the continent are confusing, and cannot be explained by the simple East/West divide. For example, sexual orientation is recognized as protected status in Sweden and Lithuania, i.e. one of the most and one of the least LGB-accepting nations in the EU, according to the newest Eurobarometer (European Commission 2015a), but it is not recognized in Germany or Ireland, both of which introduced marriage equality. Inconsistencies exist also in how laws are enforced. In 2014, 12 of the 57 OSCE participating states reported statistics on anti-LGBT hate crimes to ODIHR. Among them was Poland, a state which does not recognize sexual orientation as a protected ground in the law and has a high level of societal homophobia.

To move the academic and policy debate on hate crime forward, we ought to consider why we encounter such different national patterns; why and when politicians pass hate crime laws; and what makes the country go beyond that and ensure that laws do not stay on paper, but are used in action. Studying Poland in depth, and putting it in the context of other countries in Europe, can provide some answers. This jurisdiction is unique in that homophobia is rampant in many sectors of the society, anti-gay rhetoric is used by mainstream politicians, yet the police collect data on hate crime and receive training to recognize bias motivation of a crime. While most countries in the region have passed anti-LGB hate crime laws, Poland's LGBT movement has unsuccessfully advocated for it for over a decade. In the meantime, the government pledged to change the law in the forum of the United Nations Human Rights Council, but failed to act on its promises. In this sense, Poland's approach to hate crime is not a simple story of refusal to engage with anti-LGB hate crime at all; rather, it is a complex pattern of movement on some aspects, but refusal to move on others, a pattern that is influenced by complex interactions between internal and external factors. To make sense of this confusing picture, we need to move beyond the familiar refrain 'Poland-is-Catholic-no-wonder-it-is-homophobic' (Graff 2006:435). Instead, as Verloo and Lombardo (2007:30–31) suggest, policy analysis 'should aim at grasping the nuances and eventual inconsistencies of policy discourses, rather than over-simplifying conclusions'.

The aim of this study is thus to explore and interpret the internal and external factors that condition the legal and policy response to anti-LGB hate crime in Poland. Specifically, the objectives are:

- 1) to understand the absence of sexual orientation in hate crime law, while at the same time understand the presence of sexual orientation in policing, prosecuting and monitoring of hate crime in Poland,
- 2) to show how the mobilization of the Polish LGBT movement, as well as other social, political, historical and cultural factors impact the legal and policy responses to hate crime,
- 3) to understand the role of international organizations in developing national measures aimed at protecting LGB people from violence in Poland and other European countries,
- 4) to show the arguments used by proponents and opponents of adding sexual orientation to the list of protected grounds in hate crime legislation,
- 5) to understand hegemonic discourses on legitimate victim categories in hate crime laws.

The key argument of this dissertation is that Poland's approach to sexual orientation hate crime in law and policy is shaped by a range of internal and external factors, some of which foster and some of which impede the recognition of LGB people as deserving of hate crime law protection. Externally, there is no international requirement to recognize sexual orientation as an aggravating factor in committing a crime. Internally, the political costs of passing such laws were judged as exceeding the benefits of complying with soft international recommendations. The LGBT movement mobilization was insufficient to gather sympathy for the change of the law among key political decision makers, who saw legislative initiatives to recognize sexual orientation as a protected status as ideological and incongruent with Polish social and legal norms. Conversely, recognition of homophobia as a motive of a crime in some policy areas was possible because of the stepping up of efforts to fight racism with the support of ODIHR and other organizations and the subsequent adoption of the hate crime concept, and was almost unnoticed by critics.

Organization of the thesis

The thesis consists of 11 chapters. Following the introduction in Chapter 1, Chapter 2 sets out the conceptual framework for studying anti-LGB hate crime laws and policies and provides a review of the extant literature on homophobia, anti-LGB violence, political aspects of hate crime laws, victim categories (with special attention to LGB people) and countering hate crime in the context of international human rights framework. Following the literature review, the chapter establishes a set of specific research questions (RQ), which guide the original research in Chapters 5-10.

Chapter 3 establishes the theoretical framework for studying the development of hate crime laws and policies in Poland. The main explanatory frame is provided by theories looking at social movement outcomes in the context of the Europeanization of Central and Eastern Europe.

Chapter 4 sets out the methodological approach, which combines action research with the grounded theory approach to the coding of data. The chapter presents the qualitative data

collection and interpretation tools and steps and explains why the mixed-method approach is optimal for the identified research objectives. Methodology of quantitative research is presented in chapter 6.

Chapter 5 is the first substantive chapter. In response to the research questions RQ1 and RQ2, the chapter is concerned with political, social and cultural factors that influence the attitudes towards LGB people in Poland and explains the political context of LGB advocacy in Poland. Specifically, the chapter considers how the ethnic and religious makeup of Poland's society, public attitudes to homosexuality, the emergence of LGBT identity politics in the beginning of 2000s, and the partisan and electoral context influenced the discourse on LGBT rights and, in consequence, anti-LGB hate crime laws. Here, I begin to make the case for seeing hate crime separately from other LGBT claims (particularly recognition of same-sex unions) in both research and policy.

Chapter 6 provides a comparative analysis of the proliferation of the sexual orientation hate crime norm across Europe. In response to the questions RQ2, RQ4 and RQ5, the aim of this chapter is to illustrate the Polish situation more clearly through a comparative analysis across almost fifty different jurisdictions. Both quantitative and qualitative methods of inquiry are used to explain the presence/absence of sexual orientation hate crime laws, as well as enforcement of those laws. The chapter considers how factors relevant for Poland, such as EU integration, public opinion and income, condition national responses. The comparative analysis begins to show how the process of Europeanization affects European states, including Poland. The analysis of how Europeanization of hate crime affected Poland is further continued in chapter 10.

Chapters 7 and 8 address the question of how the LGBT movement in Poland works to make hate crime visible and how it advocates for enhanced penalties for anti-LGB violence. Specifically, chapter 7 analyses the mobilization by looking at how important anti-hate crime advocacy is among various priorities of the LGBT movement, how the movement conceptualizes key issues, how it frames the claims for treating hate crime seriously, and how this framing resonates with political decision makers. Chapter 8 considers how the Polish anti-hate crime movement uses the opportunities provided by international human rights monitoring and review mechanisms and whether international recommendations translate into political commitments. Overall, both chapters look at the anti-hate crime strategies of the Polish LGBT movement and compare them with those described in other national contexts.

Chapters 9 and 10 consider why proposals to recognize sexual orientation hate crime were rejected in the legislative framework but accepted in policy. Chapter 9 focuses specifically on the absence of sexual orientation in hate crime law in Poland. The chapter considers the historical, legal and ideological arguments against anti-LGB hate crime laws expressed in the political debates by key political decision makers. Based on the critique, I explain how the 'ideal hate crime victim' is conceptualized in Poland. Chapter 10, on the other hand, explores internal and external

factors which contributed to the recognition of sexual orientation as hate crime ground in the policing, prosecuting and monitoring of hate crime in Poland. Particularly, the chapter looks at the role of ODIHR and other human rights bodies in developing responses to hate crime in Poland.

The final chapter engages with the results of the research presented in Chapters 5-10 and provides conclusions. I revisit the key themes which emerged in the thesis and bring together possible interpretations as to why Poland does not recognize sexual orientation in hate crime law but has started to recognize it in some policy areas. The chapter outlines the empirical and conceptual contributions of my work and discusses the implications for research and policy.

FROM HOMOPHOBIA TO HATE CRIME LAWS

2.1 INTRODUCTION

THERE is already a significant body of literature concerning societal homophobia, as well as hate crime. While most scholars agree that there are numerous structures which oppress people with non-normative sexualities, the question as to which structures these are and how they influence social attitudes, violence and laws is still debated. Considering hate crime, there are ongoing debates in the literature as to how hate crime should be understood, how to select victim categories, and how hate crime laws are developed. In this chapter, I review these themes in the extant literature. The chapter, therefore, aims to: (1) show the historical development of thought in the literature about homophobia, anti-LGB violence and hate crime laws; (2) provide a conceptual framework for my PhD; (3) identify relations between ideas from various strands of literature; and (4) identify contentions and conceptual and empirical gaps in the current literature to make a case for my PhD thesis.

The chapter is divided in two main parts. First, I discuss social and cultural constructions of homosexuality as deviancy and as threat, as well as reasons for homophobia and homophobic violence. I argue that, while several constructions of homophobia exist, they are connected through the notion of hegemonic masculinity that oppresses other identities. In the second part, I analyse the notion of hate crime as a construction used to describe and address anti-LGB violence through legislative and policy means. The chapter ends with a list of research questions which will guide the thesis.

Regarding the geographic scope, the literature relates mostly to the context of Europe and North America, with limited references to Poland as a specific jurisdiction. These will be introduced in the conclusion of the chapter, as a link to the next chapters.

2.2 HOMOSEXUALITY AND HOMOPHOBIA

To understand where homophobia stems from, the first part of the literature review starts by analysing the concepts of sexuality, gender and sexual orientation. Following the constructionist tradition, I understand homosexuality as a sociocultural construct perpetuated through agents such as religion, family, nation and state. I argue that the central issue which connects

explanations of homophobia in various strands of literature, e.g. on gender, citizenship and nation, is the notion of hegemonic masculinity that oppresses other identities. The pervasive culture of heterosexism is manifested and perpetuated by states through laws and policies which deny LGB people full citizenship, such as laws allowing them to enter into a legally-recognized union or even to feel safe walking down the street.

2.2.1 SEXUALITIES AND GENDERS – DEFINITIONAL FRAMEWORK

Sexuality became an object of study with the rise of medicine and psychology in nineteenth-century Europe. According to Freud (1953:136), sexuality develops in a process that starts in early childhood and ends in puberty. Individuals who fail to navigate correctly through the process of psychosexual development grow up to have ‘aberrant’ sexualities, such as ‘inversion’ (homo- or bisexuality), paedophilia, or bestiality.

The perceived essentialism of psychoanalytical theories of sexuality, and the sweeping differentiation between what is ‘normal’ (heterosexual) and ‘abnormal’ (homosexual), was critiqued by constructionists. Rather than a result of an unconscious process that happens within an individual, Foucault ([1976] 1990) argues that sexuality is a product of sociocultural discourses. According to Foucault, sexual orientation is an aspect of sexuality, defined through the sexual behaviours of individuals (Foucault [1976] 1990).

The constructivist tradition influenced modern definitions of sexual orientation. In psychology, sexual orientation refers to ‘the sex of those to whom one is sexually and romantically attracted’ (APA 2011). Similarly, according to the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity 2006), sexual orientation

. . . refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender (Preamble).

In the Western world, those who engage in sexual acts with people of a different sex are labelled ‘heterosexual’. Those who engage in same-sex relationships are assigned the ‘homosexual’ orientation (and called ‘gay’ (used for men and women) or ‘lesbian’ (used for women)), and those attracted to members of both sexes are labelled ‘bisexual’. Collectively, lesbians, gay men and

bisexual people are often referred to as members of the 'LGB' community or called 'sexual minorities'.³

For Foucault (1990:100–101), labelling individuals based on their sexual preferences is a mechanism of social control and moral judgement. Sexuality is strongly connected with power. The differentiation between 'normal' and 'abnormal' (or 'moral' and 'immoral') sexualities creates a hierarchical binary. Constructionists argue that the heterosexual majority has a dominant position in society by virtue of their 'normality' and thus 'morality', and those who are labelled as homosexual are marginalized due to being 'abnormal' and 'immoral'. Creating a hierarchy allows the heterosexual majority to put sexual minority groups in their place (Richardson, Smith, and Werndly 2013:28).

Similarly to sexuality and sexual orientation, gender (that is the roles, behaviours and activities regarded as 'feminine' or 'masculine') is also a 'product of social doings of some sort' (West and Zimmerman 1987:129). Gender theorists agree that it is culturally constructed and separate from sex, which focuses on reproduction (Butler [1990] 1999; Connell 1987; West and Zimmerman 1987). This understanding is shared also by psychology. The American Psychological Association (2011) sees gender as referring to 'attitudes, feelings, and behaviors that a given culture associates with a person's biological sex'. The term 'gender identity' refers to 'one's sense of oneself as male, female, or transgender' (APA 2011). In the *Yogyakarta Principles*, gender identity is understood 'to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth' (International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity 2006:Preamble). While I recognize the existing queer critique of the definitions of sexual orientation and gender identity employed in the *Yogyakarta Principles*,⁴ throughout this paper, I will speak about these two terms in this sense.

Gender is performative in that it is defined through what we do to be classified as men or women, and it is concerned with the societal expectations of what we see as essential maleness and femaleness. At the same time, while society divides people into sexual categories of 'male' and 'female' based on their reproductive functions, there are many ways in which one can practise

³ There are numerous other labels used to define sexual orientation or falling under the 'sexual minority' umbrella. Particularly, asexuality (the lack of sexual attraction to others) may be identified as the fourth sexual orientation. Although important from the point of view of identity, categories other than LGB are rarely used in policy and legal documents. See also footnote 1 above, where I explain my use of the LGB and similar acronyms.

⁴ The main argument is that the homosexual archetype, conceived in the West (Foucault [1976] 1990) and arguably enshrined in the *Principles*, has limited resonance in the Global South. For example, an activist from Egypt cited by Girard (2007:350), argues that '[i]n my country, people don't get arrested for who they are, but for what they do; conduct is the issue'. Waites (2009:138) contests the introduction of terms 'sexual orientation' and 'gender identity' in international documents, because 'the emergent grid of intelligibility continues to be subject to dominant interpretations which privilege a binary model of gender, and sexual behaviours, identities and desires'. Mertus (2007:1048) suggests replacing the term 'LGBT human rights' with the term 'sexual rights as human rights,' 'because [identity] categories may be contested, but behaviours are more clearly identifiable'.

gender – such as girls, old men, lesbians, etc (Connell 1987:140). West and Zimmerman refer to it as 'doing gender' (1987:125).

Doing gender is unavoidable. In every social situation where the sex category is relevant, people's behaviour in relation to their perceived gender is subject to social evaluation (West and Zimmerman 1987:145). What is socially acceptable is what is framed as 'natural' and 'normal' masculine or feminine behaviours. For men, it is 'natural' and 'normal' to be dominant; doing gender for them means exerting dominance. For women, it is 'natural' and 'normal' to be caring and subordinate. By adhering to the rules, we perpetuate the differences between what is considered masculine and feminine. In the words of West and Zimmerman's article, '[i]f we do gender appropriately, we simultaneously sustain, reproduce, and render legitimate the institutional arrangements that are based on sex category' (1987:146). The problem arises if we fail to express gender in the way that it is expected of us. Those who fail to perform gender in accordance with their sex (for example sexual minorities) are deemed 'abnormal' and 'perverted'. For that, they may be held accountable by society (West and Zimmerman 1987:146) and disciplined.

2.2.2 AGENTS OF CONSTRUCTION

As much as we all construct gender, we are not able to do it freely – we always perform it within the confines of a specific society, which provide rules that tell us what is and what is not acceptable for our gender. Connell refers to those rules as 'structural models' (1987:98); Butler calls them either 'frameworks of intelligibility' or 'disciplinary regimes' ([1990] 1999), and Perry uses the term 'structures of oppression' (2001:49). The agents of construction include religion, family, state and nation.

In Europe and North America,⁵ Judaism and Christianity have had a major historical role in the social and cultural development of societies, including the construction of appropriate gender norms. The Bible presents gender models in which men are heads of families and 'wives should submit to their husbands in everything' (5:23-24 New International Version). In the Bible, the man is the sower of life, and the woman is the soil. Sexuality should exist only between spouses and sexual acts should aim at procreation. All sexual activities outside family were 'an act committed against the divine order and therefore against nature' (Mosse 1985:25).

Norms deriving from the Bible have been imposed on the construction of family, the 'foundation of society' (Connell 1987:121). As the traditional family is charged with reproduction, its heterosexuality is 'compulsory and naturalized' (Butler [1990] 1999:30) and institutionalized through marriage (Connell 1987:186). The heterosexual family lies at the heart of many national

⁵ Although all major religions have created specific norms for gender and sexuality, due to the geographical scope of the dissertation (Europe and North America), the analysis concentrates on Christianity.

discourses. The relationship between the nation and the family is important in the sense that the latter, through reproduction, is central to the survival of the former (Mole 2011; Mosse 1985; Nagel 1998). Before I begin the discussion about nation, some terminological framework is necessary. The term 'nation' is used in this paper in the understanding introduced by Anderson (1983), i.e. an 'imagined political community' of people who, even though they do not know all the members, feel a bond with them. The term 'nationalism' refers to a 'political ideology that claims that the world is divided into nations and only into nations; and that each individual belongs to a nation and only to one nation' (Schöpflin 1995:38). The Western (*civic*) type of nationalism has, traditionally, often been associated with liberal nations, where various groups can negotiate their interests. The Eastern (*ethnic*) nationalism is traditionally understood to be based on ethnic belonging and excluding those who do not share kinship. This type, characteristic for Central and Eastern European (CEE) countries, has been described as illiberal, born out of frustration (due to foreign rule (e.g. Communism)), and developed under a 'feeling of inferiority' towards Western Europe (Plamenatz 1973:29).⁶

Men are dominant in nationalist rhetoric (Mosse 1985; Nagel 1998; Peterson 1999). Manliness is seen as a safeguard of the existing social order against deviations (Mosse 1985:23), and men are there to protect the nation in the event of war (Nagel 1998:252). While masculinity means 'depth and seriousness', femininity is constructed as its opposition – 'shallow and often frivolous', as well as beautiful (1985:16–17). Men are active and women passive. Through their role in procreation and education of future generations (Nagel 1998:254), women are responsible for the continuity and immutability of the nation (Mosse 1985:18), as well as the state.

Having access to citizenship (i.e. having rights) means being able to operate in the public sphere (Marshall 1950). Traditionally, the public sphere has been reserved for men, and women had little access to it (consider, for example, voting rights). Sexuality (and women) was meant to stay in the private zone (Herek 1992a, 1992b; Richardson 1998:83). The 'intermingling of personal and public' led Weeks (1998:36) to constructing the theory of sexual citizenship. Sexual citizenship means that marginalized groups (such women and gay people) emerge with claims to full citizenship, i.e. participation in the public sphere. This results in a defensive reaction from the rest of the heteronormative society, which is discussed further in this chapter.

2.2.3 HETERONORMATIVITY

Several theories have been advanced to theorize the anti-homosexual sentiment. As Adam (1998:387) remarks, they have created their own objects of analysis, such as homophobia (Weinberg 1972), heteronormativity (Butler [1990] 1999), heterosexism (Herek 1992a, 1992b), homonegativity (Jäckle and Wenzelburger 2015) and sexual prejudice (Herek 2000). In the

⁶ While the division between Eastern and Western nationalism is helpful, it is often disputed in more recent literature (e.g. Shulman 2002; Spencer and Wollman 1998). It is also important to remember that all non-immigrant nations contain ethnic and civic elements.

following section, I analyse heteronormativity as a system that organizes the society based on heterosexual norms. Throughout this paper, I refer to homophobia as a prejudice against (or hostility towards) LGB people.

I would like to start off by unpacking what Goffman (1963) defined as the 'mythical norm', that is a rigid standard to which every member of the society (in his example – the United States (US)) is held. For him, the 'mythical norm' denotes a

[...] young, married, white, urban, northern, heterosexual Protestant father, of college education, fully employed, of good complexion, weight and height, and a recent record in sports... Any male who fails to qualify in any of these ways is likely to view himself – during moments at least – as unworthy, incomplete and inferior (P. 128).

Other authors complete this picture by claiming that this notion is not only normative, but also 'assumptive, widely held, and has the quality of appearing 'natural'' (Donaldson 1993; Morgan 1992; cited in Nagel 1998:247). Other identities, constructed in opposition to the mythical norm, are consequently seen as deviant and inferior. As such, they are oppressed by the hegemon. As Perry (2001:46–49) asserts, just the very meaning of 'difference' or 'otherness' is oppressive - those pictured as different do not have to do anything to be called deviant. As much as all the elements of the mythical norm are important in the construction of the hegemon, due to space constraints, we need to focus only on the aspects which are directly relevant to the topic of this dissertation – that is on masculinity and heterosexuality.

As scholars (Connell 1987; Connell [1995] 2005; Mosse 1985; Nagel 1998) agree, not all heterosexuality is hegemonic. It is heterosexual *masculinity* that Western societies have constructed as hegemonic. *Femininity* is created in opposition to masculinity. As Connell puts it (based on Freud's 'penis envy' argument) '[t]he phallus is master-signifier, and femininity is symbolically defined by lack' ([1995] 2005:70).

Just as femininity is constructed in opposition to masculinity, *hegemonic* masculinity is constructed in opposition to *subordinate* masculinities (Connell 1987). If an individual fails to qualify in one of the elements that constitute the 'mythical norm', he will be othered, stigmatized and marginalized, as someone who does not belong, as inferior, and dangerous (Perry 2001:46–49). In the Western context it is white heterosexual men who are hegemons, while people racialized as black, Asian, minority ethnic, or Jewish, are denied authority (Connell 1987:109) and negatively judged (Mosse 1985:17). Importantly, normative masculinity is not a *requirement* but rather a *goal*. Connell argues that men remain hegemons as long as they subscribe to the 'blueprint of an ideal man' ([1995] 2005:70).

The hegemony of heterosexual males leads to heteronormativity, which Butler calls 'a regime that organizes sex, gender and sexuality in order to match heterosexual norms' ([1990] 1999:30). The vision of 'how the world should look like' comes from the established social structures. The relations between various identities (the relations of difference and subordination) are shaped *within* and *by* these overarching institutions (Perry 2001:49). The context – labour, power and *cathexis*⁷ for Connell (1987), or culture, labour, power and sexuality for Perry (2001) – conditions human actions, identity and place, so that hierarchies of difference can be either challenged or maintained. Gender relations are expressed and reaffirmed within each of these structures (Perry 2001:49–50). These power structures are interconnected. Their salience and impact depend on the context in which they occur – e.g. at a Pride event sexual orientation is important, while at home it might be gender (Perry 2001:48).

In theorizing their power structures, Connell (1987) and Perry (2001) leave out some important social institutions. For example, both the nation (Mosse 1985; Nagel 1998; Peterson 1999; Pryke 1998) and state/citizenship (Richardson 1998; Weeks 1998), as explained above, have been theorized as gendered and heterosexist, thus oppressive for sexual minorities. I will come back to the relationship between nation and homophobia below.

Herek (1992b:90) and Richardson (1998) argue that heterosexism manifests itself through institutions and norms existing in society. Mohr speaks about the 'legally enforced invisibility of gay people' (Mohr 1988:1; see also Moran 1996 chapter 1). Homosexuality, as it is pushed to the private sphere, lacks the institutions that would legitimize it in public, such as same sex marriage. Richardson notices that at some point homosexuality became tolerated, as long as it remained hidden from the public sphere. LGB people should remain a minority, and refrain from 'promoting' 'alternative' sexualities. To quote her words (1998),

. . . [l]esbians and gay men are granted the right to be tolerated as long as they stay within the boundaries of that tolerance, whose borders are maintained through a heterosexist public/private divide (P. 89).

Some of those claims may not have withstood the test of time, at least in the countries where the analysis was carried out. Recent years have witnessed sweeping progress in legislating gay and lesbian rights. In countries like the US and the UK marriage and the adoption of children are available for same-sex couples. In this sense, the claim that homosexuality lacks the institutions which legitimize it can no longer be sustained. Nevertheless, the legal situation of LGB communities in the great majority of the world (or even in Europe) is still not comparable to the situation of their heterosexual peers (ILGA 2016). This means that most countries do not allow

⁷ Drawing from Freud, Connell (1987:112) understands *cathexis* as a 'construction of emotionally charged social relations with 'objects' (i.e. other people) in the real world'. Those relationships can be affectionate, hostile or ambivalent. To explain the power structures, Connell speaks about the heterosexual couple in which the subordinated role of a women is perpetuated.

LGB citizens access to full citizenship, effectively keeping them in the closet or even antagonizing society against them.

2.2.4 HOMOSEXUALITY AS A THREAT

In European history, ethnic, racial, religious or sexual minorities have often been ostracized, framed as outsiders and threats (e.g. Barker 1981; Boswell 1981; El-Tayeb 2011). Particularly, two groups – Jews and gay men – have remained as threatening Others for centuries.⁸ There are many analogies in the construction of Jews and gay men. Mosse (1985) observes that both have been pictured as unmanly, and sharing traits such as nervousness, effeminacy and excessive sexuality. Boswell (1981) writes that

. . . [t]he same laws which oppresses Jews oppressed gay people; the same groups bent on eliminating Jews tried to wipe out homosexuality; the same periods of European history which could not make room for Jewish distinctiveness reacted violently against sexual nonconformity; the same countries which insisted on religious uniformity imposed majority standards of sexual conduct; and even the same methods of propaganda were used against Jews and gay people – picturing them as animals bent on the destruction of the children of the majority (P. 15-16).

Scholars in various countries have shown a positive correlation between individual characteristics, such as education, age or gender and level of homophobia. Comparative research covering 70 countries by Jäckle and Wenzelburger (2015), based on the *World Values Survey*, shows that, in general,

. . . men are more homonegative than women, older people more so than young, married more so than unmarried, people with children more so than those without, people with low income more so than people with higher income, people with a lower education level more so than those with a higher education level (P. 230).

Religiosity, right-wing authoritarianism, conventionalism and attachment to traditions are also associated with negative attitudes towards homosexuality (Jäckle and Wenzelburger 2015; for an overview of the literature, see Van Den Akker, Van Der Ploeg, and Scheepers 2013). People in more religious nation-states (even if not religious themselves) and people in countries which do not recognize positive LGBT rights disapprove of homosexuality more than people who live in

⁸ In the West of Europe, in addition, since the second half of the twentieth century, also immigrants, particularly Muslims, have been framed as the threatening Others. Islamophobia, and the so-called 'new racism' (term coined by Barker (1981)), i.e. the moral panic connected with immigration and public discourse targeting immigrants, is well researched in countries with a long history of accepting migrants (Carr 2017a; McGhee 2005, chapter about Islamophobia; Morgan and Poyntig 2012; Taras 2012; Zempi 2014).

less religious nation-states and nation-states which recognize positive LGBT rights. In addition, Jäckle and Wenzelburger (2015:231) found that the level of homonegativity in Communist or post-Communist nation-states tends to be 'significantly higher' than in other nation-states, which can be linked with the gender roles in Communist societies, as well as the rise of nationalism following the collapse of Communist rule.

The perception of Otherness is also shaped by discourses of nation and national identity. National identity is constructed through negation. As Huntington puts it, '[w]e know who we are only when we know who we are not and often only when we know whom we are against' (1996:21). Those who do not share the required characteristics are discursively excluded from the 'imagined community' (Anderson 1983). Discourses which exclude Others are particularly strong in times of (perceived) crisis (Michlic 2000; Pryke 1998; Stychin 1997). The threatening Others can be external, e.g. Communists, immigrants, or internal, e.g. Jews or people with non-normative sexualities. For example, in Ireland, Carr (2017a:253) links Islamophobia with the 'collocation of Catholicism with Irish identity,' which results in 'exclusionary practices towards those who do not fit this idealised identity'. As LGB people are unlikely to be framed as a threat in civic nations (Stychin 1997), the following discussion relates to nations which have traditionally tended to define themselves in ethnic terms.⁹

LGB people are excluded from the nation for having the wrong sexuality and failing to do gender as prescribed. While the society glorifies the ideal types of men and women, gay (and bisexual) men and lesbians (and bisexual women) are constructed as an opposition to the norm: lesbians are hyper masculine (Freud [1905] 1953:145; Herek 1992b:97), and gay men are framed as lacking masculinity (Connell [1995] 2005:143). As a result, LGB people are stigmatized not only for their unnatural erotic behaviours, but also for threatening the masculine hegemony through failing to do gender appropriately (Perry 2001; West and Zimmerman 1987). By challenging the hegemon, gay people are seen as endangering both the foundations and the future of the society they live in, leading to 'chaos and loss of control' (Mosse 1985:16). But, as Mole (2011:548) suggests, while simply the presence of gay people could be enough to confuse the established patriarchal order, as well as assigned gender roles, their 'inability (...) to reproduce is presented as a threat to the continued existence of the nation'.

In the nationalist rhetoric, everyone's role is to enable the preservation of the bloodline, for that allows the survival of the nation. Nations which tolerate non-reproductive sexual behaviours – such as masturbation and homosexuality – do that to their own detriment, as it may lead to the nation's dying out (Boswell 1981:8; Mosse 1985:11), or endanger the nation in the case of war (Mosse 1985:34). Homosexuality is thus deemed unfit for real men and harmful for the nation

⁹ While most studies link homophobia with exclusionary discourses of national identities, alternative analyses are available. In her study of the relationship between the US nation-state and hate crime, Lewis (2014:chapter 3) shows how hate crime is constructed by liberal politicians as 'un-American'. In this framing, the nation is positioned as the real victim of hate crimes. Countering hate crime is a matter of national survival (Lewis 2014:45). See also footnote 6 above.

(Mosse 1985:34; Pryke 1998). Non-heterosexual people are constructed as alien to the national community (Richardson 1998:92), or even as its negation (Mole 2011:549). Even if formally citizens of a state, they are othered for being 'incompatible with utopian visions of the new Nation' (Hayes 2000:11).

The association of homosexuality with vice and secrecy made the homosexual individual 'a readymade conspirator against the state' (Mosse 1985:11). LGB people have been constructed as traitors, trying to destroy the nation from the inside, as well as those who try to attack it from the outside (Mole 2011; Richardson 1998). While many scholars have analysed how homosexuality can be othered as 'imported' (e.g. Richardson 1998), those writing about CEE suggest that there, LGBT rights are constructed as *imposed* by the European Union, which looks to destroy the national identity by advancing its own norms. This framing of the EU as a bully who imposes its rotten norms has been discussed in the context of many countries, for example Latvia (Mole 2011; O'Dwyer and Schwartz 2010), Slovenia and Croatia (Kuhar 2011) and Serbia (Gould and Moe 2015). For example, Gould and Moe (2015) write that

Serbian ethno-nationalists have long used homophobia to marginalize political dissent and legitimize their claim to power (...). Only international actors supported LGBTQ¹⁰ issues, but this backing had the contrary effect of associating the nascent LGBTQ movement with 'foreign interests' (P. 273).

Results of research conducted in those countries suggest that EU norms, which promote equality of LGB people, are in opposition to the understanding of national identity, which excludes homosexuality (e.g. Gould and Moe 2015; Kuhar 2011; Mole 2011).¹¹ Thus, the adoption of EU norms and values, including the implementation of the anti-discrimination framework, is framed by conservative speakers as a threat to the traditional values.

But while the discursive framing of the EU as imposing protection of LGB people has received some attention in the literature, the *actual* influence of the EU (and other international bodies) on the protection of LGB people from violence is not easy to analyse. Previous research often confuses the protection in civil (anti-discrimination) and criminal (hate crime and hate speech) law. Moreover, since the EU is often framed as the bully by conservative speakers, most authors writing about Western norms permeating the CEE societies have limited their studies to this organization, ignoring others. Because of this focus, there is a lack of knowledge about the impact

¹⁰ LGBTQ – lesbian, gay, bisexual, transgender and queer. See footnote 1 above for disambiguation.

¹¹ Most of these researchers have analysed political discourse. Illiberal quotes from politicians have been used to sustain the claim that the national identity in CEE countries excludes homosexuality. Nevertheless, it is not always possible to say who is less liberal: politicians or the society. While various surveys test the attitudes towards homosexuality, as well as the relation between the national identity, ethnicity and religion (examples from Poland will be introduced in Chapter 5), so far, I have not come across quantitative research that would measure the connection between national identity and homosexuality, and confirm that the understanding of the former in CEE countries indeed excludes the latter. A similar problem has been recognized for the UK with regard to institutional racism (Hansen 2000:16).

of the work of such organizations as the Council of Europe and the Organization for Security and Cooperation in Europe, which are also active in combating discrimination and violence. In the light of the inadequacy of the existing literature, there is considerable scope for new research on the actual influence of international organizations on national hate crime policies.

This perceived threat results in a defensive reaction from those trying to maintain the *status quo* – that is those who are uncomfortable with sexual diversity and the blurring of gender norms by homosexual individuals. Homophobic attitudes (and gay-bashing, which will be discussed below) can, therefore, as Connell (1987:248) argues, be explained by ‘the degree to which the fact of homosexuality threatens the credibility of a naturalized ideology of gender and a dichotomized social world’. To use Perry’s (2001:110) words, as the ‘[l]ong-standing gender boundaries are uncomfortably blurred by homosexuality’, LGB people are called to account for failing to do gender appropriately, for being gender traitors, and for challenging the foundation on which society is built. This notion of ‘calling to account’ is crucial in understanding the violence targeting LGB people.

2.2.5 ANTI-LGB VIOLENCE

Discriminatory violence has been theorized as backing up a dominant cultural pattern (Connell 1987:184), and as a logical outgrowth of a pervasive norm of intolerance (Herek 1989:949). Drawing from these arguments, Perry (2001) argues that hate crime offenders who punish people for transgressing boundaries do not see themselves as delinquent, because they feel that they act in the interest of the society (unlike, e.g. white-collar criminals, who act against it). For example, research conducted by Sibbitt (1997) found that perpetrators of racist crimes tend to share the views of the communities to which they belong, thus feeling that their actions are legitimized. Green, McFalls and Smith (2001), who studied racism in Germany, found that offenders felt that they shared the dislike towards ‘foreigners’ with the rest of the society.

Herek (1992b) and other authors (Richardson and May 1999:323) claim that homophobic violence is rendered intelligible by the public existence of homosexuals, which is seen as a form of a provocation. In this sense, anti-LGB violence serves to sustain the privilege of the dominant group by reminding the former of their place: it is an effective, albeit violent, ‘disciplinary mechanism’ (Perry 2001:113). Intimidating, bullying or attacking LGB people gives the perpetrator a chance to reassert his or her hegemonic identity (Nagel 1998), and, simultaneously, punish the victims for failing to perform their gender appropriately – for being gender traitors (Perry 2001:61).

Furthermore, gay-bashing is seen as a good way to demonstrate commitment to the masculine domination (Collins 1992; Franklin 1998:12; Herek 1992a, 1992b; Messerschmidt 1993:100; Perry 2001:108). It is especially important in homo-social, male-dominated environments (Nagel 1998), and for young men, who may feel that they are constantly challenged by their peers and compared with idealized sex roles (Connell [1995] 2005:70; Perry 2001:108).

Indeed, empirical research – studies of police cases as well as victimization surveys – in both the US (Herek, Cogan, and Gillis 2002; Levin and McDevitt 1993) and the UK (Chakraborti, Garland, and Hardy 2014a:8) confirm that many anti-gay hate crimes are committed by groups, men, and perpetrators who are young. Compared to non-bias crimes, hate crimes against LGB people occur disproportionately in public areas (Herek et al. 2002:323). This is connected with the fact that perpetrators of anti-LGB offenders often look for an audience in front of whom they can prove their power (Herek 1992a; Perry 2001). Victimized the Other helps perpetrators feel more positive about their in-group and about themselves (Hamner 1992), at the same time giving them a special ‘thrill’ (Levin and McDevitt 1993). This is also a reason why many hate crimes involve multiple offenders (Chakraborti, Garland, and Hardy 2014b:54; Levin 1999:15). According to Levin and McDevitt (1993), if not part of a group, many youths would not offend on their own. In the group, they feel a sense of power, companionship, inspiration, and security. Furthermore, gay men have been described as convenient targets because they tend to live in certain areas of big cities, are unlikely to put up a fight or report the assault to the police (Harry 1992:115; Levin and McDevitt 1993). Nevertheless, while the underreporting of homophobic crimes is a fact (Berrill and Herek 1992:293; Chakraborti et al. 2014b; Dick 2008; for an exhaustive list of references see HM Government 2012:7), it is not clear how it influences the perpetrators’ decisions on choosing the victims.

The media tend to present hate crime as a form of brutal violence committed by members of hate groups. Research in the US and the UK has verified, however, that most perpetrators of hate crimes are not hard-core bigots (Gerstenfeld 2004:191; Iganski 2008:13), with ‘everyday victimization’, such as verbal abuse, making up the majority of incidents (Chakraborti et al. 2014b). As UK police data have consistently shown over the years, behind the extreme violence that is reported in the media there are thousands of acts ranging from assaults to criminal damage that do not make the news (Iganski 2008:15). In this sense, Iganski argues that hate crimes are committed by ‘people like us’, not extremists. Only a small number of hate crimes are committed by members of hate groups, who feel that they are on a ‘mission’ to defend the established gender or racial order (Levin and McDevitt 1993:89).

Summing up, the image of LGB people constructed in society is far from positive. In the above paragraphs, I have shown the moral panic about family values, the threat to religious and national identity and the perceived foreignness of homosexuality as elements of homophobia. This opposition to recognize LGB people as full members of society (citizens) is also among the reasons why sexual orientation has proven so difficult to add to hate crime laws. I consider this problem in the next part of this chapter.

2.3 HATE CRIME AND HATE CRIME LAWS

The above section explained how homophobia leads to anti-LGB violence, which is a way of disciplining people with non-normative sexualities. Hate crime continues to be objects of several

theoretical discussions, all of which have policy implications. In this section, I will provide an account of those of the discussions which are relevant for the topic of this dissertation. Particularly, I discuss the understanding of hate crime in relation to types of acts and victim categories that are covered by the term. I also look at the relations between hate crime, hate speech and freedom of speech. In a separate section, I look at the controversies surrounding inclusion of sexual orientation in the law. Next, I consider the reasons why some states enact anti-LGB hate crime laws. Finally, I consider the framing of hate crime as a human rights affair and the implications that this has on the protection of victims. I conclude by summarizing identified gaps in research.

2.3.1 DEFINING HATE CRIME

So far, neither scholars nor law makers have been successful in finding a common, universally accepted definition of the term 'hate crime'. Attempts to define hate crime have been compared to entering a 'conceptual swamp' (Berk, Boyd, and Hamner 2003:51). Perry (2001) proposed a definition that significantly influenced scholarship on the subject. According to Perry (2001:10), '[hate crime] involves acts of violence and intimidation, usually directed towards already stigmatized and marginalized groups'. Hate crime is therefore a type of inter-group violence, where members of the dominant group discipline members of the subordinate groups to discourage them from transgressing existing boundaries. Violence is a mean of preserving the existing power-relations.

While the term 'hate crime' is increasingly used, it is also contested. For example, Iganski and Sweiry (2016) argue that 'there is very uneven recognition in the criminal law across nations of prejudice, hate or bigotry as motivating forces for criminal acts when viewed from a global perspective' (Iganski and Sweiry 2016). They propose the term 'hate violence', as opposed to hate crime, conceiving 'violence' not only in terms of physical assaults but also as 'violence of the word', including threats, slurs and other forms of verbal denigration (Matsuda 1989: 2332, in Iganski and Sweiry 2016). In their opinion, the term 'hate violence' is more inclusive and consistent than the term 'hate crime'.

While the inclusive approach presented by Iganski and Sweiry (2016), and before that by Chakraborti and colleagues in their research (2014b), seems helpful from the point of view of victimization, it seems difficult to translate to the language of criminal law, particularly on the international level. Part of the difficulty lies with two questions: (1) which speech acts should be penalized and which ones should be protected as free speech; (2) what is the relationship between hate speech and hate crime.

Considering the last point, the 2012 *Rabat Plan of Action* (UN OHCHR 2013), a product of a meeting of international experts under UN auspices, provides a blueprint for combating hate speech internationally (Parmar 2015). The *Rabat Plan* affirms that each restriction of speech

should be considered in the light of legality, proportionality and necessity. Each case should be assessed using a six-partite test to determine whether the threshold of 'incitement to discrimination, hostility or violence,' prohibited in the International Covenant on Civil and Political Rights (UN General Assembly 1966, further 'ICCPR'), has been reached. The test includes an in-depth analysis of the context, speaker, intent, content, extent of the speech and likelihood-imminence (UN OHCHR 2013). The freedom of speech organization Article 19 and ILGA-Europe promote the use of this test in assessing cases of anti-LGB hate speech (2013).

Considering the relationship between hate speech and hate crime, debates continue whether the former is a form of the latter, or they are conceptually separate issues. The OSCE has attempted to mitigate the difficulty in understanding which hateful words should be regarded as hate crime by defining hate crimes as 'criminal offences committed with a bias motive' (OSCE 2009). The first element – criminal offence – means that hate crime refers to criminal conduct that is punishable regardless of motivation, such as homicide, assault, property damage or threat). The bias motive needs to be based on a protected characteristic, such as race, ethnicity, religion, gender, gender, sexual orientation, gender identity or disability.

The OSCE's definition is particularly clear as it allows to distinguish between hate crimes (which comprise both elements), hate speech (which is bias-motivated and can be punished, depending on legislation, but lacks the base offence, such as assault) and hate incidents (which are minor incidents motivated by bias (such as 'bad looks') which do not constitute crimes).¹²

While the definition exists in official OSCE documents, only few countries use it on the domestic level. Most states either do not use the term hate crime at all, use the term without defining it, or have come up with other definitions. The UK is one of the countries in the last group. There, according to the official definition, hate crime is 'any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice based on a personal characteristic' (HM Government 2012:6).

2.3.2 VICTIM ATTRIBUTES

Similarly, as there is no agreement regarding what hate crime is, there are also disputes as to which victim groups should be included in the concept and protected by hate crime laws. Some jurisdictions have developed quite inclusive laws that protect categories such as race, religion, sexual orientation, sex (or gender), gender identity, disability, and even political affiliation, homelessness or wealth (e.g. Belgium), whereas others see the object of protection more narrowly and only recognize racism as a motivation (e.g. Germany).¹³ While the differences can

¹² For detailed explanation of differences between hate crime and related concepts, see ODIHR (2009b:16).

¹³ Excerpts of criminal laws containing hate crime provisions can be found at <http://www.legislationline.org/topics/subtopic/79/topic/4> (retrieved 5 May 2017).

be attributed to 'the fact that some prejudices are regarded as 'acceptable' in some jurisdictions but not so in others' (Garland and Chakraborti 2012:48), this is only part of explanation. There are important political and doctrinal questions as to who decides who will benefit from the enhanced protection purportedly offered by hate crime laws and how such decision is taken. In this section, I consider victim categories generally, while I provide a specific analysis of arguments for and against using hate crime laws to respond to anti-LGB hate crime in a separate section.

Based on Christie's (1986) seminal work *The Ideal Victim*, Mason (2014a) argues that the ideal *hate crime* victim group

. . . is one who can lend their good name, so to speak, to this call for social justice by engendering compassionate thinking for their plight and thereby challenging the sentiments that drive prejudiced and discriminatory perceptions of them in individual, social and institutional domains (P. 87).

While anyone can experience hate crime, one 'can only be a victim on the ground of prejudice or bias towards a communal attribute that is specified in the legislation' (Mason 2014a:79). Because of this, hate crime may be considered as 'the ultimate victim-led offence' (Schweppe 2012:174). Jenness (2002:28) recognizes two tiers of victim attributes. The 'core' includes 'race' (or colour), religion and national origin. The second tier, emerging increasingly from the 1990s, includes gender, sexual orientation, gender identity and disability. All categories have two fundamental criteria for deciding which categories should be protected (Mason 2014b). According to these criteria, an attribute is protected if (1) it denotes a group identity (i.e. people who share this characteristic see themselves as a community), and (2) there is a history of oppression and marginalization of members of the group (Grattet and Jenness 2001; Iganski 2008; Jenness and Grattet 2001; Lawrence 1999).

Some authors challenge the above categorization, arguing that the orthodox criteria based on group identity and history of oppression should be expanded, as they create an unnecessary hierarchy of hate crime victims. Groups which are unable to engender sufficient compassion because they lack empirical credibility of their vulnerable status, because they are seen as 'morally blameworthy', or because they are 'too strange or distant to invite concern' are not seen as 'deserving' (Mason 2014a:87). This creates a hierarchy of victimization, where some 'groups count as legitimate hate crime victims', and other victims are left 'out in the cold' (Chakraborti and Garland: 2009; Jenness: 2004, Morgan: 2002 in Mason 2014a:79).

Considering the above inadequacy and the possible damages caused by hierarchy of victims, Chakraborti and Garland (2012) propose a model focused not on historical minority status or campaigning potential, but rather on the notion of difference and vulnerability. Al-Hakim (2015) builds upon it, proposing an approach based on disadvantage. He argues that it is more suited to

capture the moral wrong and additional harms of hate crime, because 'vulnerability' perpetuates the weakness and helplessness of the victim.

While debated in academia (Bakalis 2017; Mason 2014b), the propositions to reconceptualize hate crime victim attributes are rarely recognized in policing practices or law. At the moment, only a handful of police forces across England and Wales monitor new strands of hate crime, such as sex workers, alternative subcultures, or misogynistic hate crime (Campbell 2016; Garland and Funnell 2016; Mason-Bish 2016).

The academic critique of policy-driven approaches which emphasize vulnerability and difference (Chakraborti and Garland 2012) or disadvantage (Al-Hakim 2015) of victims is that they could effectively lead to extending law protection to a large, possibly unlimited number of (undefined) categories. In an extreme case, the broad formulation of victimhood in the Australian state of New South Wales made it possible for hate crime laws to be interpreted as giving protection to adults who sexually assault children (Mason 2014b). Such use of hate crime law might give an impression that the state endorses paedophilia. To avoid such pitfalls, Mason (2014b) argues that hate crime categories

. . . must be tethered to a politics of justice that limits attributes to forms of difference that have a justifiable claim to affirmation, equality and respect for the attribute that makes them different (P. 161).

Building upon this, Bakalis (2017) argues that there is already a framework that can identify which victim groups should be selected for hate crime protection. While she observes (2017:5) that 'conceptual models traditionally used to define the parameters of hate crime legislation sit awkwardly with deeply held criminal law principles,' she argues 'that the principle of equality may provide a theoretical framework for such statutes.' This is because it is already well-established, has legitimacy and clear objects of protection. However, anti-discrimination provisions usually have open-ended catalogues of protected grounds. Some jurisdictions use an open list of victim categories in hate crime laws also. In this context, Bakalis (2017) considers where the power to decide the categories of the victims should lie: with legislators or judges? She argues that, when drafting laws, legislators should take into consideration the doctrines of legal certainty and the separation of powers.

The above two sections highlight the complexity of legal and policy issues surrounding the understanding of the term hate crime and categories which should be included in it. Having considered theoretical and practical approaches, I conclude that there is no commonly accepted definition of hate crime or commonly accepted list of protected attributes. Considering this, in this dissertation, I treat the term 'hate crime' as a floating (empty) signifier. This means that the notion does not have any referents, it does not point to any actual object and has no agreed upon meaning. It may cover any framing of hate crime as a policy issue.

2.3.3 POLITICAL ORIGINS OF HATE CRIME LAWS

Hate crime laws in the US reflect the history of slavery and civil rights struggle. They are commonly seen as a response to increases in inter-group violence (Jenness 1999:549). While this sentence remains true, it is important to qualify it. As the quality of hate crime statistics remains low, many hate crime statutes were created 'not out of an evidence-based objective approach, but rather as the result of sustained lobbying on the part of particular interest groups' (Schweppe 2012:176).¹⁴ Indeed, numerous studies conducted in the US (for a recent review see Parris and Scheuerman 2015) show the influence of mobilized social movements on how the state responds to targeted violence. Factors that influence the passage of hate crime laws can be classified into two groups. *Internal* state characteristics that have been considered by researchers include mobilization of minority groups, political context (e.g. makeup of state legislature, policy innovativeness), economic factors (urbanization, wealth), and public opinion (McCann 2011; Soule and Earl 2001). *External* state factors include, for example, regional diffusion and actions of other states (Grattet, Jenness, and Curry 1998; Soule and Earl 2001). I consider these two groups below.

There is an agreement between authors showing that the anti-hate crime social movement has shaped the response to bigoted violence in the US and other countries (Jacobs and Potter 1998:63; Jenness and Broad 1997:22–23). Social movement organizations play an important role in creating 'a societal perception that hate crime was a specific evil requiring a specific response' (Maroney 1998:579), pushing authorities to acknowledge the problem. Literature on other countries also emphasizes the political aspect of laws responding to bigoted violence. From a British perspective, Goodey (2007:427) sees policy initiatives to counter racist violence as 'a response to inter-community conflict, and, in particular, poor community-police relations'. They are linked with the work of civil society groups documenting and publicizing the problem of racism (Bowling 1998), as well as results of inquiries into handling cases of racist violence, such as the death of Stephen Lawrence (Macpherson 1999).¹⁵ Hate crime policies are sometimes also considered jointly with anti-social behaviour policies (Duggan and Heap 2014). Linked with the victims' rights movement, the movement towards a victim-centred approach to hate crime was

¹⁴ The enforcement of the law varies from one US state to the other. In 2000, California recorded 1,943 hate crimes, while Alabama did not report any (McVeigh, Welch, and Bjarnason 2003:845). Today, more than 100 federal agencies continue to fail to report hate crimes to the FBI's national database (Thompson and Schwencke 2017). Lack of data makes it difficult to understand the nature and scope of bias-motivated violence, measure and improve the effectiveness of legislative and policy responses, provide and improve victim support services, prevent hate crimes, conduct awareness raising and outreach activities, and communicate what is being done to fight hate crime to victims and the wider public (ODIHR 2014a:2).

¹⁵ Stephen Lawrence was a black British man who was murdered while waiting for a bus in London in 1993. The unprovoked, racially motivated attack became one of the highest profile hate crime cases in the world. The police were criticized for their conduct during the investigation, leading up to a judicial inquiry into the handling of the case, led by Sir William Macpherson. The report from the inquiry (Macpherson 1999) accused police of being institutionally racist and provided recommendations aimed at improving investigations of racist crimes. Two perpetrators were found guilty in 2012, almost 20 years after the murder (BBC News 2014).

developed in the UK (Goodey 2007:427). Conversely, in Australia, Asquith (2015) observes that a lack of high-profile successful campaigns around 'signal' hate crime cases, coupled with a dearth of politicians or senior criminal justice figures championing the cause of combating hate crime, have contributed to the lack of adoption of relevant legislation.

Research has found that the anti-hate crime movement uses various strategies to attain its goals. Nongovernmental organizations (NGOs)¹⁶ engage in pursuing lawsuits, and documenting the extent of violence and the level of underreporting (Jenness and Broad 1997:59, 65). The statistical reports are illustrated by descriptive accounts of particular crimes, acting as 'horror stories' (Jenness and Broad 1997:68). Indeed, authors such as Becker (1999) and Gianassi (2015) highlight the role of specific big hate crime cases as important triggering events, sometimes leading directly to changes in legislation and law enforcement practices. The role of media in steering the debate has also been significant (Becker 1999; Lewis 2014; Munro 2014).

While advocacy work of anti-hate groups seems to be crucial in the passage of hate crime laws,¹⁷ the mere presence of NGOs is not sufficient. Passage is only possible when the political environment is conducive to change. Parris and Scheuerman (2015:250) observe that, historically, US LGBT groups have worked together with Democrats and find that 'the dominance of the Democratic Party (...) is important to LGBT SMO [social movement organization] goal attainment'. Political instability within the state government (cohabitation) is also believed to facilitate the passage of anti-gay hate crime laws (Parris and Scheuerman 2015:246).

Another aspect considered in research is public opinion. Some research suggests that

. . . state laws that discriminate against homosexuals are not likely to be repealed or favorably modified until there is somewhat of a shift to the liberal side of the ideological spectrum of individuals in the more conservative states (McCann 2011:237).

Research conducted by Haider-Markel and Kaufman (2006:178) suggest 'that the more accepting a state's population is of gays and lesbians in the workplace the more likely a state is to adopt a hate crime law that includes sexual orientation'. Considering this, one can expect that anti-LGB hate crime laws can be found in more LGB-accepting states.

¹⁶ While the term 'NGO' is popularly used to refer to social movement organizations, other possibilities include national and transnational networks; grassroots groups; advocacy / activist groups and civil society organizations (CSOs). In this dissertation, I use the terms NGOs most often, interchangeably with CSOs, advocacy groups and activists. I understand activists as 'people who care enough about some issue that they are prepared to incur significant costs and act to achieve their goals' (Oliver and Marwell 1992:252, in Keck and Sikkink 1999:93).

¹⁷ For instance, US researchers (Grattet, Jenness, and Curry 1998; Soule and Earl 2001) found a correlation between the physical presence or absence of an Anti-Defamation League (ADL) office in the state and the passage of the law. Indeed, many state hate crime laws are based on the template law designed by ADL (2012).

In addition to the above factors, previous research has also investigated the relationship between the passage of hate crime laws and previous legislation in this area, as well as economic measures. Soule and Earl (2001:299) found that 'higher levels of per capita income increased the hazard of adoption' of anti-gay hate crime laws, suggesting that richer societies are more gay-friendly. They also reported that states which 'had enacted either a data collection or a civil hate crime law earlier were slower to adopt criminal hate crime laws' (Soule and Earl 2001:299). Soule and Earl interpret the finding as states taking a 'softer stand' to 'shield themselves' from discussing 'controversial' criminal hate crime laws on the one hand and 'the criticism that they are not taking action on this important social problem' on the other (Soule and Earl 2001:299). This last finding and its interpretation will be important when we compare it with Europe. There, several states enacted laws addressing homophobia decades ago, but resist the current wave of hate crime laws. It seems unlikely, however, that the interpretation offered by Soule and Earl would work in their case, as these countries (e.g. the Netherlands) are known for championing LGBT rights worldwide. This problem needs to be considered further.

Regarding external characteristics, Grattet, Jenness and Curry (1998:297) argue that the 'diffusion of hate crime laws is shaped by interstate processes'. Building on their work, Soule and Earl (2001) observe that not all states are equally likely to follow their neighbours in adopting the new norm. They argue that 'some states are likely to be leaders and others followers with regard to the enactment of criminal hate crime laws' (Soule and Earl 2001:297-98). In addition, time influences passage, meaning that there might be a 'learning curve' (Grattet et al. 1998) as states have a tendency to homogenize legislative responses.

Conversely to the US, in Europe, current national laws proscribing racism and xenophobia can be seen as a response to 'victimisation, sometimes genocidal victimisation, of national minorities in the first half of the twentieth century' (Goodall 2013:220). The Holocaust and post-war pogroms of Jews, and – more recently – the ethnic cleansing in Bosnia and Herzegovina, have come to symbolize what crimes motivated by hatred mean. Goodey (2007:423) divides laws responding to racism in Europe, enacted in the aftermath of the WW2, into three categories: (1) laws that set out to counter National Socialist/fascist/neo-Nazi ideologies, particularly important in countries with experience of dictatorship; (2) anti-discrimination provisions, originating from the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN General Assembly 1965); and (3) 'hate crime' laws. The last category is, however, as Goodey (2007:423) describes, 'not as wide-ranging as 'hate crime' legislation in the US'. According to Goodey (2007:423), many European countries developed 'hybrid' legislation, incorporating elements of the above types of laws.

In this context, the jurisdiction that has attracted the most academic attention to date is Germany, with authors agreeing that the approach taken by this country is different from that in the US and the UK (Bleich 2007; Glet 2009; Savelsberg and King 2005). For example, Glet (2009:3), considering the 'German hate crime concept', argues that it 'has a very different historical outset,

dating back to the racial and anti-Semitic hatred during the time of National Socialism'. In describing the German approach, Savelsberg and King (2005:580) emphasize several differences compared with the US understanding of hate crime. Among them, the most visible ones reflect different origins and role of the law, different objects of protection and different approaches to hate speech. While laws in the US show '[a] dehistoricized focus on individual victimization and an avoidance of major episodes of domestic atrocities', in Germany, 'discourses are rich with international references and closely associated with the memory of German history, especially the Holocaust' (Savelsberg and King 2005:580–81). The US has developed what we can describe as the 'discriminatory model' of hate crime laws (Lawrence 1999), where the victim is selected on the basis of a 'protected characteristic'. This approach is dehistoricized and victim-focused. In Germany, the 'animus' model, in which the 'hate' factor and the need to protect minorities is emphasized, has been developed.¹⁸ Unlike in the US, laws in Germany limit the freedom of expression by criminalizing hate speech for the sake of protecting minorities and the state against extremist activities. The laws are enacted to protect not individuals, but rather minority groups and the democratic order (Savelsberg and King 2005).

The US model of hate crime is currently gaining ground in Europe, supported by ODIHR, which has developed 'programmes in Europe that specifically promote recognition and policing of 'hate crime' – based essentially on a US model' (Goodey 2007:424). To date, however, little consideration has been given to the difficulties in reinterpreting laws on the protection of national and ethnic minorities from targeted violence to include, under the same rubric, more victim groups (Glet 2009:3, see also Perry 2014). At the same time, insufficient attention has been paid to the role of NGOs in this process. Goodey (2007:441) argues that, '[i]n the context of Europe, aside arguably from the UK, Jenness and Grattet's observations are, as yet, some way off' because, while minority groups exist, 'their political impact is limited'. If not social movement factors, which factors then influence the proliferation of hate crime in Europe? How does the introduction of the concept of hate crime in Europe affect the wellbeing of LGB communities in Europe? These questions are increasingly relevant in the context of the ongoing globalization and internationalization of hate crime measures (Hamm 1994; Kelly and Maghan 1998; Schweppe and Walters 2016).

2.3.4 TO BE OR NOT TO BE FOR HATE CRIME LAWS

Arguments in favour of having specific hate crime legislation can be summarized as follows: the law denounces hate violence and sends a symbolic message that it will not be tolerated by the state; it acknowledges the history of oppression and affirms members of historically marginalized groups; enhanced penalties deter potential offenders; the existence of the law has a long-term educational effect on the society. In addition, the proponents of the hate crime concept argue that

¹⁸ For description of the different models, see Goodall (2013:222–23) and ODIHR (2009b:46–48).

targeted violence should be punished more severely than non-bias crimes because 'hate crimes hurt more' (Iganski 2001:626). Let us unpack this statement.

Hate crime laws are critiqued for giving special protection to ethnic, religious and sexual minorities. Bell (2002:181) counters this argument, saying that the protection provided by hate crime laws extends to everyone, regardless of the minority/majority status. Nevertheless, 'generic categories such as race and religion can be understood as proxies that are primarily used to represent the concerns of stigmatized groups' (Jenness and Grattet: 2001 in Mason 2014b:79).

The above aspect is related to the symbolic meaning that hate crime laws are meant to convey. As Mason (2014a) writes,

. . . [b]y explicitly punishing prejudice, bias or group hostility as an element of criminal conduct, hate crime laws do more than condemn the conduct itself, they also implicitly denounce the element of prejudice (P. 87).

Setting up organizational structures and co-operating with community members are important symbolic statements which affirm members of minority communities (Iganski 2008, 2014; Levin and McDevitt 1993:166). In this sense, the 'moral work of hate crime laws' is meant to 'reconfigure perceptions of them [minority groups] as dangerous, illegitimate or inferior Others' (Mason 2014a:75).

Another characteristic of hate crime, attributed to the fact that it attacks the core of the victim's identity (Iganski 2001, 2008; Lawrence 1999), are its particular psychological and social consequences (Herek and Berrill 1992; Levin and McDevitt 1993). Similarly to the argument about brutality, the early claims have been critiqued as unsubstantiated (Jacobs and Potter 1998:82). Since then, research in the US (Herek 2009; Herek et al. 2002; Herek, Gillis, and Cogan 1999) and other countries (Chakraborti et al. 2014b; Dunn 2009; Tiby 2009) provided evidence that hate crimes can indeed hurt more than base offences. For example, Herek et al. (1999) and Herek (2009) found that, whereas being the target of any violent crime can negatively influence the victim, targets of anti-gay violence are at heightened risk of psychological distress. Research by Chakraborti et al. suggests that it is the repetitive, 'normalized' victimization, only known to those who experience it and relatively insignificant for outsiders, that has a detrimental effect on victims (2014b:41). Recent research argues that some hate crimes hurt more than similar, otherwise motivated crimes (Iganski and Lagou 2015; Mellgren, Andersson, and Ivert 2017). For example, Iganski and Lagou (2015) found that 'not all victims report being affected by hate crime, not all victims are affected the same way, and some victims of racially motivated crime report less of an emotional impact than some victims of equivalent but otherwise motivated crimes' (P. 1696). For this reason, they argue that 'the justification [for sentence uplifts] must rest on the culpability of the offender for the harms they may or may not actually inflict' (P. 1696).

Another aspect of the claim that hate crimes hurt more is that they negatively influence the group with whom the victim is associated. For example, Butler argues that '[w]e are, as a community, subjected to violence, even if some of us individually have not been' (2004:18). Furthermore, hate crimes can escalate, resulting in destabilization of the victimized communities and provoking retaliatory actions (Iganski 2001; ODIHR 2009d). Again, the claim that hate crimes have more detrimental repercussions beyond the immediate victims and their family than other crimes was challenged, as all communities who witness crimes, regardless its type, feel some level of fear (Jacobs and Potter 1998:87). While there is no conclusive answer to this question, results of newer empirical research suggest that the additional harms inflicted by hate crime may be more apparent in religiously motivated crimes and within small, marginalized groups such as transgender, homeless and Roma people (Chakraborti et al. 2014b:49).

One of the arguments most often cited by proponents of hate crime laws is that, as the offenders are believed to have a greater moral culpability (Iganski 2001, 2008; Lawrence 1999), they should be punished more severely than if the motivation was irrelevant (Mason 2014b:165). This aspect has also been the subject of criticism, as opponents argue that there is no reason why prejudice, religious zeal or negative personal experiences should be punished more severely than other reprehensible motivations, such as greed, power or lust (Jacobs and Potter 1998:80).

Scholars agree that hate crime legislation can be hard to enforce (Jacobs and Potter 1998:92; Levin and McDevitt 1993:173). The ambiguity of the hate crime concept, difficulties in investigation and other reasons may result in difficulties in applying the legislation and in the reluctance of law enforcement officers to investigate hate crime cases (Bell 2002:22; 83-97; Goodey 2007:424; Lawrence 2002:42-43). In many European countries 'the 'law on the books' does not reflect 'the law in action'' (Goodey 2007:424). This can lead to undermining the existence of the laws, and may make offenders feel untouchable.

Another controversy, where the debate continues at the international level, relates to the relationship between two competing freedoms: freedom of expression and protection from hate speech leading to violence. In liberal democracies, 'the commitment to free speech is a fundamental precept' (Hare and Weinstein 2010). Yet, as Pejchal and Brayson observe (2016), two kinds of responses to the question of restriction of free speech are discernible across the globe.

In the first model, associated with the US, freedom of speech is understood to protect even the most noxious racist ideology (Hare and Weinstein 2010). For this reason, attempts to restrict speech by enacting hate crime laws may be seen as unconstitutional (Jacobs and Potter 1998:121) and punishing people for 'improper thinking' (Iganski 2001:626). Indeed, some early state laws were found to be unconstitutional, but proponents of the legislation argue now that the current model of legislation criminalizes conduct, not thought (Lieberman and Freeman 2009:2).

In Europe, however, the situation is more cumbersome. As mentioned in the context of Germany above, criminal laws on the continent include restrictions of speech if it constitutes incitement to hatred and violence, genocide denial and public insults targeting minority groups. Such an approach is supported by the Council of Europe (ECRI 2016) and the EU (see Chapter 6). Pejchal and Brayson (2016) provide an up-to-date discussion on the competing rights to be free from discrimination and freedom of expression. According to them,

. . . [a]t the core of this problem has been finding a balance between protecting freedom of expression on the one hand and protecting vulnerable groups from verbal (and in turn potentially physical) persecution on the other (P. 247).

While the difference in the approach to freedom of speech between the US and Europe is well known, the historical and social factors affecting the understanding of and responses to hate speech across Europe have not been thoroughly analysed. One issue, for example, relates to the legacy of totalitarian regimes. Puchalska (2013:34) observes that the presence of provisions on incitement to hatred and a ban on fascist propaganda in international human rights law are the result of lobbying by the Soviet Union and its satellites. According to her, championing the inclusion of such provisions in international treaties was 'a way of gaining a political platform for their own agenda of limiting free speech' (Puchalska 2013:34). The above observations raise a set of questions: How does memory of genocide and totalitarianism affect understanding of and criminalization of hate speech? Which groups emerge as 'deserving' of special protection? How does such a legacy affect the passage of anti-LGB hate crime laws?

2.3.5 (NOT) PROTECTING LGB PEOPLE: CONTROVERSIES AND CONSEQUENCES

Even though, since the beginning of the hate crime project, gay and lesbian rights advocates were among the strongest supporters of introducing hate crime laws (Jenness 2002:28), the inclusion of sexual orientation as a protected ground in hate crime legislation has rarely been straightforward. The fact that only some jurisdictions seek to legislate against hate crimes targeting lesbians, gay men, and bisexual people gives rise to the question: what determines which characteristics are deserving of special protection in any given jurisdiction? The aim of this section is to provide an account of the arguments used by advocates and opponents of including sexual orientation as a protected ground in the hate crime legislation.

Considering the symbolic function of the law, not including sexual orientation sends a message that homophobia is acceptable (Gerstenfeld 2004:241; Herek and Berrill 1992:293). The existence of hate crime statutes which leave out sexual orientation may add to the culture of intolerance, indirectly sanctioning violence (Iganski 2014) and creating a situation in which law conditions the environment for hate crimes (Perry 2001:198).

In the context of the 'ideal victim,' Richardson and May (1999) observe that if anti-gay violence is seen as 'normal' and justified (see the section on homophobia above), it is more difficult to argue for protection in criminal law than, for example, for ethnic minorities. On the contrary – through laws and policies which encourage the heteronormative cultural context – the state reinforces and reproduces the vision of gay people as 'deserving' victims (Richardson and May 1999:327), as opposed to 'ideal' victims. According to Christie (1986),

. . . the ideal victim is not simply one who needs legal protection but also one who is judged to be vulnerable, weak, respectable and blameless for their victimization; victims who are troublesome, distasteful, trivial or engaged in risky behaviour are far less likely to be accorded legitimacy (P. 77).

LGB people, ostracized within the heteronormative culture, 'fall short' of the image of blameless victims and do not earn the necessary compassion and are hence not seen as 'deserving' of the enhanced protection (Mason 2014a:77). In fact, even in states which have sexual hate crime on the books, prejudice and moral blame have been linked with variations in the application of hate crime laws to victims of homophobic and racist or religious hate crime. For example, Mason and Dyer (2012:903) analyse several cases from Australia, where courts saw non-violent sexual advances by gay men towards offenders as behaviour that was sexually provocative, which rationalized the perpetrator's homophobic and violent reaction.

One of the reasons why homophobia is not seen as belonging together with racism and xenophobia is the fact that there is little chance that anti-LGB violence can lead to social unrest and threaten democracy (consider the German approach to hate crime analyzed above). Indeed, one of the most often invoked arguments for enhanced penalties for racist and ethnic violence is that these crimes 'have the potential to escalate and lead to larger-scale conflicts' (ODIHR 2009d:9). With sexual orientation-based hate crime, 'unlike racial or religious developments, there does not appear to be the impetus of social disintegration or fear of terrorism or radicalisation leading to changes in the law' (McGuire, Puchalska, and Salter 2012:5). Indeed, if the danger posed by hate crime and its distinct character is framed mainly as 'escalation,' categories such as sexual orientation, gender identity or disability are unlikely to be seen as 'belonging,' as victimization based on these criteria is unlikely to result in riots.¹⁹ While this argument is interesting, it has not received a lot of consideration in the literature.

Another argument against including sexual orientation in hate crime laws is brought by conservative writers who do not see sexual orientation as an immutable characteristic, such as race. For example, Gagnon (2009:1), who does not seem to oppose the general rationale behind hate crime laws, sees race and gender as '100% heritable, absolutely immutable, and primarily

¹⁹ Although, events surrounding the Stonewall riots (Stonewall UK n.d.) prove that unlikely does not mean impossible.

non-behavioral conditions of life, and therefore, intrinsically benign'. Sexual orientation, on the other hand, is not granted the same status. According to Gagnon, 'homosexual behavior is more like consensual incest and polyamory than race or gender' (2009:1). Responding to Gagnon's paper, Sweeton (2009) problematizes limiting hate crime laws to 'immutable' and 'inheritable' characteristics only, observing that religion, whose presence in hate crime law is not disputed, 'is not heritable, but is a mutable, non-genetic choice.'

Conservative politicians often fear that recognition of sexual orientation-based hate crime would affirm the existence of LGB people. For example, Perry (2001) reminds that similar discussions about legitimizing homosexuality were visible during works on the *Hate Crime Statistics Act* (US Congress 1990). The law was eventually passed with a provision stating that '[n]othing in this Act shall be construed (...) to promote or encourage homosexuality'.

Finally, an argument for not including sexual orientation in hate crime laws is advanced by some critical writers. For example, Meyer (2010, 2014) believes that anti-LGB hate crime laws may perpetuate the underprivileged position of black and minority youths. In his opinion, by punishing offenders who come from underprivileged backgrounds, anti-LGB hate crime laws reinforce inequalities based on race and social class. He argues that LGB people, who already benefit from legal recognition of LGBT rights and high level of societal acceptance, do not need special protection from violence. This argument is, however, very US-specific, as the levels of acceptance of LGBT people in other countries may be significantly lower.

2.3.6 HATE CRIME AND HUMAN RIGHTS VIOLATIONS

In the sections above, I have argued that the most common conceptualization of hate crime victims in theory and policy is the human rights approach, in which victim categories are meant to resemble those in equality legislation and international human rights law. While the human rights approach is dominant, framing hate crime as a human rights issue has been the subject of academic critique. In this section, I consider this critique.

Scholars and practitioners alike often frame hate crime as a human rights issue. For example, Perry and Olsson (2009:176) argue that hate crime deprives victims of their freedom and dignity, and, thus, 'is, by nature, a sustained and systematic violation of human rights'. Iganski (2008) specifies that hate crime impacts the victim's right to liberty and security, freedom from violence and abuse, and the right to life. On the practitioner side, the EU Agency for Fundamental Rights (FRA) (2012:13) believes that 'hate crimes violate the rights to human dignity and nondiscrimination,' and, like other international human rights bodies, fights with hate crime as part of its mandate in the area of countering discrimination.

Treating hate crime as a human rights issue has important benefits. As Brudholm (2016:96) observes, recognizing it as a human rights concern means that hate crime can be dealt with using

both the traditional instruments of the anti-hate crime movement (such as monitoring, training, campaigning and litigating cases) and the international 'human rights machinery,' i.e. international monitoring and review mechanisms and human rights courts. Considering the last type of institutions, the European Court for Human Rights, in the case *Šečić v. Croatia* (ECtHR 2007) stated:

... when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.

While arguing that racially-induced violence is 'particularly destructive of fundamental rights,' the ECtHR does not go as far as to call hate crime a human rights violation. Rather, it adjudicates cases of failures to respond effectively to discriminatory violence, seeing them in the context of violation of the right to life, the right not to be subjected to inhuman or degrading treatment, or the right not to be discriminated against.

While common, the framing of hate crime as a human rights issue can be contested. Garland and Funnell (2016) argue that the

... 'top-down' human rights-based approach to combating hate crime, endorsed by many cross-national institutions has failed to tackle the problem as effectively as it might, resulting in the uneven protection of hate crime victim groups (P. 17).

Brudholm (2015) reminds us that there is an important conceptual difference between committing a hate crime and abusing human rights. He warns against 'classifying hate crime as a human rights violation,' arguing that it hinders 'understanding of hate crime, but also our maintenance of a precise and pointed discourse on human rights violations' (2015:82). According to Brudholm (2015:91), as hate crimes are committed by perpetrators who are private individuals, it is 'misguided' to say that hate crimes are human rights violations'. Human rights violations, as acts committed by public authorities are 'distinct — not always and not necessarily *worse* [italics in the original] — class of evils' (Brudholm 2015:92). In this sense, it is worthwhile discerning, for example, state-sponsored homophobia (such as the abuse and detention of gay men in Chechnya (UN OHCHR 2017)) from hate crimes such as verbal abuse, threats or physical aggression where perpetrators act on their individual accord.

Furthermore, describing hate crimes as 'sustained and systematic' (Perry and Olsson 2009:176) brings about the vision of such human rights violations as crimes against humanity, ethnic cleansing or genocide, i.e. abhorrent acts committed by (or with the support of) public authorities. This in turn may lead to linking national measures to fight hate crime with measures to counter violent extremism. This framing may mean that non-violent hate crimes, or hate crimes committed by 'ordinary racists' (Perry 2014:77), i.e. offenders who are not members of extremist groups, could be overlooked.

Summing up, scholars and practitioners continue to debate what hate crime is; what the relationships between hate crime, hate speech and human rights abuses are; and how to select protected categories. While the problems exist across Europe, explanations vary due to specific national circumstances, or there are no answers, as the literature is silent about some regions and actors. For example, while there is already a significant body of literature on the origins of hate crime laws in the US, we know little about how the US-style hate crime model diffuses in Europe; how it impacts the existing discourses of racist violence; and which factors contribute to and which of them inhibit adoption. Particularly, there is a need to explore the role of international bodies in proliferating the hate crime concept.

2.4 CONCLUSION

The above chapter aimed, *inter alia*, to show the historical development of thought in the literature on homophobia and hate crime; build bridges between ideas from these various strands of literature; and identify conceptual and empirical gaps in the scholarship.

In the first part, following the constructivist approach, I argue that homosexuality is a social construct and that homophobic attitudes result from framing homosexuality as deviant, dangerous and a threat to the family, society, nation and state. My analysis integrates theories developed by scholars of gender, sexual citizenship, nationalism and hate crime. I argue that these theories are connected through the notion of hegemonic masculinity that oppresses other identities. Looking at CEE countries specifically, the extant literature suggests that the construction of national identity, which excludes sexual minorities and Jews as threatening Others, influences negative attitudes towards those groups. However, the literature does not explain why, in some of the CEE states, both groups are protected by hate crime laws and policies (e.g. in Slovakia), while in others LGB people are not granted hate crime victim status in law (e.g. in Poland). More research is needed to find out how historical narratives, social, cultural, political and economic factors influence who is recognized as 'deserving' of hate crime law protection.

The second part of the chapter is concerned with conceptualizations of hate crime, hate crime laws and victim categories. Quantitative research in the US has found a relationship between the presence of mobilized anti-hate crime movements and the passage of hate crime laws. Findings suggest that movements can influence the passage of hate crime laws in a favourable political

climate. Qualitative studies have provided descriptions of strategies used by the LGBT movement to make anti-LGB hate crime visible.

Both type of analyses, considering strategies or patterns of diffusion, are lacking on the other side of the Atlantic. This is an obstacle to understanding the globalization and internationalization of hate crime as a policy problem. We should not assume that LGB strategies from the West are simply transferred and employed in the East (Gruszczyńska 2007:239). Qualitative research is needed to explain the strategies used by social movement actors, while quantitative studies should explore the contexts in which passage occurs. Research should ask how NGOs in countries where there is no anti-LGB hate crime law frame their claims; how they go about attempting to affect law change, and which activities seem most effective. Researchers need to verify how strategies in the East are informed by, learn from, or contest strategies used in the West. Finally, while the impact of Europeanization on the Central and Eastern Europe has been observed in various contexts, hate crime laws have never been a central object of inquiry. Considering the increasing activity of the European Union's FRA and OSCE bodies in the area, there is a need to see how their interventions impact the national legal and policy frameworks to combat hate crime and in which circumstances they are effective.

2.5 RESEARCH QUESTIONS

Burstein (1985:193) sees social scientists studying legal reforms as two groups: 'those who study the causes of legislative change and those who study the consequences'. This dissertation's interest lies primarily within the first category; however, I believe that the reasons behind the enactment of laws have a bearing on their implementation and enforcement. The overarching question this research aims to answer is 'Why does Poland not recognize sexual orientation as a protected attribute in hate crime laws, but recognizes it in police training and monitoring?' Additionally, my project will be guided by the following specific research questions:

- RQ(1) Which cultural, historical, social, political and economic factors specific to Poland condition attitudes towards LGB people in Poland? Which hegemonic discourses regarding minorities emerge as a result?
- RQ(2) How may (1) the absence of sexual orientation in hate crime law, and (2) the presence of sexual orientation in policing, prosecuting and monitoring of hate crime in Poland be understood?
- RQ(3) How is the problem of hate-motivated criminal conduct understood by LGB organizations, the government and other political actors in Poland? Which legitimate categories and policy priorities emerge as a result?
- RQ(4) Who works to make anti-LGB hate crime in Poland visible, and how? How is the problem of anti-LGB hate crime framed? Which advocacy strategies are employed? How effective are they?

- RQ(5) How do IGOs and human rights standards set by them condition national responses to anti-LGB hate crime in Poland and other European countries? Which patterns of diffusion of anti-LGB hate crime laws can be distinguished? How much has the process of Europeanization of hate crime policies affected Poland, compared to other countries in the region?
- RQ(6) How are the arguments used by opponents of adding sexual orientation to hate crime laws constructed? How are the contestations framed?

3

THEORETICAL CONSIDERATIONS

3.1 INTRODUCTION

AS DEMONSTRATED in Chapter 2, scholars link the passage of anti-LGB hate crime laws in the US with the identity politics of minority groups. Compared to the US, knowledge about factors influencing the passage of anti-LGB hate crime laws in Europe (aside of the UK) is limited. What is visible, however, is the fact that the LGBT rights movement in Europe is increasingly organized and that the process of emancipation is supported by the European Union (Paternotte 2016). The Europeanization literature has explained the diffusion of European norms (including LGB equality) in third countries, taking account of the work of social movements, but so far, hate crime laws and policies have not been an object of its attention. Below, I provide an overview of current debates in the literature on social movements and literature on Europeanization and make a case for using the social movement outcome theories in the context of Europeanization to understand why Poland recognizes anti-LGB hate crime in policing and monitoring, but does not recognize it in the law.

3.2 SOCIAL MOVEMENT OUTCOME THEORIES

Scholars have long considered the political outcomes of social movements mobilization (Gamson 1975; Piven and Cloward 1977). A central issue in this strand of literature has been the extent to which collective action can influence political change. Before I consider this in detail, however, there is first a need to explain how movements are conceptualized and what their role is.

There are multiple definitions of a social movement (Goodwin and Jasper 2009; Meyer and Tarrow 1998; Tarrow 1998), emphasizing either its importance, tools and methods or forms of organization (Koopman 2015:341), or focusing on the differences between social movements, interest groups and other forms of collective behaviours (Snow, Soule, and Kriesi 2004:7). Snow et al. (2004) conceptualize social movements as

. . . collectivities acting with some degree of organization and continuity outside of institutional or organizational channels for the purpose of challenging or defending extant authority, whether it is institutionally or

culturally based, in the group, organization, society, culture, or world order of which they are a part (P. 11).

Movements that have emerged since the late 1960s, including the ecology (and anti-nuclear), peace, women's rights and gay and lesbian (later LGB and T) rights movements are referred to in literature as the 'new social movements' (Kriesi et al. 1995:xviii). Activities of some of them are reported in media outlets every day. Consider for example the broad coverage of the marriage equality struggles in countries such as France (2013), the US or Ireland (both 2015). Because movements and their actions are so visible, Meyer and Tarrow (1998) speak of a 'movement society,' and Snow et al. (2004:4) believe that we live in a 'movement world'.

Going back to the political outcomes of social movements' mobilization, as this field of study has developed, further questions have arisen including the extent to which social movement affect political change, compared to political and other factors. Baumgartner and Mahoney (2005:20) argue that '[s]ocial movements are clearly at the center of much policy change'. They document the influence of social movements on the agenda of the US federal government in five policy areas: women's rights, human rights and minority and civil rights groups; environmental groups; and the retired people's rights groups. On the contrary, Skocpol (2003) and Giugni (2007) argue that that movements' actions are rarely decisive. For example, Giugni (2007), who analysed the mobilization of ecology, antinuclear, and peace movements in the US between 1975 and 1995, concludes that

. . . social movements have little, if any, impact on public policy and that, if they are to have an impact, it depends on the combination of overt protest activities, the type of issues they raise, and external resources such as public opinion and political alliances with institutional actors (P. 53).

Amenta et al. (2010), having reviewed the extant literature on the power of social movement mobilization, conclude that large movements can influence political outcomes. Since their review is, however, limited to movements in 'largely democratized polities and especially in the U.S. polity' (2010:288), expectedly, their conclusion might not apply to countries in the process of democratization or states where there is a disconnect between the government and civil society. In those jurisdictions, even large movements may not have the ability to influence the political agenda. For example, in countries such as Russia, even the relatively strong and transnationally-connected LGBT movement has not managed to secure the right to organize Pride events, or overcome the ban of the 'propaganda of non-traditional sexual relationships' (Fenwick 2014:5).

Research has found that some issues and policies may be particularly difficult for movements to influence. These include

. . . policies (a) closely tied to the national cleavage structure, (b) for which high levels of political or material resources are at stake, (c) regarding military matters, or (d) on which public opinion is very strong (Kriesi et al. 1995, Giugni 2004, Burstein & Sausner 2005 in Amenta et al. 2010:295).

In these areas, the movements are likely to meet with strong opposition. In the context of the gay and lesbian movement, Haider-Markel and Meier (1996) argue that

when gay and lesbian rights are not salient, the pattern of politics resembles that of interest group politics. If individuals opposed to gay and lesbian rights are able to expand the scope of the conflict, the pattern of politics conforms to morality politics (P. 332).

The morality politics pattern suggests that policies concerning salient, ideological issues reflect influences of religious groups and party competition, with two opposing camps formed on both sides of the divide, and at least one group framing the issue in terms of morality and/or sin (Haider-Markel and Meier 1996; Studlar and Burns 2015). The pattern was observed in various countries in issues such as abortion (Goggin 1993; Studlar and Burns 2015) and gay rights (Haider-Markel and Meier 1996; Holzacker 2012; Studlar and Burns 2015).

Tilly (1999) adds that political outcomes of social movement actions may also include consequences that were not intended, such as backlash (Keck and Sikkink 1999:94; Piven and Cloward 1977; Snow and Soule 2010). Considering the example of Russia brought up above, the systematic torture of men perceived to be gay at secret detention camps in Chechnya is seen as a reaction to attempts to hold Pride events in the region (Kondakov 2017).

To assess the impact of social movements on public policies, scholars came up with phases of the process of influencing a policy domain (Jenness and Grattet 2001:6–7; Keck and Sikkink 1999:98). For example, Keck and Sikkink (1999:98), looking at advocacy from an international perspective, identify the following stages:

- (1) issue creation and attention/agenda setting;
- (2) influence on discursive positions of states and regional and international organizations;
- (3) influence on institutional procedures;
- (4) influence on policy change in 'target actors' (...);
- (5) influence on state behaviour (P. 98).

Authors generally agree that the movements' role in generating political change is crucial at the early stage of the process, i.e. agenda setting (Johnson 2008; King, Bentele, and Soule 2007; Olzak and Soule 2009; Soule and King 2006), because it is the movement which formulates the

claim and brings it to the table. If the collective benefit (for example, a piece of legislation or a public policy) is approved, the final task is to ensure that it is implemented, i.e. the state behaviour changes (Jenness and Grattet 2001:7; Keck and Sikkink 1998). As Keck and Sikkink (1999:98) warn, '[w]e must take care to distinguish between policy change and change in behaviour; official policies may predict nothing about how actors behave in reality'.

Considering the above, there are various measurements of success of a social movement's advocacy work. For example, Parris and Scheuerman (2015) treat the passage of sexual orientation hate crime law as a success. While this choice may be reasonable considering the number of variables in their study, my research (chapter 6) shows that observations based on laws could be misguided. This is because most countries which adopted anti-LGB hate crime laws fail to evidence that they use it in a systematic way (i.e. that the state behaviour has changed). For this reason, apart from legislation, I consider written policies on countering anti-LGB hatred, as well as enforcement of the law, measured through number of recorded cases.

Organizing

Most movements, particularly those with complex claims and long-term strategies, develop structures known as social movement organizations. To describe this process, scholars use the term 'NGOization'. NGOization is a process which entails 'a shift from rather loosely organized, horizontally dispersed and broadly mobilizing social movements to more professionalized, vertically structured NGOs' (Lang 2013: 62, cited in Paternotte 2016:3).

The role of NGOs can become crucial in attaining and maintaining the movement's goals. As Parris and Scheuerman (2015) summarize, social movement organizations

. . . do the work of social movements, including gathering resources, recruiting members, creating claimsmaking frames, providing legitimacy to the broader movement, mapping strategies, and engaging in tactical behaviors (P. 238).

While there are several definitions of NGOs, I follow the conceptualization proposed by Teegen, Dah and Vachani (2004). They refer to NGOs as

. . . private, not-for-profit organizations that aim to serve particular societal interests by focusing advocacy and/or operational efforts on social, political and economic goals, including equity, education, health, environmental protection and human rights (P. 466).

The process of NGOization may involve professionalizing, understood as the 'acquisition of a set of competences that exceeds the skills utilised by most first-generation activists to deal with policy environment' (Ruzza 2004:12, cited in Paternotte 2016:3). The skills include

. . . legal knowledge, technical and scientific expertise, public relations skills, a detailed understanding of the policy process and the development of personal contacts with members of the civil service, elected representatives and the press' (Ruzza 2004:12, cited in Paternotte 2016:3).

In other words, professional activists have a good knowledge of 'the rules of the game' and are proficient in the art of 'politicking' (van Schendelen 2002, cited in Swiebel 2009:21).

Professionalization of NGOs is crucial particularly at stages beyond the agenda-setting stage and for movements with complex demands and long-term strategies. As movements mature and institutionalize, they tend to focus on policy initiatives (Parris and Scheuerman 2015). The initiatives should be specific and use frames that legitimize them (see below). Once articulated and framed, specific demands need to 'make their way inside the appropriate parts of the often fragmented organizational structure' of the target organization, such as the government (Swiebel 2009:21). Baumgartner and Jones (1991:1050, cited in Swiebel 2009:21) call this stage 'internal venue shopping'. In the context of LGBT rights, specification of demands may include the transition from generalized calls against homophobia to initiatives in the areas of discrimination at work and in access to services, hate speech and hate crime, recognition of same-sex unions and adoption rights, gender recognition laws, as well as policies aimed at preventing homelessness of LGB youth, HIV prevention, etc. For all these, different skillsets are necessary.

Organizations working on similar issues in different locations can form national and transnational networks and coalitions (Keck and Sikkink 1998; Tarrow 2005). According to Keck and Sikkink (1999:89), transnational advocacy networks gather 'those actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services'. While advocacy networks may include various participants, including the media, international organizations and people within the system, it is NGOs that play a central role in most of them (Keck and Sikkink 1999:92).

Framing and strategizing

The effectiveness of the mobilization of the movements depends, *inter alia*, on how they frame their claims and what specific strategies they employ to attain goals. Before I move on to discussing specific strategies, I will spend a moment considering the role of framing.

Theorists define framing as 'conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action' (McAdam et al. 1996:6, in Keck and Sikkink 1999:90). Verloo (2005:20) defines a policy frame as an 'organizing principle that transforms fragmentary or incidental information into a structured and meaningful problem, in which a solution is implicitly or explicitly included'. The problem and

solution means that the frame contains a diagnosis (the current situation and what is wrong with it), a prognosis (what should be done about it), and 'a call to action', or a rationale (Benford and Hunt 1992; Snow and Benford 1988). For example, a policy frame may diagnose a high level of underground abortions as a women's rights issue and identify a restrictive abortion law as a violation of women's rights; then it may suggest that liberalization of the law would bring down the number of illegal abortions (prognosis), and call on legislators to change the law that oppresses women.

To be effective, frames should be narrowed down to specific issues. For example, a frame may speak of shelter conditions rather than homelessness generally, identify those responsible for dealing with social policies; and propose viable solutions, such as an investigation of shelter conditions (Cress and Snow 2000:200; Polletta and Ho 2006:14).

Frames can be produced by the movement or drawn from existing, larger master frames, such as equality (Snow and Benford 1992). Frames can transform over time, and old issues may be framed in new ways, as activists learn from colleagues within their network and observe how frames resonate with various audiences. Keck and Sikkink (1999:95) provide an example of land-use rights in the Amazon, which 'took on an entirely different character and gained quite different allies' when the issue was 'viewed in a deforestation frame' rather than through a 'social justice or regional development' lens.

There are several ways of categorizing specific strategies (Jenness and Grattet 2001; Keck and Sikkink 1998; Polletta and Ho 2006). For example, Keck and Sikkink (1998) grouped various tactics used by transnational advocacy networks into four categories. The first one – *information politics* – focuses on providing an alternative source of information. This usually means drafting reports which can supplement, clarify or refute information provided by the government. Reports may contain statistics and testimonies, i.e. lived experiences of people whose lives have been affected (Keck and Sikkink 1999:95). The second tactic - *symbolic politics* - includes the use of powerful symbolic events through which activists can show that something is profoundly wrong, and mobilize audiences around making it right (Keck and Sikkink 1999:96). The third tactic focuses on achieving leverage (*leverage politics*). Leverage can take the form of 'issue-linkage, normally involving money or goods', or, alternatively, may focus on 'mobilisation of shame', 'where the behaviour of target actors is held up to the bright light of international scrutiny' (Keck and Sikkink 1999:97). The fourth tactic involves *accountability politics*, which is 'the effort to oblige more powerful actors to act on vaguer policies or principles they formally endorsed' (Keck and Sikkink 1999:95). It is used when the target organization, e.g. government, publicly commits itself to a principle, for example human rights or democracy. Activists can use this position 'to expose the distance between discourse and practice,' which 'is embarrassing to many governments, who may try to save face by closing the distance' (Keck and Sikkink 1999:95).

Connected with the above tactics is the so-called *boomerang pattern of advocacy*, where activists blocked in one state may appeal to other states' governments, as well as international bodies' monitoring and review mechanisms to apply pressure on their own governments. The pattern may be used in cases '[w]here governments are unresponsive to groups whose claims may none the less resonate elsewhere' (Keck and Sikkink 1999:93). In such cases, 'international contacts can 'amplify' the demands of domestic groups, pry open space for new issues, and then echo these demands back into the domestic arena' (Keck and Sikkink 1999:93). The boomerang pattern of advocacy is presented in the Figure 1 below.

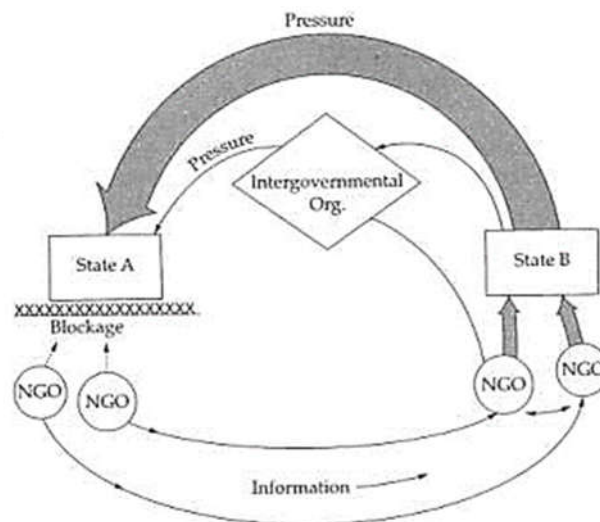


Figure 1 The boomerang pattern of advocacy. Source: Figure 1 in Keck and Sikkink (1998:13).

The boomerang pattern of advocacy is increasingly used in the international human rights monitoring and review process and by NGOs dealing with hate crimes. Nevertheless, to date, there are no studies looking at the effectiveness of this procedure. For this reason, in my study, I include the question about the influence of international bodies on national hate crime laws and policies (RQ(5)).

Political and other factors

Apart from movement characteristics, several political and other circumstances may impact the political outcomes of social movement claims. Eisinger (1973) introduced the concept of political opportunity structures, which was further developed by McAdam (1982), Tarrow (1998) and Meyer (2004). Kriesi et al. (1995:xiii) cite Tarrow's definition of political opportunity structures as 'signals to social and political actors which either encourage or discourage them to use their internal resources to form social movements'.

Political opportunity structures may include, *inter alia*, the division within elites and the presence of political allies (Amenta et al. 2010). Tarrow (1998) argues that social movements are more successful if political elites are divided. This is because disagreements between political elites

create opportunities for movements to enter the political stage. To be successful with their claims, movements need also influential political allies (Tarrow 1998), or a favourable partisan context (Amenta 2006). According to political mediation theory, elected officials and bureaucrats on the other hand are more likely to cooperate with the movement and comply with its demands if they see how it benefits them (Almeida & Stearns 1998, Jacobs & Helms 2001, Kane 2003 in Amenta et al. 2010:298).

Finally, scholars (Agnone 2007; Brooks and Manza 2006; Giugni 1998) recognize that public opinion may impact political outcomes. Giugni (2007:53) claims that, to have any political impact, 'movements need the joint occurrence of mobilization, support from political allies, and public opinion favorable to the cause'. Recent scholarship, however, has deemphasized the role of social acceptance, arguing that social movement organizations can achieve their goals through various means, such as cooperation with political allies (Parris and Scheurman 2015). Europeanization studies also show that states may pass progressive laws, such as equality legislation, thus responding to movements' calls, despite the lack of resonance in the broader society. I consider this strand of literature below.

3.3 EUROPEANIZATION THEORIES

Similarly to social movements scholars who analysed norm diffusion in the US, Kollman (2013) and Ayoub (2015) divide factors influencing adoption of LGBT rights laws in Europe into domestic and external. Whether domestic or external factors are more influential in norm adoption differs by country, and can depend on, for example, the relationship with the European Union. According to Ayoub (2015), who analysed the passage of various strands of LGBT rights across Europe,

[d]omestic factors, particularly economic modernization, are more relevant for policy adoption in the older member states, whereas the newer member states display greater dependence on transnational actors and are more influenced by international channels (P. 293).

In Europe, the political opportunity structures have been analysed in relation to the European Union. Europeanization is a theoretical framework which can be summarized as explaining 'the process in which states adopt EU rules' (Schimmelfennig and Sedelmeier 2005a:7).²⁰ Europeanization theorists provide two main explanations why third countries accept EU norms: rational choice institutionalism and sociological (constructivist) institutionalism (Börzel and Risse 2003; Schimmelfennig and Sedelmeier 2005a). The rationalist perspective, which follows the 'logic of consequentialism,' argues that the external norm is accepted by states when they decide that the benefits of conforming to the norm outweigh the domestic costs associated with it. This

²⁰ I understand the term 'norm' as a standard of behaviour accepted and enforced by members of the community. When speaking of an 'international norm', I refer to norms adopted and promoted by IGOs.

relates to the EU integration process, which may be halted if the third country does not adhere to norms. In contrast, the constructivist perspective emphasizes the 'logic of appropriateness' and processes of persuasion (Börzel and Risse 2003), focusing on the soft transfer of EU norms to member and candidate states (Checkel 2001; Kollman 2013). Compliance is understood as an effect of the changing preferences of the country and the norm becoming perceived as legitimate and appropriate.

Krizsán and Popa (2010:384 citing Beveridge 2009; Krizsán 2009) observe that the 'logic of consequences dominates before accession, while appropriateness becomes the predominant logic post-accession, when conditionality is no longer in place'. Commenting on the different treatment of member and candidate countries, Ayoub (2013:284) argues that '[t]he EU does require states to make changes to accompany accession, but it becomes cautious about 'embarrassing its own members' once they are in'. Both the above mechanisms – external conditioning and social learning – are vertical, top-down processes, in which the norms are transferred from the EU, which is the socializing agent, to third countries, which are objects of socialization (Börzel and Risse 2012).

While accession negotiations are mostly about economic issues, in recent years the EU has developed an approach in which human rights are pushed to the front, described as 'fundamentals first' (see Slotmaeckers and Touquet 2016). Among the norms championed by European institutions is respect for LGBT rights. Unlike in the United Nations, where it was contested,²¹ the concept of LGBT human rights 'touched the EU at the core of its soul, linking mythical concepts such as the 'European identity' to the problems of credibility and popular support' (Swiebel 2009:30). For example, in 2012 the European Commission (EC) confirmed that LGBT rights constitute 'an integral part of both the Copenhagen political criteria for accession and the EU legal framework on combatting discrimination' (Rettman 2012). Opportunities provided by the EU (such as access to institutions and provision of core funding) are also seen as instrumental in the growth and professionalization of ILGA-Europe, the European LGBT umbrella organization (Paternotte 2016).

Both external conditioning and social learning are top-down processes, in which the norms are transferred from the EU to third countries (Börzel and Risse 2012). Kulpa (2014) critiques this aspect of Europeanization theories arguing that it is a form of a cultural hegemony of the West. Slotmaeckers (2014) adds that the EU does not introduce new norms to enlargement countries, but rather helps to mobilize norms which already exist there, although perhaps in a marginalized

²¹ Saiz (2004:57) reminds that the 'typical objections' raised whenever sexual orientation rights were asserted in the UN was that sexual orientation was not defined, cannot be universally recognized as part of the non-discrimination principle because it does not appear in any UN treaty, and that it is not a 'human rights issue but a social and cultural one, best left to each state to address within its own sovereign legal and social systems'.

form. The mobilization is facilitated by NGOs, often connected in transnational advocacy networks.

In the context of the Europeanization of LGBT rights, the role of NGOs was the object of analysis of several scholars, most recently Ayoub (2013), Ayoub and Paternotte (2014) and Paternotte (2016). Considerably less academic attention has been paid to the role of institutional actors, such as ODIHR and OSCE missions, i.e. international human rights institutions which support governments on the ground. In the context of hate crime, as chapter 6 and 10 below show, a closer look at the activities of OSCE bodies allows us to better explain the proliferation of the international hate crime model, and the presence of sexual orientation in hate crime laws and/or policies.

One of the reasons why NGOs have received a lot more attention than OSCE bodies is that the object of attention has been either LGBT rights in general (e.g. Ayoub 2013), or same-sex unions (e.g. Kollman 2009), areas in which these bodies have a limited mandate to intervene. Conversely, countering hate crime, in which both bodies are involved, has not been a separate object of attention of scholars of Europeanization.²² Only recently Goodall (2013) has observed that the OSCE has influenced EU's hate crime policies and was the reason why some European countries enacted US-style hate crime laws. Another reason why activists' work receives more attention is because their actions, such as Pride events (Ejdus and Božović 2016; Underwood 2011) or legislative initiatives, are readily visible. On the contrary, OSCE bodies tend to work with professionals (civil servants, law makers etc.), attracting little public (as well as scholarly) attention.²³ Their role (and effectiveness) should therefore be explored to see how they impact the passage of hate crime laws and policies.

Before I conclude this part of the chapter, there is a need to consider not only how the norm is implemented in the adopting country, but also – what kind of contestations are present. Zürn and Checkel (2005) looked at the congruence of the international norms with norms on the domestic level, taking a 'bottom-up' approach to Europeanization. In this sense, if the international norm does not resonate with certain political and cultural variables (e.g. religious values of the society), there may be no adoption, or the adoption may be delayed or limited. The norm may also be contested if the issue divides public opinion (Kriesi et al. 1995, Giugni 2004, Burstein & Sausner 2005 in Amenta et al. 2010:295). In the context of LGBT rights, if the issue is salient, 'the pattern of politics conforms to morality politics' (Haider-Markel and Meier 1996:332), which also inhibits adoption.

²² Credit should be given to Ayoub's (2015) impressive analysis, which distinguished between various branches of LGBT rights laws, including employment and incitement to hatred provisions, but did not account for variations in hate crime norm adoption.

²³ Although it should be noted that information about ODIHR's activities in countering hate crime is regularly published on the OSCE's website at <http://www.osce.org/odihr> (retrieved 11 August 2017).

Indeed, while the US and most Western European Union countries promote equality and the rights of LGBT people, this may be seen as Western imperialism, in which the West is the hegemon which constructs and imposes human rights norms on other regions (Kulpa 2014). Keck and Sikkink (1999:94) observe that 'the 'civilizing' discourse of colonial powers can work against the goals they espouse by producing a nationalist backlash'. Indeed, as pointed out above in chapter 2 and in this section (Saiz 2004), there is visible opposition to the Western norm of protecting LGBT rights around the world. The East of Europe, particularly Russia, propounds an alternative political and cultural model (Ayoub and Paternotte 2014), emphasizing 'authentic' and 'traditional values,' and opposing 'homopropaganda' and 'modern' norms arguably imposed upon the region by the West (Wilkinson 2014). Orthodox-majority countries look to Russia to counter the Western influence (Pew Research Center 2017). In this process, LGBT rights have become a symbol of Western norms and are used in political campaigns. The clash between the two visions was observed, for example, in Ukraine, where opponents of EU integration put up posters warning that '[a]ssociation with the EU means same-sex marriage' (Slootmaeckers, Helen Touquet, and Vermeersch 2016:3).

Summing up, the two sections above have shown how social movements and Europeanization scholars explain the passage of laws and policies responding to the claims made by social movements. The two groups of theories work well together, and may provide an explanation as to why some countries in Europe enact anti-LGB hate crime laws and use them, some pass them, but rarely use them, and others try to counter anti-LGB hate crime without laws.

3.4 CONCLUSION

As the aim of this dissertation is to understand the internal and external factors that condition the legal and policy response to anti-LGB hate crime in Poland, I apply the social movements impact theories in the context of Europeanization as a theoretical framework to explain my findings. The combination provides a powerful explanation of all issues identified in the case study, such as advocacy networks, international organizations, the political system, legal debates and bottom-up resistance to Europeanization.

Considering social movements' mobilization, I will analyse how activists frame their claims, which strategies they employ and why, and how effective these strategies are. With regard to political opportunity structures, I will consider the make-up of the legislature, stances of main political actors on LGBT rights, as well as public opinion and other factors. Answering calls for research comparing movements and their consequences between countries (Amenta et al. 2010), I will compare the legal and policy frameworks for countering anti-LGB hate crimes across Europe. This comparison will allow me to appreciate factors conditioning the adoption of the norm of protecting LGB people from violence that I might not see otherwise, if I only looked at Poland, without the broader context. Finally, since the social movements and Europeanization frameworks are over-focused on NGOs and overlook the agency of other transnational network members, I

aim to add to both frameworks by analysing the role of international and regional human rights bodies (ODIHR, OSCE missions and FRA) and 'activists within governments' in developing rights norms.

4 METHODOLOGY

4.1 INTRODUCTION

In this chapter, I describe how I gathered and analysed data for this research. I also further explain my decision to use the combination of social movement impact and Europeanization theories (presented above) as an explanatory frame.

Research on anti-LGBT violence in Poland to date has been dominated by quantitative studies, mostly victimization surveys (Abramowicz 2007; Świder and Winiewski 2017; Świerszcz 2011). Even though survey results can provide evidence of the prevalence, extent and incidence of victimization, they may miss out on the wider social context (Goudriaan, Lynch, and Nieuwbeerta 2004), i.e. the cultural meanings attached to the non-normative sexualities and the socio-political reasons for supporting and/or rejecting attempts to introduce hate crime legislation. For this reason, while we now have conclusive evidence that anti-LGBT violence and the low level of reporting are policy problems in Poland, we lack theoretical explanations considering the priorities and strategies of the NGOs, as well as political and other reasons why anti-LGBT hate crime law is so difficult to pass and enforce. The same is true for most countries in the region.

As the aim of this research is to explore what conditions the legislative and policy response to anti-LGBT hate crime in Poland, it was natural that I needed to draw on a wide range of data, allowing me both to widen and deepen my understanding of the issue. In such exploratory studies, it is common to use mixed methods of inquiry, i.e. a methodology in which quantitative and qualitative data 'are integrated and interpreted to address research questions' (Creswell 2015 in Schrauf 2016:7). The strength of the multi-method approach is in the fact that, while quantitative studies can explore 'phenomena on a larger and perhaps more precise scale' than qualitative research (Schrauf 2016:7), thereby identifying reasons and consequences, the difficulty is often not showing that a relationship exists, but rather interpreting that relationship. Here, the qualitative approach helps to explain not only *that* something happened, but also 'how and why it happened' (Huberman and Miles 1994:434; quoted in Punch 1998:55).

In my research approach, I follow the interpretivist tradition, prioritizing 'interpretation and meaning of human experience over measurement, explanation and prediction' (King and Horrocks 2010:21). The importance of experiences will be particularly visible in the interpretation of changes in hate crime policing and data collection practices in Poland, which would be lost in the abstraction of quantitative research. As Chapter 10 shows, the experiences and relative

positions of activists versus public officials results in two different explanations of the same change.

While the dissertation focuses on Poland, Chapter 6 includes a quantitative cross-cultural analysis of laws and reporting across Europe. There were two reasons for adding this comparative angle to the Polish case study. First, I wanted to provide context and contrast for the case study of Poland. Second, I wanted to validate my interpretations of the qualitative data (methodological triangulation, see below). This approach follows the advice of social scholars (Creswell 2003; Schrauf 2016). For example, Schrauf (2016:7) argues that '[i]n cross-cultural comparisons, where social and cultural contexts are key factors, an approach that captures the range of macro- and micro-influences on human behavior is unquestionably ideal'. As such, while the method of data collection and analysis is different (numbers in spreadsheets instead of texts), the purpose of both approaches remains the same: 'to enhance knowledge, in some way to enable us to know more' (King and Horrocks 2010:23).

4.2 DOING RESEARCH THAT MATTERS

Social scholars often emphasize that conducting research on marginalized communities has the potential to empower them (Reinharz 1992:180-194; cited in Punch 1998:143). Research that aims to change the situation of the researched groups is often (although not always) conducted by practitioners engaged in action on the ground. Stake (2010:158) observes that 'action research usually starts with a practitioner realizing things could be better and setting out to look carefully in the mirror'. In his view, 'all action research starts with evaluation, with a notion that 'something's not right' (Stake 2010:157). The feminist literature (e.g. Ackerly and True 2010) came up with the concept of 'scholars-activists', who are concerned about 'political engagement, objectivity and the relationship between academia, activism and social change' (Santos 2013:5). Santos (2013:5) concludes that 'this type of 'double agency' (...) offers the opportunity to build and disseminate empirically grounded knowledge while maintaining a sense of social responsibility and political engagement'.

Dick (2007:3) observes that 'all action research shares a commitment to both theory development and actual change'. Authors following this tradition frame their 'research so that it may be complex and theoretical, yet understandable to wide range of audiences' (Tracy 2013:390). The school of public sociology (Burawoy 2005a, 2005b) sees knowledge production as something that should be accessible for audiences outside academia, and accentuates the element of public engagement both in disseminating research findings and in the research design. The problem, however, remains that scholars are not encouraged to write non-reviewed papers, as it is scholarly articles that count in an academic career (Tracy 2013:390).

While there are disagreements as to what constitutes 'full' or 'proper' action research, scholars agree that in its basis, action research is 'emancipatory' (Boog 2003) and political (Nugus et al.

2012). Another element of the description of action research is that it is cyclical, build on the model: plan → act → observe → reflect → repeat (Kemmis and McTaggart 1988 in Dick 2007:4).

This dissertation is also grounded in the commitment to producing research which is theoretically informed, methodologically sound yet politically engaged, and accessible for audiences outside academia. Bringing these criteria on board is possible, although not easy. While my study has a 'work-related focus that is intended to improve practice' (Lapan 2012:291) and action research principles feature prominently in the study, in designing it, I decided that following a full cycle described above would not be suitable or feasible. Instead, I embraced some action goals, while maintaining a more traditional research approach. In particular, I combined action research with the grounded theory approach to coding (see below). This approach is based on the belief that 'qualitative data can be systematically gathered, organized, interpreted, analysed and communicated so as to address real world concerns' (Tracy 2013:22).

In my case, the acute social problem was the inadequacy of the state response to hate crime based on sexual orientation. The choice of topic was not accidental. Living in Poland, I witnessed homophobia on multiple occasions. Before starting the PhD, I worked occasionally on projects in the field of human rights, LGBT rights and anti-discrimination and observed the struggles of the LGBT movement to push for legislation that would protect LGBT people from discrimination and violence. It was then that I realized that hate crime as a policy area is under-researched in Poland. As this was the time when I was looking for a topic for my PhD (2012), I hoped that my research on hate crime law might not only add to scholarship, but also help move forward the political debate.

During the four years of research, I often heard and read about the disconnect between hate crime theory and practice and a 'tendency for researchers, policy makers, and practitioners to work in silos' (Chakraborti and Garland 2014, referred to in Perry et al. 2015:2).²⁴ In Poland, I heard practitioners complain about researchers coming in, collecting data and then 'catapulting back' to the ivory towers. Their research reports were neither accessible (due to paywalls) nor relevant (theory-focused) for practitioners; thus, even though concerned with policy, they failed to *inform* policy. My observation was in line with what Lapan (2012:295) writes, i.e. that '[m]any professionals report a lack of access to these research findings, but most describe them as neither relevant nor closely linked to what they need to know for solving real-life work-related issues'.

To make my research accessible and relevant to the non-academic public, particularly activists and policy makers, I decided to draft and publish an open-access, scholarly informed report focused on policy rather than theory (Godzisz 2015). The idea was to write a 'white paper,' first

²⁴ The need to bring people working on hate crime from different theoretical, practical and national perspectives is also among the reasons why the International Network for Hate Studies, a platform that provides an 'accessible forum through which individuals and groups can engage with the study of hate and hate crime in a manner which is both scholarly and accessible to all' (INHS n.d.) was set up. See the Network's website at <http://www.internationalhatestudies.com/>.

identifying a key problem (the inadequate response to hate crime) and then laying out policy recommendations to solve it (Tracy 2013:381). White papers are increasingly popular among scholars who turn to them to address societal and policy problems. They are also a way to build bridges between policy makers, activists and researchers, or even victims. For example, researchers in the *Leicester Hate Crime Project* produced a set of briefing papers, a video, and a *Victims' Manifesto* in addition to the research report.²⁵ Such formats are much more accessible to people who are focused on practice, not theory.

4.3 RESEARCH DESIGN AND SOURCES OF DATA

4.3.1 CASE STUDY

This research takes the form of a case study. A case study is widely used in the social sciences to understand a phenomenon in depth in its natural settings, recognizing its complexity. This is because case studies can thoroughly 'describe complex phenomena and how people interact with them' (Moore, Lapan, and Quartaroli 2012:243). Seen more as a 'strategy than a method' (Punch 1998:150), case study research 'incorporates a variety of data gathering methods to answer the questions' (Moore et al. 2012:251). The use of different methods of collecting data (methodological triangulation; see below), and the subsequent need to find agreement between evidence collected through different methods is helpful in corroborating findings.

For the case to be studied, it needs to be bound in terms of research questions, geography and time (Moore et al. 2012:245–46). The research questions guiding this dissertation are presented at the end of Chapter 2. Considering the location, the dissertation provides an in-depth insight on development of laws and policies in Poland (case study), while other European jurisdictions are analysed using mixed methods (quantitative analysis supported by qualitative insights) as a contrast. Regarding the timeframe, the period analysed is limited to the decade between 2005 and 2015. The first date is selected as it was then that hate crime advocacy in Poland started (see chapter 7). The end date – 2015 – is when the PO party lost the elections and a new, conservative government came to power and policy directions changed.

With its holistic approach, the case study may use a range of data collection methods. The tools selected should 'best fit the research problem and enable the ongoing analysis of the data' (Thornberg and Charmaz 2012:44). For this reason, this study uses three major types of data source: documents, interviews and observation, all of which are widely used in qualitative research (Punch 1998:174).²⁶

²⁵ See all documents at the project's website https://www2.le.ac.uk/departments/criminology/hate/research/copy_of_project (retrieved 11 October 2017).

²⁶ For the sake of clarity, the description of the methodology and limitations of the quantitative study can be found in Chapter 6.

Using a variety of sources of information and various methods of data analysis is known as triangulation. Denzin (1978) differentiates data triangulation, methodological triangulation, investigator triangulation and theory triangulation. I found triangulation to be ‘a useful stimulant to reflexivity’ (King and Horrocks 2010:172) and helpful in making the study more comprehensive. Specifically, in this research, triangulation of data gathering methods (e.g. interviews with both activists and public officials combined with archival research) helped me to find two competing interpretations of reasons of the changes in policing and monitoring practices. Methodological triangulation (quantitative analysis added to qualitative research) was also used to corroborate results of the qualitative research and identify additional factors influencing Poland’s laws and policies. Below, I provide a description of how I approached each of the three major data sources.

4.3.2 DOCUMENTS

Various kinds of documents are employed as sources of data for researchers working on policy issues. My approach to documentary data collection and analysis draws from the methodology and experiences in the transnational *Quality in Gender+ Equality Policies* (QUING) project (Dombos et al. 2012). There, Dombos et al. (2012:9) collected documents including ‘bills, laws, policy plans, policy reports, party programs, parliamentary debates, Court decisions, consultation papers, position papers, as well as official letters and statements’. In addition to the primary sources, the analysis in the QUING project was complemented by other materials relevant to policy developments, such as media reports and published interviews with actors involved.

For my project, I first attempted to collect all documents relevant to hate crime policy and law in Poland produced by public authorities, civil society and international organizations, as well as relevant scholarly publications. Documents were sourced through online and offline archive searches. Below I describe the process of identifying relevant sources.

Regarding documents produced by and for international human rights institutions, I searched the archives on the website of the UN Office of the High Commissioner for Human Rights²⁷ and the Council of Europe’s Commission against Racism and Intolerance (ECRI).²⁸ Regarding national laws and the legislative process in Poland (laws, bills with explanatory memoranda, opinions on bills drafted by relevant statutory agencies, parliamentary debates), I searched the archives on the Sejm website.²⁹ Regarding comparative hate crime laws in other European countries, I used legislationline.org and ILGA and ILGA-Europe’s resources (see Chapter 6 for details of the comparative analysis). Regarding official letters, in June 2015, I sent a freedom of information request asking for any correspondence with NGOs or other statutory bodies concerning the

²⁷ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=138 and <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/PLSession1.aspx> (retrieved 12 October 2017).

²⁸ http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Poland/Poland_CBC_en.asp (retrieved 12 October 2017).

²⁹ <http://www.sejm.gov.pl/sejm7.nsf/proces.xsp> (retrieved 12 October 2017).

amendment of hate crime provisions to the Ministry of Justice.³⁰ To ensure that I approached the data collection in a systematic manner, similar requests were sent to the Ministry of Labour and Social Affairs (The Office of the Government Plenipotentiary for Disabled People); the Office of the Commissioner for Human Rights, and the Government Plenipotentiary for Equal Treatment. I also searched for the documents on the Campaign Against Homophobia's website. In result, I received the requested documents from the MoJ and the Human Rights Commissioner. The Plenipotentiary for Disabled People said they did not have anything to do with the change of the law. I did not receive a response from the Government Plenipotentiary for Equal Treatment. The freedom of information request revealed information not available online or through interviews. For example, I found that in 2012, a disability rights organization enquired with the MoJ about the possibility of adding disability to hate speech/crime provisions, separately from the efforts led by LGBT groups (PSON 2012).

Regarding other policy documents, such as action plans, police and prosecution guidelines and training materials, I searched the websites of the respective public bodies. Similarly, I searched the websites of key NGOs for civil-society produced documents, such as commentaries, shadow reports, and survey results. For the same reason, I searched the website of the FRA and polling agencies.

Regarding Polish-language academic publications concerning hate crime in Poland, I conducted searches in the catalogues of the Library of the University of Warsaw³¹ and the Public Library of Warsaw.³² These searches brought back a few publications, concerning mostly legal aspects of countering hate speech. In addition to that, I searched international catalogues, e.g. using *UCL Explore*³³ and the British Library catalogue,³⁴ which revealed a lack of English-language academic literature on hate crime law or policy in Poland.

While the above data sources were my main objects of interest, similarly to researchers in the QUING project (Dombos et al. 2012), I also conducted a cursory analysis of media coverage of issues identified in the issues' history (see below). Particularly, the media reports covered parliamentary debates on the bills and the results of votes, international bodies' reports, as well as big hate speech and hate crime cases.

This stage resulted in a rich collection of documents (over 300 items), which were categorized based on authorship and the date of creation in the computer catalogue. In the QUING project, researchers divided the documents into five categories: laws with bills' explanatory memoranda,

³⁰ An example of the freedom of information request may be found in Appendix B.

³¹ <https://chamo.buw.uw.edu.pl/search/query?theme=system> (retrieved 12 October 2017).

³² <http://www.koszykowa.pl/bazy-danych/katalogi-biblioteki-na-koszykowej> (retrieved 12 October 2017).

³³ http://ucl-primo.hosted.exlibrisgroup.com/primo_library/libweb/action/search.do?vid=UCL_VU1&reset_config=true (retrieved 12 October 2017).

³⁴ http://explore.bl.uk/primo_library/libweb/action/search.do?dscnt=1&dstmp=1456756616309&vid=BLVU1&fromLogin=true (retrieved 12 October 2017).

policy plans, parliamentary debates, civil society texts and other types of documents (such as reports, refused bills, court decisions, etc.). For my research, I modified these categories, reflecting the focus and scope of my research. As a result, I came up with seven categories (all quotations from Krizsán et al. (2012:18)):

- national and international laws, i.e. binding legal documents which 'form the core of any state policy' and commentaries on the laws provided by legal scholars;
- bills with explanatory memoranda, as they help to 'understand the motivation and framing behind' the proposed laws;
- opinions on the bills issued by relevant statutory bodies, and transcripts of parliamentary debates, necessary to 'understand how the policy resonates within the larger policy environment, and especially what types of contestations' of the bills' stated aims are present';
- other types of official document (such as letters, written statements, reports, court decisions, police and prosecution guidelines etc.);
- texts pertaining to the work of international human rights monitoring and review bodies, as they allow us to see the interplay between the government, IGOs and NGOs (boomerang advocacy);
- civil society texts, (such as shadow reports, research reports and strategy documents), selected to 'cover the voice of non-state actors';
- other documents, particularly media reports, training materials, etc.

Following categorization, I conducted an initial analysis of all documents, with the aim of selecting some for the final analysis (sampling). The preliminary analysis revealed, for example, that all the bills and their explanatory memoranda were almost identical, which meant that coding all of them was not necessary. In deciding whether to include a document in the final analysis, I followed the QUING methodology, where researchers selected documents that: '(1) are the most recent; (2) are the most comprehensive; (3) are the most authoritative; (4) are the most debated; (5) have the highest potential impact on gender;³⁵ and (6) contain the greatest policy shift' (Krizsán et al. 2012:18). Selected documents were subsequently transferred to qualitative data analysis software NVivo for coding.

4.3.3 INTERVIEWS

Similarly to documents, interviews are commonly used in qualitative research, as they are a good tool to elicit information from people regarding their background, experiences, behaviour, opinions, values, feelings and knowledge (Patton 1990). While qualitative research is not concerned with statistical representativeness (King and Horrocks 2010:35), the sampling

³⁵ I understand 'impact on gender' broadly, e.g. as gender mainstreaming, silencing women and sexual minorities, etc.

strategies should not be opportunistic. Rather, they need to 'relate in some systematic manner to the social world and phenomena that a study seeks to throw light upon' (King and Horrocks 2010:36). One of possible ways of doing it is identifying participants through purposeful sampling, which 'lends more strength in case study research because data sources, participants,³⁶ or cases are selected by how much can be learned from them' (Punch 1998:193).

Following the principles of purposeful sampling, I focused on people with different perspectives on the developments in hate crime policies and laws. In their model of transnational networks, Keck and Sikkink (1998) identify actors such as local and international NGOs, international organizations, the national government and others. Perry (2016a:612–14), on the other hand, identifies three groups of people who influence how the state responds to hate crime. These include: (1) national and international policy and law makers, police and criminal justice practitioners; (2) civil society organizations and groups; and (3) academics. While Perry's classification is useful, I expected that the views of Polish and international officials on hate crime could be sometimes so different that they could not be seen as one group. For this reason, I divided the 'policy' group in two. Conversely, I knew that most Polish scholars who researched hate crime are also affiliated with NGOs or otherwise engaged in policy work (cf. Santos (2013:5) above). For this reason, it made sense to group NGOs and academics together. As a result, three categories of key informants emerged:

- A. National authorities,
- B. International organizations and embassies,
- C. Civil society organizations and academia.

My sampling strategy focused on eliciting perspectives from all three groups. In particular, having in mind Swiebel's (2009) critique that social movements researchers overlook the agency of bureaucrats, I wanted to ensure balance between civil society and official (national and international) perspectives. Intersectional aspects, particularly gender, were also considered when selecting research participants.

Regarding recruitment, it is common that researchers first recruit and interview an initial sample of participants (e.g. Corbin and Strauss 2008). Further samples are defined to address specific emerging issues based on the preliminary analysis of data from the initial sample. In the summer of 2015, I prepared a list of key informants whom I wanted to interview. Then, I arranged all interviews directly with specific participants, asking them to decide whether to seek official permission from their organizations. I decided that this approach was suitable as I planned to make all participants anonymous. As such, there was no need for approaching gate keepers (King

³⁶ Various names exist in the literature for participants of qualitative research, particularly interviews. I like the term 'informant', which I understand, following (Moore, Lapan, and Quartaroli 2012:252), as 'a data source, or someone who knows about the case and can help the researcher learn about the case'. I use the term interchangeably with the terms 'respondent' or 'interviewee'.

and Horrocks 2010:38).³⁷ Everyone whom I approached to take part in an interview agreed. Another round of interviews took place in 2016. Similarly as in the initial sample, all those approached agreed to be interviewed. As a result, the total of 22 in-depth interviews were conducted (nine with representatives of civil society; eight with officials from Poland (including law enforcement, prosecution services and civil servants); and five with people affiliated with international human rights bodies):

- civil society organizations (HejtStop, KPH, No Hate Speech Movement in Poland, Trans-Fuzja, Association for Legal Intervention (SIP) and NEVER AGAIN Association);
- public institutions in Poland (the Prosecutor General's Office, the National Police Headquarters, two regional police departments, the Ministry of the Interior; the Ministry of Justice; the Ministry of Education, and the Office of the Commissioner for Human Rights);
- international human rights bodies (the OSCE Office for Democratic Institutions and Human Rights, the European Commission Against Racism and Intolerance, the UN Human Rights Committee).³⁸

In key organizations, I interviewed two or even three people (separately). This happened when the first interviewee said that their colleague would be better suited to answer a specific question or set of questions. In one case, I interviewed a group of three people. Group interviews have a purpose and dynamics that may be different from individual interviews and are usually planned separately (see e.g. Fontana and Frey 1994). In this case, as I did not cover sensitive topics, I decided to continue with a group and asked similar questions as in the individual interviews, letting members of the group decide who will answer and supplement the answers of their colleagues.

I knew all of the people I interviewed before, having met them at various occasions in professional settings (e.g. at work, conferences, training events or during specially-arranged 'preliminary meetings' (see the sub-section below)). The date of each interview was arranged with participants and recorded in the research diary (King and Horrocks 2010:140). Each interview was conducted in person, in Polish (in most cases) or English, and lasted for approximately one hour. While each participant was interviewed once, in several cases I asked follow-up questions by email, in person or over the phone at a later stage.

Apart from formal interviews and follow-ups, I also conducted many 'briefing interviews' (Tracy 2013:117), i.e. informal conversations and email exchanges with Polish and international activists, officials and others. The reason for both follow-up and briefing interviews was to clarify / supplement information. I also maintained occasional contact by email and in person with some

³⁷ The only exception was ODIHR, where I sought permission of the head of the department to approach staff with requests for interviews. See the section on ethical considerations below.

³⁸ The list of interviews is provided in Appendix D.

of the respondents to exchange information about events, publications and other things of interest.³⁹

The interviews were semi-structured, which means that they were based on a similar set of topics, listed in an interview guide. The interview guide was prepared beforehand and contained questions about background; experience, behaviour; opinions and knowledge (Patton 1990). It was a living document, updated and modified throughout the research (King and Horrocks 2010:45). This interview format allowed for chosen lines of inquiry to be pursued with each respondent while managing all interviews in a systematic way. Questions were categorized into themes and written up as phrases and bullet points. I decided for this approach as it allowed flexibility, albeit with possible difficulties. Specifically, without written up questions, one needs to be mindful to avoid leading questions, or expressions of 'endorsement of participant opinions', which can happen when 'the interview drifts into a style that is too conversational' (Willig 2008, in King and Horrocks 2010:45).

All formal interviews were paraphrased and summarized in a text file based on the recordings and notes, and the coding (see the section on analysis below) was done on the paraphrased/summarized text. Selected fragments of the interviews, which I identified as important during the initial listening of recordings or during coding, were transcribed *verbatim* and translated to English (cf. King and Horrocks 2010:154). A little bit of tidying up was necessary for some quotes to aid comprehension (King and Horrocks 2010:157). This was done usually in the process of translation.

Analysing interviews based on a paraphrased/summarized text rather than using *verbatim* transcription has certain risks, as data (e.g. specific language) may be lost. This is particularly the case of projects where various stages of the research process (e.g. interviewing, transcribing and analysing) are conducted by different people. In my case, this risk was minimized as I conducted all activities: interviewing, recording and taking notes; listening, paraphrasing/summarizing; coding and drafting memos; and, finally, writing up. The original recordings were available at all times and, whenever I needed more information, I could (and did) re-listen to them. In fact, I would argue that this way of processing data helped me get to know my information quite well, ultimately improving, rather than hampering, analysis.

4.3.4 OTHER SOURCES OF INFORMATION

The last ways of gathering data were 'preliminary meetings' and observation. I describe my approach to both procedures below.

³⁹ Ethical issues connected with conducting interviews are discussed below in this chapter.

King and Horrocks (2010:38) argue that requests for interviews coming from trusted sources are less likely to 'be seen as another form of junk mail'. Anticipating that there may be difficulties in recruiting participants for interviews, I wanted to introduce myself and the project in an informal but professional setting and build trust with policy makers and activists involved in hate crime work to facilitate interviews in the future. For this reason, in 2013, I conducted a series of 'preliminary meetings.' These meetings were informal and not recorded (although I often had a list of questions or topics to discuss and I took notes). They were not intended as a pilot study, e.g. to test questions, but, rather, their role was to aimed at establishing rapport, gathering general knowledge and identifying other relevant sources of information. King and Horrocks (2010:42) call this type of activity an 'informal preliminary work to focus your thinking about the area.'

In some cases, the preliminary meetings were arranged through cold-calling. Oftentimes, however, I asked people I had already met or known otherwise to put me in touch with people I had identified within a specific institution or organization as suitable interviewees.

The last method of collecting data was observation. This ethnographic method is often used to 'generate understanding and knowledge by watching, interacting, asking questions, collecting documents, making audio or video recording, and reflecting after the fact' (Lofland & Lofland 1995 in Tracy 2013:94). In my case, I observed several public events, including Pride events in Warsaw (Warsaw Equality Parade) in 2015 and 2016, and Gdańsk (Tri-City Equality March) in 2015, and the Independence March in 2015. I also observed parliamentary proceedings, including plenary sessions and committee meetings (both of which are public). On these occasions, I observed and documented public displays of homophobia and recorded the language and images used by LGBT groups and anti-LGBT protesters. These events and observations were usually recorded in field notes (Schrauf 2016:5). In addition to observation, I used archival pictures which I took at demonstrations prior to PhD. The fieldwork started in March 2015 and lasted until the end of data collection period, i.e. October 2016.

4.4 ANALYSIS

Huxham observes that theory building 'is probably the most challenging aspect of action research' (2003: 243, in Dick 2007:5). Coming from a practitioner background, when starting this research, I did not have a preferred theoretical framework. At the same time, I needed to ensure that my work would have the necessary academic rigour. For that, as many authors before me (see the list in Dick (2007:8)), I turned to grounded theory (in its constructivist form (Charmaz 2006; Thornberg and Charmaz 2012)), which has a clear, tested methodology for collecting and analysing data.⁴⁰

⁴⁰ While some may see action research and the grounded theory approach as incompatible (for example, Glaser (2003) discourages involving informants in theory development), Dick (2007:15) argues that both schools 'bring overlapping but different strengths to research'. Both approaches are also cyclical, whether

Grounded theory (Glaser and Strauss 1967) is among the most popular methods used by social scientists. In this approach, the theory is developed inductively based on the data gathered and studied in the research. In this sense, it is 'grounded' in a specific data-set. In the first stage of data collection in grounded theory, the researcher collects a small sample of data. At this stage, the data are unstructured: there are no predetermined codes or categories. Specific themes start to emerge only during the first round of analysis (see below). Now, the researcher collects the second set of data, guided by directions which emerge in that analysis. This cycle of data collection and analysis continues until we reach a theoretical saturation, a point 'when gathering fresh data no longer sparks new theoretical insights, nor reveals new properties of your core theoretical categories' (Thornberg and Charmaz 2012:61). Following first insights, researchers decide 'what data to collect next and where to find them' (Glaser and Strauss 1967:45). This stage, called 'theoretical sampling', is about 'seeking and collecting pertinent data to elaborate and refine categories in your emerging theory' (Charmaz 2006:96).

Using the classic grounded theory advanced by Glaser (1998) in PhD research may cause difficulties (Dunne 2011). In this approach, secondary sources are fed into the research only in its final stage, 'when theoretical directions have become clear' (Punch 1998:168). Too early an engagement with the existing literature may influence the researcher, who should approach the data without a theoretical bias. Corbin and Strauss (2008) as well as constructivist grounded theorists, such as Charmaz (2006), oppose this view. Thornberg and Charmaz (2012) argue:

... instead of risking reinventing the wheel, missing well-known aspects, coming up with trivial products, or repeating others' mistakes, researchers indeed can take advantage of the preexisting body of related literature in order to see further (P. 63).⁴¹

To 'see further' (and answer my research questions), I needed to find a way to grasp several different, but connected, issues related to my case study. Having conducted the literature review for the upgrade, I saw how others explained the passage of hate crime laws. I was not sure whether any of the frameworks would help me to understand all the different issues in my case study (e.g. advocacy efforts; legal debates, patterns of diffusion of hate crime laws in Europe, nationalism and homophobia, etc.). Grounded theory allowed me to proceed with data analysis with an open mind. In the paragraphs below, I proceed by presenting how I coded and interpreted data and why, finally, I decided to use an existing theory to explain my results.

explicitly (action research) or implicitly (grounded theory). For the above reasons, grounded theory can be a conceptual tool to analyse data and build theory while action research 'guides the intervention process' (Dick 2007:8).

⁴¹ Using the grounded theory in its constructivist approach has some limitations. For example, one cannot argue that A predicts B. Rather, the researcher attempts to understand and reconstruct the meanings attached to studied phenomena by others.

The first step of the analysis, similarly as in the QUING project (Dombos et al. 2012), was to create an 'issues history', a timeline of relevant developments, such as readings of bills in the Sejm, publication of reports, etc. The reason for it was to map and 'trace when and how issues appeared on the political agenda, who has contributed to the debate and what documents were produced' (Dombos et al. 2012:9). To create the issues history, I used timeglider.com and Office Timeline Free software. Figure 4 (chapter 7) presents a fragment of the timeline.

Following the initial analysis and sampling, I reread all selected documents and began to code them in NVivo. I used open (data-driven) codes, which I attached to clusters of text, either from documents or summarized / transcribed fragments of interviews. The initial stage of coding resulted in a long list of descriptive codes relating to themes (e.g. 'health condition as a protected category'); people and organizations (e.g. 'ECRI'). As part of the process, codes were standardized and merged into higher-level codes. For example, 'police training' and 'TAHCLE' were merged into 'training', while various minority organizations were grouped as 'NGOs'. This bottom-up method 'has the advantage of being transparent: the process of abstraction is traceable in the construction of the hierarchy' (Dombos et al. 2012:12).

The second phase involved interpretative, conceptual coding. Here, I developed codes that did not appear *verbatim* in the texts; rather, these codes were an effect of interpretation and summarization of larger chunks of data. For example, my categories included 'influencing the government', 'hate speech – focus on' and so on. The stance of some of the public officials towards the issue of combatting hate crime was coded as 'being an activist within the government'.

During the writing and rewriting stage, I understood that I did, in fact, have starting assumptions about the phenomena that I analyse. Specifically, it became clear to me that I assumed that the state recognizes LGBT rights if it has sufficient reasons to do so (i.e. it is pushed hard enough). I realized that, while I followed the grounded theory principles for data gathering and coding, I was thinking in terms of inputs (e.g. NGO reports, international recommendations) and outputs (laws and practices). Such thinking is characteristic for social movement outcome theories. Having acknowledged that, I was faced with a question whether I should continue with developing my own grounded theory (as Charmaz (2006:139) suggests), or use the existing explanation, but modify and supplement it. The first option was tempting, but, by choosing it, I risked coming up with a descriptive analysis or 'a low level theory (...) difficult to 'scale up' appropriately' (Urquhart 2003:47, cited in Charmaz 2006:139). The second option seemed more suitable. Employing a theory used before in other contexts (e.g. the US) allowed some sort of comparison. Moreover, the social movement outcome framework provides a room for a range of social, historical, cultural and political factors to be considered. Categories from other theories (e.g. gender and masculinity (Chapter 2), Europeanization (see above)) can be incorporated in it. For the above reasons, I decided to use social movements impact theories as the main explanatory frame.

In addition to coding, I used memos. Memos provide 'the theorizing write-up of ideas about codes and their relationships as they strike the analyst while coding' (Glaser 1978: 83 in Thornberg and Charmaz 2012:54). Writing memos helps record observations, emerging thoughts, questions and assumptions. I created two types of memos: one for each text and 'stand-alone' memos. The first kind followed a similar structure, which included document information (date, name, author); summary; questions (arising from analysing the document); quotes; and analysis. The second type was used to record thoughts and observations of a more general nature, not necessarily related to the piece of information that I was currently analysing. Some of the memos were living documents. For example, one memo recorded my thoughts about contributing factors and a possible strategy for securing the passage of anti-LGB hate crime laws based on the analysis of the legal debates in the Polish parliament. When the theoretical framework for explaining my results was finally selected, this memo became the basis for the interpretation of social movements, political and other factors contributing to the passage of anti-LGB hate crime laws. Examples of both types of memos – document-related and stand-alone memos – are presented in Appendix C.

It is considered good practice to use some sort of procedure to assess the quality of the emerging codes. One possibility is respondent feedback, where research participants comment on the results of the analysis and say 'how well the interpretation fits their own lived experience' (Jones et al. 2000, Octoby et al. 2002, in King and Horrocks 2010:170). This technique was particularly appealing, considering that I wanted the research to be useful for people engaged in policy making and advocacy. Nevertheless, getting feedback from respondents may also be problematic, as '[p]eople may have good reasons for denying the accuracy of an interpretation that in fact they recognize as a fair picture' (King and Horrocks 2010:170). Research may reveal information that may be difficult for participants to process, accept or understand. For this reason, 'researchers must go beyond dropping their analyses in participants' 'inboxes' ' (Deetz, Tracy and Simpson 2000 in Tracy 2013:376) and help participants to understand the results and learn from them.

I presented selected preliminary results of the analysis to respondents at several points in the study. For example, during meetings with representatives of civil society organizations in August and October 2015, I shared my understanding of the reasons why Poland does not have sexual orientation hate crime law (and provided recommendations as to how to change it). Some of the most contentious issues were the perceived focus on same-sex unions in advocacy and its detrimental effect for anti-LGB hate crime (see Chapter 7). In addition, I also tested interpretations with some of the respondents interviewed later. For example, I shared my interpretation of the proliferation of anti-LGB hate crime laws in Europe with four interviewees with experience of working at international organizations interviewed towards the end of the fieldwork. They considered it and provided further insights from their own practice.

4.5 ETHICAL CONSIDERATIONS

There are three key issues related to research ethics in this project. One involves the rights of research participants in general. The second focuses specifically on conducting research in a setting which was also my place of non-academic work. The third issue focuses on my own psychological well-being as a researcher. I discuss these issues below.

Considering the sensitive character of the topic I was going to research, before conducting fieldwork I ensured that the study complied with accepted ethical and data protection standards. According to the UCL Research Ethics Committee, research involving publicly available information (such as chanting at demonstrations) or interviews with 'human participants in the public arena' (e.g. politicians) is exempt from ethical approval.⁴² While I planned to interview people in their professional capacity, it was unclear if activists, police officers or civil servants should be categorized as belonging in the public arena. In situations where a choice of ethical standards was available, I decided to follow the highest standard possible and obtained approval to carry out the study from the UCL Research Ethics Committee (project ID number 6312/001).

To ensure that all participants understood the nature of the research and were informed of what was being asked of them, at the beginning of each interview I conducted a short briefing.⁴³ During the briefing I presented the project and its aims; explained the voluntary character of the participation in the research; informed interviewees that their participation was confidential and explained data protection procedures.⁴⁴ Following the briefing, I checked that participants had understood everything, asked for permission to audio-record the interview,⁴⁵ and asked for a verbal consent.⁴⁶ Most interviewees said that they would not mind being named in the research. Two people specifically requested that they not be named and asked for the interviews not to be audio-recorded.

Another issue related to the rights of participants related to the fact that the fieldwork for this research overlapped with my work outside of the academia, particularly my internship at ODIHR (March – September 2015) and my work at Lambda Warsaw (October 2015 onwards). In both cases, I made sure that my supervisors and colleagues knew that I was working on a PhD which concerned the respective organization's area of work. While conducting participant observation

⁴² Information about the ethical approval procedures at UCL can be found at <https://ethics.grad.ucl.ac.uk/index.php>.

⁴³ During 'briefing interviews', I made sure that my interlocutors understood that I approached them in my capacity as a researcher and asked if I can use the information for my research.

⁴⁴ All recordings, notes and transcripts were anonymized and kept in an encrypted computer file, under lock and key, in accordance with the Data Protection Act 1998 (UK). The project was registered with the UCL Data Protection Officer (Z6364106/2014/12/05).

⁴⁵ The initial round of meetings was not audio-recorded, but I made detailed notes.

⁴⁶ A consent form was not used; this is because research took place in a post-Communist setting where requests to sign forms can still be regarded as suspicious. The use of consent forms can thus be expected to negatively influence respondents' attitudes towards the research and considerably reduce the usefulness of this research method.

was not part of my research plan (and would not be possible due to other duties and possible conflict of interest), the internship at ODIHR and work with Lambda Warsaw provided me with a broader context and allowed me to appreciate the role of both organizations in fighting hate crime in Poland and internationally (see particularly chapters 6 and 10).

Considering my own well-being, when embarking on the PhD journey back in 2013, I was not aware of research results suggesting that as many as one in three PhD students may be at risk of a common psychiatric disorder (Evans et al. 2018; Levecque et al. 2017). Knowing, however, that writing a PhD may be a lonely and challenging process, I understood the importance of taking care of myself, and attended several 'PhD survival' courses offered by UCL Graduate School. While they were useful, in the final stage of the project I also sought professional help to deal with mental health challenges, such as anxiety and lack of motivation. This has helped me overcome difficulties and enjoy day-to-day activities while writing up.⁴⁷

What I was aware of was that, as part of the research, I would be seeing, reading and hearing about (sometimes brutal) cases of bias-motivated crimes. While such descriptions may be disturbing or triggering for anyone, they may affect people sharing the identity of victims (in my case – sexual orientation) even more than others. In my case, I was able to find emotional support in my work environment, talking to colleagues. I also noticed that, while I learnt to deal with the descriptions of violence, I became more sensitized and open towards the needs of victims and the decisions they make (e.g. whether to report), which was ultimately a good thing.

4.6 SUMMARY

The fieldwork for this study was conducted between March 2015 and October 2016. The study uses a multi-method approach, with Poland selected as the key case study and additional insights gained through a quantitative comparative analysis of Council of Europe member states.⁴⁸ Key data sources include legal and policy texts and elite interviews. In the first category, national and international laws, bills with explanatory memoranda, transcripts of parliamentary debates, civil society texts and other documents were analysed. In the second category, the total of 22 semi-structured interviews (nine with representatives of civil society, eight with Polish officials and five with people affiliated with international human rights bodies) were conducted. In addition to that, the study is informed by insights from 'preliminary meetings' and observation. Data collection and analysis followed the principles of constructivist grounded theory. The findings are interpreted through a combination of social movement outcome theories in the context of Europeanization.

⁴⁷ I decided to disclose this information to help break the silence around mental health issues in academia.

⁴⁸ For details of the methodology of quantitative research see chapter 6.

5

POLITICAL, SOCIAL AND CULTURAL FACTORS CONDITIONING THE LEGAL AND POLICY APPROACH TO ANTI-LGB HATE CRIME IN POLAND

'A woman on the street began to shout that a gay man cannot be the mayor. Then she shouted that a Jew, too, cannot be the mayor. I asked: 'Why?' She said: 'Because only a Pole can be the mayor.' As if a gay man or a Jew could not be a Pole.'

Robert Biedroń, Polish politician and former LGBT rights activist (2014)

5.1 INTRODUCTION

FOLLOWING on from the literature review in Chapter 2, this chapter is the first of six substantive chapters which seek to understand why Poland does not include sexual orientation in hate crime laws, but increasingly recognizes anti-LGB violence in policing, prosecuting and monitoring. In response to the research questions RQ1 and RQ2, the chapter is concerned with political, social and cultural factors that influence the attitudes towards LGB people in Poland and influence the political decision (not) to legislate against anti-LGB hate crime. Here is where I contextualize such themes from the literature review as social movements' mobilization, political opportunity structures, public opinion, as well as homophobia and national identity.

The chapter is divided into five sections. The first section considers how the demographic make-up of Poland may impact attitudes towards Others. I argue that the relative ethnic and religious homogeneity of the society can be linked to the negative attitudes to LGB people, which I present in the second section. The third section considers the make-up of the legislature and the approaches of the main political parties to LGBT rights. I argue that, between 2005 and 2015, the parties in power were not supportive of LGBT rights (there was no 'political will'). At the same time, as the next sections argue, around the time of EU accession, and following the mobilization of LGBT advocacy groups, the issue of LGBT rights became politicized, and political homophobia replaced political antisemitism. Conservative groups, borrowing from the hegemonic discourses regarding minorities in Poland, started framing homosexuality in terms of morality and presented it as a threat to the survival of Poland in its desired ethnic and cultural form. Such a political

context impacts the strategies of the movement (analysed in chapters 7-8), as well as the parliamentary debates about hate crime laws (chapter 9).

5.2 DEMOGRAPHY

As shown in Chapter 2, personal and societal religiosity is often linked with negative attitudes towards homosexuality and LGBT rights (e.g. Van Den Akker et al. 2013). In Poland, apart from religiosity, also the religious and ethnic homogeneity of the society may be seen as one of the explanations for negative attitudes towards Others, including LGB people. For this reason, in the analysis below I consider the religious and ethnic make-up of Polish society.

Before the Second World War, around one-third of Poland's population consisted of religious and ethnic minority groups (Dyłałowa 2000:143–44). After the war, as a result of the change to the borders, the toll of the Holocaust and anti-Jewish pogroms (Tryczyk 2015), a series of population transfers (Cordell and Wolff 2005; Mucha 1997) and the mass emigration of remaining Jews in the 1960s (Aleksiun 2003; Stankowski, Grabski, and Berendt 2000; Zimmerman 2003), the ethnic and religious make-up of Poland was completely changed. According to the last census, the vast majority of the population (99.7 per cent) holds Polish citizenship and declare themselves only to be Polish in terms of national identity (94.8 per cent). Regarding religion, almost nine out of ten Poles (87 per cent) identify as Catholic (GUS 2013). This is the highest level of religious homogeneity among Catholic-majority countries in CEE (Pew Research Center 2017). Orthodox-majority countries such as Moldova, Armenia, Georgia and Serbia are even more homogenous; Estonia, Bosnia and Herzegovina and Latvia are religiously mixed; the Czech Republic is primarily atheist (Pew Research Center 2017). The low level of ethnic and religious diversity correlates with the view that an ethnically and religiously homogeneous society is better (57 per cent) than a diverse one (34 per cent) (Pew Research Center 2017). There is also a strong association between religion and national identity. Two third of Poles (64 per cent) believe that being Catholic is somewhat or very important to truly be a member of the nation (Pew Research Center 2017).

While all sources agree that Poles as a nation are religious, data about declared religion should be approached carefully. Szacki, a Polish sociologist, firmly states that '[t]he thesis that 90 per cent of Poles are Catholic is nonsense' (1995:189, cited in Auer 2004:83). Recent surveys confirm this. For example, about 45 per cent of Catholics in Poland declare that they attend worship services at least once per week (Pew Research Center 2017). According to CBOS (2013c), only one in eight Poles sees religious beliefs as one of the most important values in life. In general, the number of people for whom values such as religion and patriotism are very important is decreasing.

Despite the decline, the still-high level of religiosity in Poland is linked with intolerant attitudes towards sexual diversity (CBOS 2013a, 2013c; Van Den Akker et al. 2013). The overall high religiosity in the country affects also non-religious individuals' views on homosexuality (Van Den

Akker et al. 2013). This may be explained by a high level of involvement of the Catholic Church in politics in the country, as well as other factors, such as historical circumstances or political discourse. I will consider these factors below in this chapter.

5.3 PUBLIC OPINION

Haider-Markel and Kaufman (2006:178), who examine how public opinion influences the passage of various state-level laws affecting LGB people, suggest 'that the more accepting a state's population is of gays and lesbians in the workplace the more likely a state is to adopt a hate crime law that includes sexual orientation.' Considering their finding, this section reports data on attitudes towards homosexuality in Poland and considers public opinion as a possible factor influencing the passage of sexual orientation hate crime law.

Acceptance of homosexuality in Poland continues to be limited, although the attitudes are improving. A survey by CBOS (2013a) shows that a mere 12 per cent of Poles agree that homosexuality is 'something normal'. Almost two-thirds of the respondents (63 per cent) believe that homosexual individuals should not have the right to publicly express their lifestyle. In the most recent survey by the Pew Research Center (Pew Research Center 2017), about half of adults (47 per cent) said that homosexuality should not be accepted by society. The low level of acceptance of homosexuality is accompanied by low level of support for the legalization of same-sex marriage. Eurobarometer (European Commission 2015a) reports that 28 per cent of Poles agree that same-sex marriage should be allowed throughout Europe, compared to the EU average of 61 per cent.

While we can see from the above statistics that Poland's society continues to be suspicious of homosexuality, there is evidence that the attitudes are improving, along with the decline in religiosity. In particular, the younger, less religious and more urban cohorts are increasingly accepting (CBOS 2013c:6).

Another way of measuring social attitudes towards LGB people is by considering the level of acceptance of anti-LGB hate speech.⁴⁹ In research conducted by Bilewicz et al. (2014:6), negative comments about LGB people were accepted by Poles more often than statements about other minority groups. The most offensive statement in the survey ('I am disgusted by fags, they are a degeneration of the humanity, they should seek medical treatment') was found acceptable by one in five respondents. As I will show later in this chapter, such derogatory comments are also made by elected officials during parliamentary debates.

If we treat public opinion as a factor influencing the passage of anti-LGB hate crime laws, we should not be surprised by the lack of such laws in Poland. The country whose society does not accept homosexuality is unlikely to see the value in protecting LGB people from violence. Quantitative comparative research (Chapter 6), however, shows that public opinion is not a good

⁴⁹ I consider definitions of hate speech in chapter 7.

predictor of the passage of anti-LGB hate crime laws in Europe. On the continent, several countries (e.g. Georgia, Bosnia and Herzegovina or Lithuania) recognize sexual orientation hate crime in law, even though homosexuality is not accepted, and the level of prejudice is high. For this reason, there is a need to consider other social, cultural and political factors which condition the approach to LGB people and their rights. I start from the political context.

5.4 POLITICAL CONTEXT

Research shows that the presence of influential political allies improves the chances of the passage of anti-LGB hate crime laws (Parris and Scheuerman 2015). In Poland, the vague (or negative) attitude of the main political parties towards the claims made by the LGBT movement throughout most of the analysed period can help explain the failure of the attempts to pass anti-LGB hate crime laws.

There were four terms of the parliament in the analysed period. The coalition of the Alliance of Democratic Left party (SLD) and the Labour Union (UP) held power until autumn 2005, when the Law and Justice party (PiS) won elections and formed a coalition government with the Self-Defence of the Republic of Poland (Samoobrona) party and the League of Polish Families (LPR) party. In autumn 2007 the Civic Platform party (PO) won elections and formed a coalition government with the Polish People's Party (PSL). The coalition remained in power for two terms, until autumn 2015. From 2007 the Samoobrona party and the LPR party were not represented in the Sejm, while in 2011 the newly-established Palikot's Movement (Ruch Palikota) party won 40 seats. Table 1 below shows the composition of the legislature (Sejm) between 2005 and 2015.

Term (dates) \ Party	PO	PiS	PSL	SLD	Samoobrona	LPR	RP	German minority
4th (2001-2005)	65	44	42	216 ⁵⁰	53	38	-	2
5th (2005-2007)	133	155	25	55 ⁵¹	56	34	-	2
6th (2007-2011)	209	166	31	53	-	-	-	1
7th (2011-2015)	207	157	28	27	-	-	40	1

Table 1 Distribution of seats in the Sejm following the elections in 2001, 2005, 2007 and 2011.

Source: National Electoral Commission (<http://pkw.gov.pl/>).

Stances regarding LGBT rights are rarely explicitly included in the parties' manifestoes, so parties' positions can only be inferred from ideological declarations (Zawadzka 2016:55) or legislative initiatives. In the analysed period, both the SLD-UP (2001-2005) and the PO-PSL (2007-2015) governments could be seen as potentially open to discussing legislative solutions for same-sex couples. The PiS-led government between them (2005-2007) was ideologically opposed to any

⁵⁰ Coalition SLD+UP.

⁵¹ Coalition SLD+SDPL+PD+UP.

recognition of LGBT rights. Below, I first consider the political and social support for regulating same-sex unions. Then, I analyse how this relates to the discussion on hate crime laws. I argue that the stances on same-sex unions do not necessarily reflect the approach to hate crime laws, and that the latter should be considered separately.

During the 4th term of the parliament, under the SLD-UP government, senator Maria Szyszkowska (SLD) sponsored a bill on registered partnerships (Senate 2003). The bill was approved by the Senate in 2004 and was sent for consideration in the Sejm. There, however, the works stalled, and the bill was never tabled for proceeding.

Three bills regulating civil unions, varying in detail as to which rights of same-sex couples were recognized, were prepared between 2009 and 2012 by the SLD party, the Palikot's Movement party and a group of MPs from the PO party. All three were rejected by the Sejm in the first reading in January 2013 (Gazetaprawna.pl 2013). In addition, in 2014 and 2015 opposition parties unsuccessfully attempted to put bills on registered partnerships on the Sejm's agenda (Gazeta.pl 2015; md 2014b).

While all attempts to pass legislation recognizing the rights of same-sex couples failed, what is important is the discursive stance and ideological justifications of the failure. Two explanations explaining the failure of Szyszkowska's bill exist. According to the LGBT activist Krystian Legierski, the bill was sacrificed in exchange of the Church's support for Poland's EU accession (in Stawiszyński 2015). The bill's sponsor, on the other hand, links the failure to pass the law with the death of pope John Paul II (April 2, 2005). In her opinion, dropping the works on the act was a 'posthumous gift for the pope from the parliamentarians' (Szyszkowska 2013).

In his 2011 exposé, the prime minister of the PO-PSL government, Donald Tusk (cited in Siedlecka 2011), said:

I realize that in recent years, (...) besides great financial and economic challenges, new civilizational, moral and cultural challenges have also emerged. One needs to understand these changes. But our coalition, the Polish government, institutions of public life, the Polish state is not meant to be carrying out a moral revolution.

The unwillingness to spearhead a 'moral revolution' was visible during the debates and in the votes on the bills on registered partnerships (the debates on hate crime laws are analysed in chapter 9). The PO parliamentarians split over the issue almost in half, with some politicians declaring support for civil unions and some vehemently opposing it. For example, Tusk argued that 'civil unions are a fact and this needs to be acknowledged,' while the minister of justice Jarosław Gowin dismissed the bills as unconstitutional (Gazetaprawna.pl 2013). Other politicians argued that the unions are contradictory with the Catholic Church's social doctrine (Zawadzka

2016:56).⁵² Commenting on the internal divisions and subsequent lack of interest of the PO party in taking up LGB issues, Michał Kabaciński MP said, looking at empty seats of PO parliamentarians during the debate on the Draft Amendment 2357 (SLD 2014):

They are no longer here, because they are afraid to speak consequently on this subject. Today on the rostrum they say one thing, but later when it comes to that and the committee's works start, immediately everything will be done to not let any of these bills pass further. And this is precisely the cock and bull story [ściema] of the Civic Platform. If needed, they will say it, smile, but later, they won't consequently go in either of the ways, while the draft amendments lie in a drawer (...) So here we really had an illusion of support by the Civic Platform of this draft amendment only so they can stand apart between the left and the right and stay inconsequential in their actions (in Sejm 2014:123).

The above shows that, while the PO party, joined by the SLD party and the Palikot's Movement party had a mathematical majority needed to pass any law, the fear of antagonizing the conservative wing of the PO party halted any progress in this area (Zieliński 2014). This is particularly surprising, considering the fact that 61 per cent of PO voters support introduction of registered partnerships for same-sex couples (TNS Polska 2013). This suggests that the PO party is not only unwilling to embrace LGBT rights, but also that its politicians are more conservative than their constituencies. In addition, the failure to pass laws regulating same-sex unions can be interpreted as a sign that declarations of support for LGBT claims are provided for symbolic purposes only. In addition, Zawadzka (2016:55) argues after Jartyś (2015:187–88) that the SLD party treated the LGBT community instrumentally. A similar statement can be made about the PO party.

Some activists interviewed in this research, among them leaders of the movement, speak about the 'political will' as a decisive factor for the change of law (see Chapter 5).⁵³ Explaining why the attempts to pass the anti-LGB hate crime laws have been unsuccessful, one activist observes that 'neither the PO nor the PiS are interested in LGBT issues'.⁵⁴ A trans rights activist adds that 'without the political will, [the impact of NGOs] is very small'.⁵⁵

The perceived high political costs of passing LGBT rights legislation resulted in the fact that the PO government did not actively support the changes to the criminal code, failed to pass the gender recognition act in 2015 (ILGA-Europe 2015) and, finally, never allowed bills on same-sex unions to be worked on in a parliamentary committee. Indeed, the political aspects of passing

⁵² The documentary *Article 18* (Staszewski 2017) presents the struggle for marriage equality in Poland.

⁵³ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-15-trans-rights-activist2-2015-10-08. See also Chapter 5.

⁵⁴ Interview-03-LGBT-rights-activist1-2015-08-11.

⁵⁵ Interview-15-trans-rights-activist2-2015-10-08.

controversial rights legislation emerged in some interviews too. For example, one respondent said:

There are matters touching so sensitive ideologically, hot and religiously motivated questions (...). I think that the more charged internally the problem is, the lower the readiness to implement recommendations concerning the given issue, in this case discrimination of homosexual people.⁵⁶

Another expert observed that the legal change was not enforced in questions where there were controversies surrounding 'ideology, canons of world view' – such as protection of conceived life, but also legal protection of LGBT people.⁵⁷ In his view, the PO government steered away from sensitive topics.

Turning to hate crime laws, in 2005 the Minister of Justice of the SLD-UP government refused to support the idea of adding sexual orientation to hate crime provisions proves otherwise (see chapter 9). The response of the MoJ shows that, apart from ideology, there are other, particularly historical, factors influencing how criminal law responds to targeted violence and which groups are seen as legitimate (see chapter 9). For this reason, while part of the contestation of anti-LGB hate crime laws reflects the contestation of same-sex unions' regulations, there are also important criminal-law specific aspects which can only be captured if we consider hate crime laws separately from same sex unions. This will be done in chapter 9.

What is interesting to point out at this stage, however, is the evolution of the approach of the left-wing SLD party towards the issue of anti-LGB hate crime between 2005 and 2011. Six years after rejecting LGBT rights groups' proposals, the SLD party submitted a draft amendment postulating the opposite (SLD 2011b). How can this transition be explained? One factor may be that the SLD party was interested in building an image of a modern, left-wing European social democratic party, which requires showing support to LGBT causes (see the speech by Ryszard Kalisz MP during the debate on the draft amendment 383 (Sejm 2012:231)). Another factor was that a competitive party fighting for the support of liberal voters emerged on the political scene. The new party, Palikot's Movement, attracted some of the leaders of the LGBT movement. The gay activist Robert Biedroń, founder of the KPH, and Anna Grodzka, a transgender founder of Trans-Fuzja, became MPs of the Palikot's Movement party. In 2012, both parties submitted separate, but practically identical draft amendments no. 340 (Ruch Palikota and SLD 2012d) and 383 (SLD 2012).

While it is not clear why both parties did not cooperate on the issue, the absurdity of submitting two identical draft amendments was pointed out in parliamentary debates. MP Bartosz Kownacki

⁵⁶ Interview-18-ECRI-2015-11-20

⁵⁷ Interview-19-HRCtee-2015-11-21.

argued that '[t]wo left-wing clubs will compete to see who is more sensitive, who cares more about the rights of homosexuals' (in Sejm 2012:215). He added:

I don't know who cheated from whom here (...). Here, gentlemen members of the Sejm, an appeal: if you prepare a draft amendment, make an effort, because you take money for it (...) You can write two different draft amendments or combine it into a joint one, but not make a comedy of the Highest Chamber (in Sejm 2012:215).

The political opposition to the legislation frames LGBT rights as a 'moral revolution,' suggesting that they abuse legal, religious and social norms. Here, we begin to observe, in line with Holzhaecker (2012), that the political debates on LGBT rights in Poland reflect the patterns of morality politics, where two competing coalitions form around religious norms. This leads to the polarization of opinions, as the topic becomes a way of dividing people into moral categories. Pointing out the difficulties resulting from such politicization of the topic of anti-LGB hate crime, one civil servant interviewed in this research said:

What really bothers me is the attempt to play these issues politically. As if there is no understanding that, at the end of the day, we are talking about fighting criminality, which should not have any political colouring.⁵⁸

What is important is the fact that, while the issue of changing the law was salient in public debate, the changes in policing and monitoring hate crime, implemented between 2011 and 2015 (see chapter 10), went almost completely under the radar. As a result, police training and the data collection system are inclusive of sexual orientation, despite the fact that the law remained unchanged. This shows that the politicization of the issue of law was an important obstacle to the passage of the law.

Finally, this situation – the fact that the PO-PSL government does not support the draft amendments but PO-dominated Sejm still 'pretends' to work on them can suggest ritualism (for definitions of ritualism, see Braithwaite, Makkai, and Braithwaite 2007; Charlesworth and Larking 2015). Dudzińska (2015), using systems theories (Luhmann 1995), argues that the Polish political system is closed operationally for information from the environment (such as legislative initiatives originating in the civil society, see chapter 7). According to her, political outputs, such as new legislation, are almost exclusively informed by internal communication between the government and the Sejm. The discourse on legislation in Sejm and Senate is ritualized, and the parliament in Poland is a 'voting device', whose role is reduced to legitimizing decisions of the government. From the point of view of social movements theories, the argument forwarded by Dudzińska

⁵⁸ Interview-08-Mol-group-2015-08-20.

(2015) shows that the only way for the movement to influence policies is to convince the ruling party and the government to support it.

5.5 NATIONALISM

In Chapter 2, I reviewed the extant literature to show how social structures reinforce heteronormativity by serving as a tool to discipline sexual minorities. The goal of the analysis below is to show how these mechanisms operate in Poland. This is done to understand in greater depth the historical and cultural factors conditioning and constraining the protection offered to members of the LGBT community.

There is a rich literature on nationalism in Poland. Most authors agree on the tropes which are crucial to understanding it: that it is fused with Catholicism; it is romanticized; it encourages the sacrifice of the needs of the individual for those of the collective; it is highly gendered and (hetero)sexualized; and it was built in opposition to other nations and ideas (Germany, Russia, Communism). The consensus is that Polish nationalism has tendencies to be illiberal and focused on ethnicity (even if it has some civic elements) and that it excludes Jews and sexual minorities. The following analysis sets out the key components of Polishness.

5.5.1 RELIGION

It is often considered that perhaps the single most important component of Polish national identity is Catholicism. After the eighteenth-century partitions of Poland, religiousness became an important tool for some Poles to cope with the loss of their country. Without physical borders, the nation was indeed an 'imagined community' (Anderson 1983). Collectively, some Poles imagined Poland as the Christ of Nations, 'martyred for the sins of the world and resurrected for the world's salvation' (Zubrzycki 2007:134). Krzemiński (2001:66–67) claims that the myth of Polish martyrology is so strong that even educated Poles are likely to think that their nation suffered more in history than any other in Europe. The historical vision of Poland defending Europe's moral and Christian tradition was romanticized and reinforced in national poetry. The Black Madonna of Częstochowa, an icon that survived previous attacks on Poland, was idealized by some Poles as the queen of Poland: its mother and protector (Graff 2009:136; Osa 1996; Ostrowska 2004:218). The cross was quickly incorporated into the national imaginary as a symbol that represented the plight of the nation, its imminent salvation and future resurrection (i.e. independence). Through this process, it became the symbol of the fusion between Polishness and Catholicism, the symbol of Poland (Zubrzycki 2007:144). This fusion is pictured in the Figure 1 below.



Figure 2 Polish flags, the cross, the Black Madonna of Częstochowa and the slogan 'Wake up Poland and return to God' during the Independence March in Warsaw, 11 November 2011. Image: Piotr Godzisz (2011).

Next to language and ethnicity, Catholicism became a way to distinguish Poles from the enemy: Turks in the seventeenth century, Germans and Russians in the nineteenth century (Walicki 1994). After WW2, religion helped distinguish between Poles and ethnic minorities (mainly Germans and Jews), vilified by both the Church and the Communist government (Fleming 2010).

While united with the Communists against ethnic minorities immediately after the war, the Catholic Church subsequently became an active supporter of the anti-Communist opposition (Auer 2004:68–70). Some Catholic priests became actively engaged in the democratization movement, supporting Solidarity and providing an alternative for those who contested the oppressive system (Osa 1996). Religious events provided a space to express concerns about citizen rights and allowed dissidents to show their opposition to the Party's policies (Auer 2004:69).

While Solidarity was engaged in the fight for democracy, an ideology based on personal liberty and respect for the individual, it always had to strike a balance between liberal and conservative forces (O'Dwyer and Schwartz 2010). As a result and due to the long-lasting bond with the Church, the new political elites in the 1990s 'erased plurality from the notion of liberty, offering a vision of freedom defined under collectivist terms' (Kulpa 2012:94). Indeed, as Auer (2004:70) observes, during the times of transition, many political scientists were concerned about 'the danger the existing conflation of nationalism with religion would pose to the establishment of liberal democracy'.

Through its hegemonic position, the Church helped reinforce the conservative vision of the nation and the society. Illiberal politicians connected with the Church belong to the mainstream of public life (see above in this chapter, as well as chapter 9). The Church's political interventionism resulted in Catholic norms quickly infusing many aspects of public and private life. In the former, this was seen through legislation (e.g. the legal need to respect Catholic values by the media and the reference to God in the preamble of the 1997 Constitution) as well as presence of crosses in public spaces and offices. In the latter, particularly the sexual and reproductive rights, such as access to contraception, abortion and in-vitro fertilization are affected, as well as laws and policies governing gender-based violence. The next section considers the construction of gender norms in Poland.

5.5.2 GENDER NORMS

Above in this chapter I presented evidence from surveys showing that social norms are changing in Poland. The Polish society, while still conservative, is increasingly accepting of sexual diversity. Similarly, gender norms have been shifting. Many Poles no longer think about gender in traditional terms. For example, while most Poles still condemn abortion, contraception and pre-marital sex is morally acceptable for most of respondents (CBOS 2013c:3).

While the society is increasingly becoming more progressive and tolerant, traditional gender roles continue to play an important role in the construction of Polish nationalism and, ultimately, in the construction of legal norms governing issues such as LGBT rights. For this reason, I briefly discuss traditional gender norms in Poland below.

As in other societies in Europe (see Chapter 2), traditional gender roles in Poland are binary and heterosexual (Graff 2009; Hauser 1995). Traditionally, Polish women are presented as passive 'reproducers' and 'bearers of culture' (Graff 2009:134), responsible for ensuring the continuity of the nation and its norms. Their place is in the private sphere, while their role is to give birth, take care of the family and raise children. The Polish Mother is the embodiment of Poland.⁵⁹ She is the Madonna, Mother of God and Poland's queen and protector (Ostrowska 2004). The Polish men, on the other hand, fight for the family / nation, sometimes sacrificing their individual happiness (as well as life) for the benefit of the community (Graff 2009:135). The good Polish men fight the *bad* men, foreigners or traitors, who aim to destroy traditional Polish values (Graff 2009:135).

The traditional vision of gender in Poland, imposed by religion and politicized in the nationalist discourse, was temporarily shaken by Communism. Women were encouraged to educate themselves and work outside of the family (however, again for the benefit of the nation rather than themselves), and abortion was freely available. Nevertheless, as Gosciolo and Holmgren (2006)

⁵⁹ Paradoxically, Poland is both a woman (Polonia) and a man (Christ of Nations).

argue, the Communist idea of 'state feminism' was not the same as liberalization in the West. In fact the ideology of real socialism was not so different from the traditional understanding of gender (Ritz 2002:52 referred to in Kulpa, 2012:107).

After the collapse of Communism, the traditional understanding of gender roles and sexuality came back with a vengeance. The Polish national discourse, similarly to other countries in the region (see Chapters 2-3), continues to be framed in traditional terms. In the idealized picture of the nation there is little or no space for non-normative relationships, such as those between members of the same sex. While no explicit ban of same-sex unions was introduced, the wording of the Constitution's Article 18 ('Marriage as a union of man and woman, the family, motherhood and parenthood are under the protection and care of the Polish Republic') is understood as such by conservative politicians (Siedlecka 2011). Non-traditional sexual behaviours and transgressing gender roles is seen by conservative members of the society as un-Polish and a threat to the survival of the nation in its desired cultural form.

5.5.3 NATION

For 123 years between 18th and 20th century, Poles were literally an 'imagined community' (Anderson 1983) – a nation without its own state. Without state borders, Poles identified themselves through language and religion (rather than citizenship), which helped them differentiate themselves from Protestant Germans, Orthodox Russians and Jews. The lack of statehood led many authors to argue that the Polish nationalism has more elements of the Eastern type (Brock 1969; Brubaker 1999; Plamenatz 1973; Schöpflin 1995). Newer studies (for example, Auer 2004:62) argue, however, that Polish nationalism has both ethnic and civic elements.⁶⁰ This is visible, for example, in Poland's citizenship law, which is a mixture of *ius sanguinis* (citizenship by descent) and *ius soli* (citizenship by territory), with the dominance of the former (MSW n.d.). It is difficult for people without Polish roots to become citizens. Public opinion also shows the attachment to ethnicity, history and traditions, although civic elements are also important in deciding who can be considered Polish. Almost a quarter of Poles (23 per cent) believe that being white is a prerequisite for being Polish (Kaczorowski 2011). According to the majority of Poles, one cannot be Polish if they do not know the words of the national anthem (75 per cent), do not speak Polish (72 per cent), or are not proud of the Polish heritage (74 per cent) (Szewczyk 2011:2). While there seem to be no survey results about being Polish and LGB, qualitative research shows that connecting those two identities is also troublesome, if not impossible. The link between nationalist discourse defining Poland as a uniform society made of Poles-Catholics, on the one hand, and hate speech attacking national and sexual minorities, on the other, is

⁶⁰ The difficulties in categorizing the type of nationalism come from the traditions of 'noble democracy' in the Polish-Lithuanian Commonwealth before 1795, being Catholic, rather than Orthodox, and having liberal tendencies (e.g. belonging to the EU), mitigated by illiberal traditions (Auer 2004; O'Dwyer and Schwartz 2010).

apparent in the xenophobic and homophobic speech of nationalist mainstream politicians, analysed below.

While Polish national pride, according to nationalists, is linked to Poland's being the moral defender of Europe, many Poles perceive the 'return to Europe' after 1989 (and particularly following the EU accession), which is connected with liberalization of social norms, as an attack on the traditions and values underpinning what they understand as Polishness (Krzemiński 2001). Nevertheless, while the opposition to liberalization is visible (for example, through organization of highly popular marches on the Polish Independence Day, where illiberal, xenophobic and homophobic chants are common (Taylor and agencies 2017)), to say that Poland is an unchangeable preserve of Catholicism and traditionalism would be untrue. The rates of religiosity have been constantly dropping since the end of Communism (CBOS 2012, 2013c). Not all Catholics in Poland are nationalist, and not all nationalists are Catholic. For example, the magazine of the Catholic intelligentsia, the *Tygodnik Powszechny* weekly, regularly denounces nationalism (for example Kicińska 2016; Strzelczyk 2016), while the nationalist movement Zadruga declares paganism and denounces Catholicism (Grott 2003; Potrzebowski 1982, 2016). As mentioned above, gender norms are liberalizing. For this reason, some authors argue that there is more than one Poland, one nationalism, one Catholicism (Korboński 2000:142, referred to in Auer 2004:74; Krzemiński 2001:61).

Summing up, Poland has developed a model of nationalism which has many illiberal, ethnicist elements. As a result, ethnic and sexual minorities, despite formally being citizens, are ostracized as not 'fully' Polish. Once discursively excluded from the nation, they are framed as public enemies – the threatening Others. I consider this issue in the next section.

5.6 THREATENING OTHERS

In Chapter 2, based on writings of authors such as Mosse (1985) and Boswell (1981) I argue that throughout European history, Jews and gay people were constructed as deviant and threats to the 'normal', Christian people. In Poland, since the nineteenth century, it was the Jews who have been framed as the *primary* threatening Other. Sexual minorities, mostly invisible to the heterosexual majority until the early 2000s, only recently joined Jews in being the villain, and even replaced them in being the *primary* threatening Other. The following section analyses how Jews and, later, sexual minorities, have been framed as threatening Others in Poland.

5.6.1 UNTIL 2004: JEWS

Scholars of antisemitism in Poland argue that Jews have been a permanent element of the Polish collective memory, and that this memory in the national context has been generally a negative one (for example, Irwin-Zarecka 1990). The myth in which Jews are the principal threatening Other for the Polish nation is very closely interrelated with another one, analysed above: the one

about the suffering and decline of the Polish nation, caused, among others, by Jews (Zubrzycki 2007:131). Throughout the years, it has been adapted to suit various historical and socio-political conditions. Michlic (2000), who examined the development and use of the myth for political purposes, argues that the Polish nationalism is fused with antisemitism. At times, the obsession with Jews harming Polish national interests was so strong that it was branded 'anti-Jewish paranoia' (Gerrits 1993, referred to in Michlic 2000:5). After the Holocaust, and particularly after the mass emigration of Jews in 1968, the term 'antisemitism without Jews' was used (Michlic 2000:5). Most recently, the term 'antisemitism without antisemites' can be heard, as those who use anti-Jewish hate speech frequently deny being antisemitic (Mac 2000). While statistics show a clear decline in social distance towards Jews (CBOS 2013b), Poles continue to believe in the myth of the Polish nation as 'the chosen one', and antisemitism still plays an important role in the society (Kublik 2013).

Antisemitic rhetoric has been particularly prominent in political discourse. The historical narrative in which Jews kill Christ has been replaced by a new one (however, also with a long tradition; see Brock 1969:344), in which Jews are framed as a mysterious, dangerous group, who control the government and the capital, plot against Poland, appropriate the martyrdom through the memory of the Holocaust and do not allow Poles to govern their own country. Krzemiński (in Kublik 2013) refers to the new framing of Jews as 'modern antisemitism'. These sentiments are sometimes expressed in a very twisted way. Zygmunt Wrzodak, former MP, went on record saying:

. . . I think that the common business, common interest is what unites the Germans and the Jews. And it is known that the European Union is controlled by the Freemason lodges (...), and the interests are such as to strengthen one nation and the other, that is, the worldwide Jewish nation and the European German one (Anon 2002).

While antisemitism in politics was virulent in the 1990s, in the 2000s, it became less prevalent. Also, antisemitism in society has weakened (CBOS 2013b). 'Uncomfortable' historical books, particularly Gross's *Neighbours* (2001), forced Poles to face the fact that Poles were responsible for numerous anti-Jewish pogroms during and after WW2. Politicians understood that antisemitism had started to become something they might face censure for. Finally, the international community strengthened pressure to combat racism and xenophobia (see chapter 8). A new threatening Other was needed.

5.6.2 FROM 2004: SEXUAL MINORITIES

Jean-Paul Sartre argued a long time ago that 'if the Jew did not exist, the anti-Semite would invent him' ([1946] 1995: 8, cited in Brudholm 2015:85). For illiberal politicians in Poland, an opportunity to find 'a new Jew' came around 2003/2004. At that time, the mobilization of the LGBT movement, marked by the campaign *Let them see us*, the March of Tolerance in Cracow and Senator

Szyszkowska's bill on registered same-sex partnerships, brought the topic of LGBT rights the public's attention (Gruszczyńska 2009). As Binnie and Klesse (2012:456) argue, around that time, 'the question of 'homosexual rights' started to play an ever more important role in debates about national identity, values and sovereignty'.

Of course, nothing changed overnight, and Polish homophobia was not born in the early 2000s. But, before 2004, LGBT people, at least as an interest group with specific demands, were largely invisible to the heterosexual, cisgender majority. In Communist Poland, homosexuality did not exist in public discourse. While, unlike in many other European countries, independent Poland has never criminalized sodomy (Baer 2002; Healey 2001),⁶¹ the police, under the codename *Operation Hyacinth*, infiltrated the male homosexual community, kept records of those believed to be homosexual, and blackmailed them, trying to use them as informants (Czepukojć et al. 2006:106; Kurpios, 2003, 2010, cited in Kulpa 2012:108; see also Tomasik 2012).

Also during the early years of the transition, homosexuality seems not to have been an important political issue. Discussions about sexuality concentrated on sex education and women's rights. The issue that divided 'moral Poles' from the 'immoral West' was abortion (Graff 2006:445). Homosexuality and LGBT rights became an important topic of public debate only around the time of EU accession. Indeed, observers such as Törnquist-Plewa and Malmgren (2007), Gruszczyńska (2009) and Chetaille (2011) see 2004 as a turning point for LGB identity politics in Poland, linking it with the political opportunities provided for the LGBT movement by the EU accession.

While the issue reached the political agenda around the time of EU accession, the gay (later LGBT) rights movement formed earlier, already in the 1980s, and had international ties (Kliszczyński 2001; Szulc 2017). The first report on discrimination, persecution and violence based on sexual orientation was published by the Warsaw branch of the then national Association of Lambda Groups in 1994 (Lambda Warszawa 2001:4). Lambda Warsaw was established in 1997, and the KPH, which focused on advocacy, was registered four years later.

The years following accession – 2004 through 2007 – brought significant anti-gay mobilization, exemplified in the banning of two subsequent Equality Parades by the then mayor of Warsaw Lech Kaczyński. It is here where Graff sees the birth of the anti-LGB discourse (Graff 2006:434). This rise of political homophobia resulted in commentators such as Umińska (2004) and Ostolski (2007) claiming that, in Poland, sexual minorities are the new Jews. as 'hatred of sexual minorities has basically replaced hatred of Jews in the imagination of the extreme right' (Graff 2006:445). While both groups are 'stigmatized in their respective contexts as scheming, devious, and treacherous, a powerful lobby' and a 'threat to civilization', guilty of their own exclusion as well as

⁶¹ Laws criminalizing same-sex sexual activity between consenting adults were enacted on Polish territories by the occupying powers during the country's partitions (1795-1918), and remained in force until 1932, i.e. the enactment of the new Polish Criminal Code (President of the Republic of Poland 1932).

the violence they supposedly 'provoke' by 'imposing themselves' on the majority' (Ostolski 2007, referred to in Graff 2009:140), in the absence of ethnic minorities, and increasing disapproval of antisemitism, hatred towards sexual minorities has joined (or replaced) ethnic hatred in the nationalist discourse.

According to Graff (2006), there are three key elements of Polish political homophobia:

- (1) Poland as an island of 'normalcy' in the sea of Western European degeneracy (...)
- (2) An aura of imminent danger and the claim that gay people already have more power than heterosexuals. Gay people are conspiring to dominate EU politics and to destroy religion and the traditional family (...)
- (3) The ironic appropriation of the term 'homophobe' as an identity. Meanwhile, other elements of liberal discourse ('equality', 'discrimination') are being disqualified as somehow offensive to Polish common sense (P. 447).

In Graff's words we should be able to recognize already familiar tropes and themes, introduced in Chapter 2 and contextualized earlier in this chapter. First of all, authors observe that accepting Otherness in Poland is particularly difficult because Polish national identity is conflated with religion (Krzemiński 2001; Pew Research Center 2017). As Ayoub (2014:337) argues, '[t]hreat perception is heightened in cases where religion is historically embedded in the essence of the popular nation'. Consequently, being LGBT (or Jewish) is seen by many as antithetical to being Catholic and thus Polish. In this sense, LGBT people are systematically excluded from mainstream society. Robert Biedroń (2014), a Polish politician and former LGBT rights activist, provides an example of this type of thinking. Reflecting on his mayoral campaign, he recalls that

. . . a woman on the street began to shout that a gay man cannot be the mayor. Then she shouted that a Jew, too, cannot be the mayor. I asked: 'Why?' She said: 'Because only a Pole can be the mayor.' As if a gay man or a Jew could not be a Pole.

LGBT people are ostracized because they blur the traditional gender roles and gender dichotomy. Gay men are pictured as unmanly. During nationalist demonstrations such as the protests during LGBT Pride events (see Figure 3 below), a symbol known as 'ban the faggots' is used, and gay men are called 'poofs' (Polish *cioty*).



Figure 3 Anti-LGB protest during the 2013 Warsaw Equality Parade. The black slogan reads ‘Not red, not rainbow, but national Poland.’ The white slogan on the right says ‘We want men, not poofs’ (with a spelling mistake in Polish). Below them, the slogan with the symbol of two figures in the red circle says ‘Ban the faggots.’ The protesters chanted ‘A real family – a boy and a girl.’ Image: Piotr Godzisz (2013).

Relationships of same-sex couples are portrayed as abnormal and inferior to heterosexual unions. They are perceived as unable to produce children. For this reason, they are discursively framed as a threat to the survival of the nation. For example, during the parliamentary debate on registered partnerships on 24 January 2013, Krystyna Pawłowicz, MP of the PiS party, asserted that ‘the society cannot fund a sweet life to unstable, barren unions, from which the society cannot benefit’ (Koźmiński 2013).

Homosexuality is pictured as an effect of the degeneration of Polish norms through Western influence (Graff 2010:597). To join the EU, Poland had to implement the anti-discrimination framework, which includes sexual orientation as a protected ground (see the next chapter). The norm of protecting LGB people from unequal treatment is framed as foreign and contradicting to traditional Polish norms (Keinz 2011), and does not resonate well with national identity (O’Dwyer and Schwartz 2010:220). The nationalist chants ‘this is Poland, not Brussels, we do not support

deviancy here,' or 'Neither rainbow, nor red, but national Poland,' (see Figure 2 above) which can be heard during anti-LGBT demonstrations, exemplifies that.⁶²

Another example which shows how the concept of equality is framed as foreign in Poland is the debate on 'gender ideology' that swept Poland in 2013/2014. The English term 'gender' came to symbolize Western depraved norms, such as abortion, acceptance of homosexuality and alleged sexualization of children. Acknowledging that gender exists results in being branded anti-Polish, anti-Catholic, destructive for family and unfit to work with children. Progressive sex education teachers are forced to explain themselves in the media if accused of promoting 'gender ideology'. Protests against 'gender ideology' are a platform to express illiberal and homophobic views (Chadwick 2014).

In connection with all of the above, LGB people, representing the vilified 'gender ideology', are framed as a threat to children. LGB people are equated with paedophiles and accused of sexualizing children. As such, they are framed as a threat to the survival of the Polish nation – if not entire humanity – a notion that was visible during the speech of the Polish president Lech Kaczyński in 2007. During his visit in Dublin, speaking about homosexuality, he said: 'If that kind of approach to sexual life were to be promoted on a grand scale, the human race would disappear' (cited in Brennan and Byrne 2007, no page).

Research indicates that this type of narrative, where LGB people are vilified as threatening Others, is present in several CEE countries, for example Latvia (Mole 2011) and Serbia (Gould and Moe 2015), and is less visible in nations which see themselves in civic rather than ethnic terms (Stychin 1997). Once extracted from the nation, LGB people, especially activists, are framed as foreign agents, just like sexed Others in the analysis conducted by Pryke (1998). As the nation is framed discursively as being on the brink of extinction, any form of 'cultural diversity seems threatening' (Inglehart and Baker 2000:28). At the same time, the Western origins of LGBT rights is a regional variation of the argument about the 'foreignness' of homosexuality and denial of citizenship to sexual minorities (see, e.g. Richardson 1998:91).

Before concluding this section, one last note needs to be made. While this study argues that sexual minorities have been the major threatening Other in Poland since the early 2000s, the year 2015 has seen an unprecedented rise in Islamophobia (understood as anti-Muslim racism) and anti-refugee sentiment. Politically, it is manifested in inflammatory statements by illiberal politicians. For example, the leader of the PiS party Jarosław Kaczyński played on antipathy to migrants ahead of parliamentary election in 2015, warning that they carry 'all sorts of parasites and protozoa, which ... while not dangerous in the organisms of these people, could be dangerous here' (quoted in Cienski 2015). The prime minister Beata Szydło, speaking about linking terrorist attacks with the influx of refugees in Europe, called on Europe to 'rise from your knees and wake

⁶² During fieldwork, I observed many public assemblies where protesters chanted these and other anti-gay chants.

up from the lethargy, because you will mourn your children every day' (Mikulski 2017). Socially, the spike may be observed, *inter alia*, in anti-migrant demonstrations, the increase in registered cases of anti-Arab and anti-Muslim hate crimes (MSWiA 2016:7), and the decrease of support for accepting refugees in Poland (CBOS 2016:5).

The strength of Islamophobia (Pędziwiatr 2016) in Poland, where Muslims constitute fewer than 0.1 per cent of the total population (GUS 2013), as well as other countries in the region, may be surprising. Bayrakli and Hafes (2016:7) explain this phenomenon arguing that '[i]n countries like Hungary, Finland, Lithuania, or Latvia, where only a small number of Muslims live, Islamophobia functions as a successful means to mobilise people'.

Two aspects of the rise of political Islamophobia in Poland, in relation to political homophobia, need to be emphasized. First, while the rise of political homophobia in the early 2000s can be understood as backlash following the beginning of identity politics of domestic LGBT groups, the rise of Islamophobia is not a response to advocacy efforts of Muslims in Poland. Rather, it relates to the coupling of several geo-political factors, such as terrorist attacks in France and Tunisia, atrocities committed by ISIS in Syria, the so-called European 'refugee crisis', and parliamentary and presidential elections in Poland. While there is already some research on ties between global terrorism and hate crime (Benier 2016), future research should analyse how these interplay in countries such as Poland, where there has not been a single terrorist attack to date.

Second, the rise of Islamophobia in Poland suggests a shift in the discursive positioning of Poland between the East and the West. As discussed at length above, when engaging in homophobia, right-wingers in Poland emphasize traditional Polish values which are threatened by Western decadence. In this sense, Poland is not part of the West – rather, it rallies behind the Russia-led bloc of states which see homosexuality as a threat to national norms. Yet, when practising Islamophobia, Polish nationalists frame Islam as anti-Western and illiberal, encroaching upon personal freedoms. In a way then, they defend the norms which they reject when preaching 'traditional values'. While one could interpret this as a discursive passage of Poland from Eastern to Western Europe, I see it as one of many inconsistencies in the nationalist rhetoric (such as that Poland is both a woman (Polonia) and a man (Christ of Nations)).

5.7 CONCLUSION

The aim of this chapter was to analyse the cultural, social and political factors influencing how Poland sees sexual minorities and, in consequence, why society does not see the benefit of protecting LGB people from violence. It is argued that the ethnic and religious homogeneity of Poland, coupled with high level of religiosity in the society, may be linked with high levels of homophobia in Poland. The strong position of the Church and its interventionism result in upholding the traditional gender and sexuality norms. Similarly to many other countries in the region, religious and national identities are closely entwined. Nationalist discourses excluding

dissimilar Others, such as Jews and sexual minorities, are virulent, because they are expressed by mainstream politicians. The perceived crisis of traditional norms is the reason why first Jews (until 2003), then sexual minorities (from 2003), and, most recently, Muslims, have been framed as threatening Others.

The emergence of identity politics of the LGBT movement in the early 2000s led to the topic of LGBT rights becoming increasingly visible in the public discourse, reaching the political agenda in 2003, with the first bill on registered partnerships. While the issue of LGBT rights is increasingly salient, between 2005 and 2015 the main political parties either did not actively support or oppose enacting legislation that could 'legitimize' homosexuality. Only left-wing opposition parties came up with legislative initiatives aiming to recognize same-sex unions and counter anti-LGB hate crime. These initiatives, however, found no support in the government, as the political will to spearhead 'a moral revolution' was lacking.

In the chapter, I begin to make the case for considering same-sex unions and hate crime separately both in research and advocacy. Only then we will be able to identify specific differences which are crucial to understand contestations and inhibitors to anti-LGB hate crime laws. This argument will be developed in chapters 6 and 8.

While the analysis suggests that Poland's homonegativity is the reason why Poland does not have anti-LGB hate crime laws, it does not explain why other countries in the region, with similar or even higher levels of homophobia, pass such laws. This suggests that there must be other, external factors that condition the passage of such laws. While Poland's experience with equality legislation shows that EU norms may be passed despite a lack of resonance locally, there are no such analyses on hate crime laws. For this reason, Chapter 6 considers comparatively the proliferation of anti-LGB hate crime laws in Europe, providing more insights into who, works to promote such type of legislation in the region and how and why.

6

LEADERS AND LAGGARDS: UPS AND DOWNS OF THE HATE CRIME PROJECT IN EUROPE

6.1 INTRODUCTION⁶³

RESEARCH from the US, presented in Chapter 2, shows that states with an active advocacy community, higher income, liberal population, progressive elected representatives and political instability⁶⁴ are more likely to legislate against anti-LGB violence (Haider-Markel and Kaufman 2006; Parris and Scheuerman 2015; Soule and Earl 2001). A quick look at Europe shows, however, that these observations do not always apply. Laws providing for penalty top-ups for sexual orientation hate crimes are passed in some LGB-friendly and some LGB-hostile countries; countries with some of the highest and some of the lowest income on the continent; some stable democracies and some countries in the process of democratization. While we already know a little about hate crime in Europe thanks to reports by international human rights bodies (FRA 2016a; ODIHR n.d.), theoretical explanations are lacking. If academic studies exist, they are mostly qualitative and limited to ‘developments in individual states, with comparatively little in the way of cross-national analysis’ (Chakraborti and Garland 2015:133). This hinders the possibility of understanding the reasons and consequences of the proliferation of anti-LGB hate crime laws in Europe. In the context of this dissertation, a comparative analysis is needed to identify the interstate and supranational factors whose presence (or absence) conditions Poland’s response to anti-LGB hatred. For that, a broad-based quantitative research is needed, as these factors are not always visible at the country level.

While the proliferation of anti-LGB hate crime laws in Europe is already one reason worth investigating, the disparities between how countries use the law are even more surprising and warrant attention. Simply the passage of hate crime laws does not mean that the country is fighting homophobia, and heralding this as a success of the anti-hate crime movement could be premature. This is because, as authors such as Perry (2014), Whine (2016) and Garland and

⁶³ Fragments of this chapter will be published under the title *The Europeanization of Anti-LGBT Hate Crime Laws in the Western Balkans* in a special edition of the *Crime, Law and Social Change* journal, edited by H. Mason-Bish and M. Walters (forthcoming). I have contacted the publisher about permission to include copyrighted material in the electronic version of the thesis.

⁶⁴ Instability is understood here as the fact that the governor and the majority of state legislature come from different parties.

Funnell (2016) observe, many countries do not return statistics on hate crimes, raising questions about their commitment. To prove its commitment, a country needs to show that the laws are systematically used to prosecute and sentence perpetrators. For this reason, the combination of data on legislation, policy and practice is as a sort of a 'litmus test,' showing the country's commitment to countering hate crime or, in other words, how well the norm of protecting LGB people from violence is institutionalized.

While current Europeanization literature is helpful, showing how the European Union encourages countries to address homophobia, the adoption of hate crime laws has never been a central research question in this field of study. As a result, some factors specific to criminal law (as opposed to, for example, equal treatment legislation) which influence the implementation of EU norms, have skipped the attention of Europeanization scholars. First, as I show in Chapter 2, criminal hate crime laws in parts of Europe originate from WW2 and their meaning is linked with countering violent extremism. I argue that this factor, not relevant for other strands of laws, impacts how countries understand the role and objects of protection of hate crime laws. This, in consequence, may lead to leaving out groups such as members of the LGB community. Second, the literature is almost silent about the role of the OSCE, seen as a leading international authority on hate crime (Swiebel and van der Veur 2009), but not active in, for example, the area of same-sex unions. Most importantly, little has been offered, in terms of theory, to explain the political impacts of OSCE's activities, as opposed to the impacts of social movements. For this reason, there is a need to consider the development of hate crime laws (where OSCE bodies have been active) separately from other strands of LGBT rights legislation (where the OSCE has been less active).

Considering the above, the chapter responds to research questions RQ(2), (4) and (5). The aim of this chapter is to illustrate the Polish situation more clearly through a comparative analysis across Council of Europe jurisdictions. The chapter considers how factors relevant for Poland, such as the international human rights framework, EU integration, public opinion and income, condition national responses to anti-LGB hate crime. By showing which patterns of diffusion⁶⁵ of anti-LGB hate crime laws across time and space can be distinguished, the comparative analysis begins to show how the process of Europeanization of hate crime laws and policies affects European states, including Poland. This analysis is further continued in chapter 10.

The chapter starts with an overview of the current international framework to combat anti-LGB hate crime, focusing on the work of the OSCE. Next, in the empirical section, I consider whether the relationship with the EU, income and attitudes towards homosexuality can explain the passage of sexual orientation hate crime laws and the actual enforcement of laws. I find that Western European countries with higher incomes and more accepting societies, such as the UK, were first to address homophobia through the means of criminal law and remain leaders in this

⁶⁵ I understand diffusion as 'the process by which an innovation spreads throughout a social system over time' (Gray 1973:1175 in Jenness and Grattet 2001:76).

area. On the contrary, several states with lower incomes and higher levels of homophobia have enacted laws but fail to show that they use them in a systematic way. I argue that anti-LGB hate crime laws in these states are provided as an expedient way for governments to prove their *bona fide* towards fundamental rights. A lack of statistics means, however, that the norm of protecting people from homophobia is yet to be realized in practice. The third group consists of countries which add sexual orientation to the law as a result of state-to-state diffusion and learning. Finally, the last group (including Poland) monitors anti-LGB violence without having a relevant legal framework. I argue that this is also an effect of European socialization, yet domestic factors (such as historicized hate crime laws) inhibited the passage of laws. In the last two sections I reflect on what the 'wave' of hate crime laws means in practice and reflect on the role of institutional actors, particularly OSCE bodies, in promoting the hate crime model in Europe.

6.2 ANTI-LGB HATE CRIME AND INTERNATIONAL ORGANIZATIONS

There is no international obligation to recognize anti-LGB hate crimes as specific offences. The most relevant EU law pertaining to hate-motivated conduct – Framework Decision 2008/913/JHA (Council of the European Union 2008), while setting out an obligation to provide penalty enhancements for crimes motivated by racism and xenophobia, leaves out sexual orientation (as well as gender identity, gender or disability) hate crime. Directive 2012/29 (European Parliament and Council of the European Union 2012) recognizes a broad range of personal characteristics (including sexual orientation) that should be considered when assessing protection and support needs of crime victims, but it does not, however, provide for harsher penalties.

The European Union supports member states in the implementation of both the above instruments. For example, the Fundamental Rights Agency has been involved in facilitating the exchange of promising practices to encourage reporting and recording of hate crime since 2013, while the European Commission offers grants for projects aimed 'to prevent and combat racism, xenophobia, homophobia and other forms of intolerance' (Council of the European Union 2013:5),⁶⁶ and monitors the implementation of EU law (European Commission 2014). Both activities are a soft way of transferring EU norms to third states.

Traditionally, some European countries (and the European Union) have focused on countering hatred through remembrance and raising awareness of the crimes committed by totalitarian regimes (Council of the European Union 2011), as well as elaborate ways of criminalizing speech acts (e.g. threats, incitement to hatred and genocide denial) and racist violence. While it is now used by the EU, the term 'hate crime' first appeared in international commitments in the context of the OSCE in the early 2000s (OSCE 2003). Since then, as Swiebel and van der Veur (2009:31) observe, the OSCE 'has become the leading international authority in combating hate crimes,

⁶⁶ See the website of the European Commission at http://ec.europa.eu/justice/grants1/programmes-2014-2020/rec/index_en.htm (retrieved 29 April 2017).

including hate crimes against LGBT persons', despite 'lacking official mandate to include sexual orientation and gender identity as a 'bias ground' '. At the same time, unlike the European Union (Council of the European Union 2016), the OSCE does not work on promoting LGBT rights as such.

The OSCE 'hate crime model,' a new way of understanding and responding to the old problem of bigoted violence,

. . . elaborate[s] on traditional descriptions of racist violence in that more than one type of bias motivation is covered and that the response to this violence goes beyond the legal sphere, and into the realm of policy actions that aim to increase reporting, victim support, practitioner training and access to justice (Perry 2014:75).

The OSCE's conceptualization is influenced by the US experience (Goodall 2013; Goodey 2007), where the penalty-enhancement-type law became the method of choice to fight bigoted violence (Grattet et al. 1998). Because hate crime is such an 'OSCE thing,' development of hate crime laws and policies is the most obvious aspect of democratization (and Europeanization) work conducted by the OSCE to analyse. At the same time, the organization's bodies' unique characteristics provide even more reasons for scholars to look at the OSCE more closely. ODIHR, the organization's human rights agency working across 57 countries, collects information and statistics on hate crimes and relevant legislation in the OSCE region, builds capacity of law enforcement and criminal justice personnel, and may review current and proposed hate crime laws (OSCE 2006). OSCE field missions, on the other hand, each with an individual mandate, are tasked with assisting post-Communist, and particularly post-conflict countries in the east of Europe and in Central Asia in the democratization process, including implementing human rights commitments.⁶⁷ Social movements and Europeanization studies could be interested in how these bodies use their unique features to facilitate the transfer of norms between countries and mobilize and validate norms on the ground, and in what the political impacts of their interventions are.

But, while the OSCE (through commitments, field missions and ODIHR) has been active in the field of hate crime for about fifteen years now, its work has attracted surprisingly little attention from academics. Commentaries are few and far between, and they seem to contradict each other. On the one hand, Goodall (2013:215) speaks about the 'under-acknowledged influence' of the OSCE' which has implanted the hate crime concept in some European states. On the other hand, Garland and Funnell (2016:27) suggest that, 'while they have devised well-intentioned hate crime policies, organisations like ODIHR appear to have little influence over whether states actively seek to address and combat hate'. Findings below show that the truth may lie somewhere in between. I will argue that the OSCE has impacted how some states seek to address hate, but

⁶⁷ See the list of missions and their mandates on the OSCE website at <http://www.osce.org/where-we-are> (retrieved 29 April 2017).

that the political outcomes of its interventions are dependent on the target country's relationship with the EU. This argument will be further developed in Chapter 10 in the context of Poland.

6.3 DATA AND METHODS

Considering the research problem addressed in this chapter, the methods of inquiry differ from those in the rest of the dissertation. Specifically, I use a mixed-method approach, combining quantitative, large-N analysis with insights from qualitative research, particularly elite interviews. The qualitative research is used to interpret the results from the quantitative study (explanatory sequential design) (Schrauf 2016:9). For the sake of clarity, I describe the methods below, rather than in Chapter 4.

Attitudes towards homosexuality

To see whether there is a correlation between anti-LGB hate crime laws and policies and public opinion on homosexuality in European states, data from the *European Value Survey 2008*, presented in the *Atlas of European Values* (Institute of Education et al. 2012) are used. The *European Value Survey* is a large-scale longitudinal survey research programme on basic human values. This study uses the question which asked respondents to give their opinion on whether homosexuality can be justified. *The Atlas of European Values* (Institute of Education et al. 2012) shows the responses on a scale from 0 to 100, with the higher number indicating higher level of acceptance of homosexuality.⁶⁸

Income

As mentioned in Chapter 2, research conducted by Soule and Earl (2001:299) in the US suggests that richer societies are more likely to pass anti-gay hate crime laws. In Europe, Ayoub (2015) found that countries which are well-off economically have more LGBT-friendly laws. To see whether indeed there is a link between the passage of anti-LGB hate crime laws and policies and the level of income in Europe, I include data on gross domestic product based on purchasing-power-parity *per capita* (GDP PPP *per capita*). Data are derived from the *World Bank Data* website.⁶⁹ The values (in current international dollar) are rounded to full thousands.

European integration

The relationship with the European Union is used to see whether the passage of anti-LGB hate crime laws and policies can be linked with the influence of the EU (Europeanization). States have

⁶⁸ The *European Values Survey* is used as it covers all Council of Europe countries (unlike, e.g. the *European Social Survey* (ESS-ERIC n.d.)).

⁶⁹ The World Bank Data website can be accessed at <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.KD?end=2013&start=2010> (retrieved 8 August 2017).

been categorized into the following subsets: EU-15 countries which were members of the EU before 2004 (so called 'old EU' member states);⁷⁰ EU-12 countries which joined the Union in 2004 and 2007;⁷¹ and EU-Candidates+Croatia.⁷² Non-EU countries belonging to the European Free Trade Association (EFTA) are grouped together.⁷³

Controls for population, the post-Communist state of a country, the location in the Central and Eastern Europe or in the Western Balkans,⁷⁴ as well as types of legislation,⁷⁵ other protected categories and reporting on racist and xenophobic crimes are included in the analysis, but they are not reported in the Table 2 below.⁷⁶

Hate crime laws and policy

While several aspects of the hate crime model could be used to measure the depth of the adoption of the anti-LGB hate crime norm in each country, the following dependent variables were deemed sufficient for this study to reach meaningful results:

- 1) inclusion of sexual orientation in
 - a) incitement to hatred and
 - b) hate crime laws,
- 2) presence of policy tackling hatred based on sexual orientation,
- 3) collecting data and reporting on anti-LGB hate crimes.

I treat the presence of all four above conditions as a measure of the acceptance of the international anti-LGB hate crime norm (while ODIHR cannot advocate limiting freedom of

⁷⁰ This group includes Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

⁷¹ This group includes Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (which joined in the 2004 enlargement), as well as Bulgaria and Romania, which joined three years later, in 2007.

⁷² This heterogenous group includes countries which have been subjected to the new 'fundamentals first' conditioning, i.e. Croatia (which joined the EU in 2013) and countries at various stage of integration with the EU. As of December 2015, Albania, FYR Macedonia, Montenegro, Serbia and Turkey were official EU candidates; Bosnia and Herzegovina and Kosovo are potential candidates which have applied for membership; Georgia, Moldova and Ukraine signed an EU Association Agreement, are recognized by the EU as having a European perspective and may apply for membership; Armenia signed the EU-Armenia Partnership and Cooperation Agreement (1999) and is included in the Eastern Partnership (2009). Information on country status comes from the website of the European Commission (2016) and from Peter (2014). Kosovo is not uniformly recognized as an independent state. However, as law and police systems are separate from those in Serbia, and the OSCE has separate operations in Prishtinë/Priština, this study treats Kosovo as a separate case.

⁷³ The European Free Trade Association (EFTA) is the intergovernmental organization of Iceland, Liechtenstein, Norway and Switzerland. The European Economic Area unites EU countries and the three EEA EFTA states (Iceland, Liechtenstein, and Norway) into an internal market governed by the same basic rules (freedom of goods, services, capital, and persons). See the website of the EFTA at <http://www.efta.int/eea> (retrieved 28 August 2017).

⁷⁴ Albania, Bosnia and Herzegovina, Croatia, Kosovo, FYR Macedonia, Montenegro and Serbia.

⁷⁵ Countries use general penalty enhancements, specific penalty enhancements or substantive offences, or a combination of these. See ODIHR (2014d).

⁷⁶ These imperfect groupings are used for analytical purposes. They are not meant to ostracize enlargement countries as 'backwards' (Kulpa 2014).

expression by passing hate speech laws, the EU promotes the adoption of both hate speech and hate crime laws).

The analysis of hate crime law is based on the excerpts from national criminal codes (unofficially translated into English) relating to hate crime, available at Legislationline.org, which is a service run by ODIHR. The excerpts were analyzed to establish the bias motivations covered in the legislation. Ambiguous wording (e.g. 'other marginalized groups' or 'social group') or open catalogue was not counted as covering sexual orientation. To eliminate errors (e.g. outdated or missing information), data from Legislationline.org were cross-referenced with information from the *Rainbow Europe 2015* map, published by ILGA-Europe (2015),⁷⁷ and the *State-sponsored homophobia 2016* report, published by ILGA (2016). The information about incitement to hatred laws comes from the *Rainbow Europe* map and the *State-sponsored homophobia* report. The data on anti-hate policy is based on the *Rainbow Europe* map. Data on reporting and the numbers reported come from ODIHR's *Hate Crime Reporting* website.⁷⁸ For the analysis in this chapter, combined data on reporting on SOGI hate crimes (ODIHR reports data on sexual orientation- and gender identity-based hate crimes jointly) between 2013-2014 are used. The number of crimes reported is not comparable between countries, as definitions and data collection methods differ (see ODIHR (2014) for information about recording methods). However, while the statistics are not comparable, the significant number of reports is treated as evidence that the country systematically detects and prosecutes hate crimes. Results of the analysis are presented in the Table 2 below.

6.4 PATCHWORK OF LAWS AND POLICIES

As Table 2 below shows, bias motive based on sexual orientation is recognized as an aggravating circumstance in committing a crime in 27 out of 49 European countries. Most of them (21) also penalize incitement to hatred based on sexual orientation. Seven countries have provisions on incitement to hatred based on sexual orientation, but do not have hate crime laws, while six have hate crime laws without incitement to hatred laws.

Compared to hate crime legislation, the number of countries that have drafted sexual orientation-inclusive anti-hate policies, and/or report cases dramatically dwindles. Specifically, only 14 countries return statistics on anti-LGBT hate crime to ODIHR, with the reports varying in quality (from two cases in Croatia to over 6000 in the United Kingdom). Out of the 14, nine countries also have policies on countering hate that include sexual orientation. Compared with legislation, among those that return statistics, nine countries have both incitement to hatred and hate crime laws, two have incitement to hatred laws only, while three countries report without relevant legal

⁷⁷ The *Rainbow Europe* map, available at www.rainbow-europe.org, is updated more regularly than legislationline.org. For example, ODIHR's service does not reflect the change of the law in the Federation of Bosnia and Herzegovina in 2016. Data from both services as of 1 June 2016.

⁷⁸ The 2014 report, available at hatecrime.osce.org, was published in November 2015.

provisions. Table 2 below illustrates the proliferation of the sexual orientation hate crime norm in Europe. The next section explains the norm adoption among European countries, using the theory of Europeanization of social movements as an explanatory frame.

<i>Country group</i>	<i>Acceptance of homosexuality (0-100)</i>	<i>GDP PPP per capita (thousands \$)</i>	<i>EU membership</i>	<i>Incitement to hatred law</i>	<i>Hate crime law</i>	<i>Policy tackling hatred</i>	<i>No of cases recorded</i>
Hate crime laws (or equivalent), incitement to hatred laws and reporting (10)							
Belgium	53	41	1957	2003	2003	✓	60
Croatia	16	20	Cand. ⁷⁹	2003	2006	✓	2
Denmark	70	45	1973	1987	2004	✓	24
Finland	62	39	1995	2011	2011		40
France	53	37	1957	2005	2003	✓	90
Netherlands	74	45	1957	1992	2003 ⁸⁰	✓	1383
Norway	68	63	EFTA	1981	1994	✓	34
Spain	56	31	1986	1996	1996	✓	513
Sweden	76	43	1995	2003	2003		493
United Kingdom	50	37	1973	2004-2010 ⁸¹	2004-2010 ⁸²	✓	6202
Incitement to hatred laws and reporting (1)							
Ireland	47	45	1973	1989			8
Reporting without laws (3)							
Germany	52	43	1958 ⁸³			✓	129
Italy	29	34	1958				27
Poland	20	24	2004				7
Hate crime laws and incitement to hatred laws, but no reporting (11)							
Albania	12	11	Cand.	2013	2013		

⁷⁹ Croatia joined the EU in 2013.

⁸⁰ According to ILGA (2016:46), the date concerns the instruction on the basis of Article 130(4) of the *Act on the Judicial System*.

⁸¹ ILGA (2016:48) provides that such laws have been adopted in England and Wales (2005), Northern Ireland (2004) and Scotland (effective 2010).

⁸² ILGA (2016:49) provides that such laws have been adopted in England and Wales (2005), Northern Ireland (2004) and Scotland (effective 2010).

⁸³ Belgium, France, Germany, Italy, Luxembourg and the Netherlands officially entered on January 1, 1958.

<i>Country group</i>	<i>Acceptance of homosexuality (0-100)</i>	<i>GDP PPP per capita (thousands \$)</i>	<i>EU membership</i>	<i>Incitement to hatred law</i>	<i>Hate crime law</i>	<i>Policy tackling hatred</i>	<i>No of cases recorded</i>
Greece	32	24	1981	2013	2013		
Hungary	24	23	2004	2013	2013		
Iceland	81	41	EFTA	1996	1996		
Lithuania	11	25	2004	2003	2009		
Malta	39	30	2004	2012	2012		
Montenegro	8	15	Cand.	2010	2010		
Portugal	36	26	1986	2007	2007		
San Marino	n. d.	n.d.		2008	2008		
Serbia	9	13	Cand.	2009	2012		
Slovenia	33	28	2004	2008	2013		
Hate crime laws, but no reporting (6)							
Andorra	n. d.	n.d.			2005		
Bosnia and Herzegovina	8	10	Cand.		2010 ⁸⁴		
Georgia	2	8	Cand.		2012		
Kosovo	n.d.	9	Cand.		2013		
Romania	13	19	2007		2006		
Slovakia	46	27	2004		2013		
Incitement to hatred laws, no reporting (6)							
Austria	48	44	1995	2011			
Cyprus	15	30	2004	2011			
Estonia	15	26	2004	2006			
Luxembourg	59	91	1958	1997			
Monaco	n. d.	n. d.		2005			
Switzerland	59	56	EFTA	2015			
No laws and no reporting (12)							
Armenia	2	8	Cand.				
Azerbaijan	7	17					
Belarus	18	18					
Bulgaria	20	16	2007				
Czech Republic	44	28	2004				

⁸⁴ One out of two Bosnia and Herzegovina constituencies – Republika Srpska – included sexual orientation as one of the protected characteristics in 2010 (ILGA 2016:47).

<i>Country group</i>	<i>Acceptance of homosexuality (0-100)</i>	<i>GDP PPP per capita (thousands \$)</i>	<i>EU membership</i>	<i>Incitement to hatred law</i>	<i>Hate crime law</i>	<i>Policy tackling hatred</i>	<i>No of cases recorded</i>
FYR Macedonia	11	12	Cand.				
Latvia	16	22	2004				
Liechtenstein	n. d.	n. d.	EFTA				
Moldova	8	5	Cand.				
Russia	13	25					
Turkey	5	22	Cand.				
Ukraine	7	8	Cand.				

Table 2 Adoption of the sexual orientation hate crime norm (laws, policy and reporting) in 49 European countries. Source: Author’s own analysis, based on data from the *Atlas of European Values* (Institute of Education et al. 2012), World Bank,⁸⁵ Legislationline.org, Hatecrime.osce.org, ILGA (2016) and ILGA-Europe (2015).

6.4.1 EUROPEAN LEADERS

Out of 49 countries in Europe, 10 recognize bias based on sexual orientation as an aggravating circumstance in committing a crime and report the number of anti-LGBT hate crimes to ODIHR. All of them also have relevant incitement to hatred provisions, while eight also have sexual orientation-inclusive anti-hate policies. Nine of these countries are in Western Europe (eight are old-EU members while Norway is part of EFTA), are characterized by a high level of income (over \$30,000), and their societies are highly accepting of homosexuality (Belgium and France score the lowest at 53/100). The remaining country – Croatia – is an exception in this group. Compared to the rest, it is the only non-West European state, its society remains largely hostile towards homosexuality (16/100), and its income is significantly lower than the rest of the group (\$20,000). Croatia’s hate crime statistics are also poor, with a mere two cases of anti-LGBT violence recorded (Denmark, the next in the group and with slightly bigger population than Croatia, recorded 24).

Apart from Finland, the Western European countries in this group started to address anti-LGB hatred before transnational bodies picked up the problem (for example, Spain in 1996). Their approaches are diverse, reflecting the lack of a single template at the time when laws were

⁸⁵ The *World Bank Data* website can be accessed at <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.KD?end=2013&start=2010> (retrieved 8 August 2017).

introduced. For example, §232 of the Norwegian Criminal Code⁸⁶ recognizes motivation based on the victim's 'homosexual orientation' as an aggravating circumstance in committing a crime, conversely to the abstract 'sexual orientation', which is used by most other states. The Netherlands, on the other hand, does not have hate crime laws as such. Instead, official guidelines obligate prosecutors to press for increased penalties should the bias motivation of a crime be detected. Despite the lack of a law, the country deals with hate crime in a consistent manner, as shown by the high number of cases recorded.

Asked to interpret the fact that the nine Western European countries seem to have the most developed anti-LGB hate frameworks, one of the international civil servants interviewed in this research observes that these countries have a 'tradition of actually giving effect to the laws,' together with 'otherwise high standing of human rights, which also comes with certain economic development, legal culture and all that.'⁸⁷ In his view, the 'popular demand to giving meaning to concepts like equality is much higher in these highly-developed countries – old EU members – than in the accession countries.' One expert commented on the Dutch case by saying that it proves that 'the role of law is secondary', and issues can be addressed without changing legislation.⁸⁸

The early start, the diverse legislative approaches and systematic use shown by high numbers of recorded cases mean that these West European countries are the first movers in terms of protecting LGB people from hatred through the means of criminal law. Conversely, in Croatia, while the 'data collection' box is checked, the actual commitment of the authorities to detect and prosecute hate crime cases can be questioned.⁸⁹ The doubt in Croatia's commitment to countering discrimination and violence is further strengthened by rulings delivered by the European Court of Human Rights, which found Croatia in breach of the European Convention on Human Rights (ECHR) several times. In 2007, the ECtHR ruled that the country failed to mount an effective investigation into a racially motivated attack in the case *Šečić v. Croatia* (ECtHR 2007). More recently, the Court found that Croatian authorities did not protect a mentally and physically disabled man from repeated harassment (case *Đorđević v. Croatia*, ECtHR 2012a). Considering the low income and low acceptance of homosexuality and evidence that the country has trouble dealing with hate crime in a consistent manner, Croatia should be seen as a norm follower, together with other countries in the EU-Candidates+Croatia subset. The explanation for developments in these countries is provided below.

⁸⁶ Excerpts of hate crime laws from the OSCE participating states are available at <http://www.legislationline.org/topics/subtopic/79/topic/4> (retrieved 8 August 2017).

⁸⁷ Interview-21-International-civil-servant2-2016-05-30.

⁸⁸ Interview-18-ECRI-2015-11-20.

⁸⁹ Interview-21-International-civil-servant2-2016-05-30.

Ireland

Ireland is a specific case of a first mover which warrants separate consideration. The country is well off economically, has a relatively accepting population⁹⁰ and was one of the first countries to recognize sexual orientation in hate speech laws almost 30 years ago, but has not followed up with hate crime laws. Unlike in the Netherlands, however, there are no specific instructions for Irish prosecutors to press for higher charges if bias motivation is detected. As a result, Ireland's case is unique in the Western world, as the country does not recognize the hate element in crimes. Also, the Garda Síochána (the police force of the Republic of Ireland) detects only small numbers of anti-LGBT hate crimes. An international expert interviewed in this research comments on the low number of cases by saying:

Of course, in the Netherlands it [not having hate crime laws] might work. In Ireland, it probably is not working that well, so it's random, inconsistent (...). And these are all symptoms of actually not having a law.⁹¹

While 'Ireland cuts a lonely figure in respect to hate crime' (J. Perry 2017:93) in the European legal landscape, its authorities have consistently opposed recognizing the hate element of a crime, simply stating 'that motivation can always be considered by the courts' (European Commission 2014:14). This conclusion is increasingly contested by activists (ENAR Ireland 2013, 2014), international human rights bodies (CERD 2011; ECRI 2013), and scholars (Carr 2011, 2017b; Carr, Schweppe, and Haynes 2014; Haynes and Schweppe 2015, 2016, 2017; Michael 2015; B. Perry 2017; J. Perry 2017). Nevertheless, until the end of 2015 there have been no efforts made on the part of the government to legislate against hate crimes.⁹² This shows that international criticism has not encouraged the country to implement the international hate crime model. In this line, Haynes and Schweppe (2016:abstract) argue that 'the failure of intergovernmental bodies to stir Ireland into action raises important questions regarding the possibility of internationalizing responses to hate crime.' According to them,

... where a state erroneously insists that its legislative position is in compliance with international law and is utterly intractable in this position, there is very little that can be done to rectify the situation (P. 157).

⁹⁰ It is worth noting that, in 2015, a constitutional referendum to allow for marriage equality passed by 61-39 per cent (ILGA 2016:51).

⁹¹ Interview-21-International-civil-servant2-2016-05-30.

⁹² A Bill introducing hate crime laws in Ireland has been prepared by the University of Limerick Hate and Hostility Research Group and the NGO Working Group on Hate Crime (Haynes and Schweppe 2015), but, as of 2016, it has not gained approval of the government. The text of the Bill can be found at <http://enarireland.org/wp-content/uploads/2016/10/WG-Bill-2015-Criminal-Law-Hate-Crime-Bill.pdf> (retrieved 21 November 2017).

As it can be seen, Ireland has been impervious to the process of Europeanization of hate crime laws, which resulted in enacting anti-LGB hate crime laws elsewhere in the region. There may be various reasons why this is so. Similarly to Poland (Chapter 5), literature links Ireland's exclusionary practices towards minorities (Carr 2017a:253) and restrictions of sexual morality (Mullally 2005) with the collocation of Catholicism and the Irish national identity. For example, Mullally (2005:78) argues that 'reproductive rights particularly and women's human rights generally have often been portrayed as hostile to cultural and national sovereignty'. Despite the success of the marriage equality referendum, Ireland continues to have some of the most restrictive abortion laws in Europe (similarly to Malta).

Iceland and Luxemburg

Iceland and Luxemburg are also specific cases worth considering separately from other Western European countries. They are both doing very well economically (GDP PPP *per capita* \$41,000 in Iceland and \$91,000 in Luxemburg) and rank high in acceptance of homosexuality (81/100 in Iceland and 59/100 in Luxemburg). Both legislated against homophobic criminal conduct over two decades ago (Iceland in 1996 and Luxemburg in 1997). Nevertheless, they rank lower than their neighbours because they do not provide data to ODIHR and, in the case of Luxemburg, also do not have penalty enhancements for hate crimes. Apart from that, they are in a similar situation as the first movers analysed above, having found their own ways of dealing with homophobia, before the international norm was established.

Similarly to Ireland or the Netherlands, Iceland and Luxembourg have resisted the process of Europeanization of hate crime laws. Unlike democratizing countries in the East and South of Europe (see below), they have also not been primary targets of international human rights bodies. Despite that, however, there are increasing signs of recognition of the hate crime concept in those countries. For example, in 2016, Iceland signed an agreement with ODIHR to strengthen hate crime response, investigation and prosecution (OSCE 2016). This could be explained by socialization and regional contagion (below).

6.4.2 SOCIALIZATION

The third group consists of three countries that report on anti-LGBT hate crimes, despite not having sexual orientation in the criminal laws. This is the case of Germany, Italy and Poland. While Germany outranks the two others when it comes to income (GDP PPP *per capita* in Germany \$43,000, Italy \$34,000 and Poland \$24,000), all three countries are EU members and are relatively well off. Germany has also a higher level of acceptance of homosexuality (52/100) than the other two (Italy 29/100 and Poland 20/100), and is the only one that has a policy on homophobic hatred. German police record more cases of anti-LGBT crimes than the police in the other two countries combined. Nevertheless, compared to the European leaders, the ability of all three countries to deal with anti-LGB hate crime cases remains limited. In the analysis of possible

factors behind the above results I will focus on the German case, because the observations on Germany are, to a certain extent, relevant to the two other countries, and, because Poland, as the main case study, is considered separately in Chapters 5 and 7-10.

Considering the good economic situation and high level of acceptance of homosexuality, one could expect Germany to be among European leaders in protecting LGB people from violence. Nevertheless, as Table 2 shows, unlike other Western European states, Germany does not recognize sexual orientation as part of any crime and detects fewer cases than, for example Spain or Sweden. This suggests the presence of some powerful domestic factors which inhibit the state from casting 'the widest possible net' to capture crimes that are potentially bias-motivated (ODIHR 2014a:15). In other words, forces which slow down the process of adoption of the international hate crime model. In Chapter 2, I provided an analysis of the German approach to hate crime, arguing, based on previous research (Bleich 2007; Glet 2009; Savelsberg and King 2005), that the country sees countering hate crime as part of efforts to eradicate political extremism. My analysis builds upon these explanations, adding that the economic position and EU membership mean that the country does not need to 'prove itself' and the established legal framework resists change.

At the same time, two recent changes suggest that the international model is slowly permeating the criminal justice policy. First, Germany amended its criminal law in 2015, adding a general penalty enhancement for hate crimes. While the shape of the law is in line with the current international standard (i.e. the hate crime model), only racism is recognized as a bias motivation. This confirms how powerful the resistance to change the object of protection of laws enacted to address hatred against national and ethnic minorities is. Second, the fact that the policy is implemented, and systems are put in place to record sexual orientation-based violence, suggests that, while laws are resistant to change, there is a creeping recognition among personnel responsible for criminal justice policy of the need to tackle bias violence more broadly. Policy makers may realize that it is not necessary to amend the laws (on which they may not have influence) to improve policing and recording of hate crime. That, in their own capacity, they can also do something to effectuate change.⁹³ One of the international experts interviewed in this research argues:

They [policy makers] realize that it's a certain societal phenomenon and the criminal law does not necessarily provide the answers for all its breadth. Which, if you have enlightened enough minds, doesn't necessarily need to stop, and shouldn't stop, law enforcement.⁹⁴

⁹³ Interview-01-International-civil-servant1-2015-06-17, Interview-21-International-civil-servant2-2016-05-30.

⁹⁴ Interview-21-International-civil-servant2-2016-05-30.

Summing up, the fact that Germany, Italy and Poland have started to recognize sexual orientation hate crime in some areas means that the lack of law is not a sign of a total refusal to deal with homophobia, but rather, there are numerous internal and external factors which all influence how politicians and civil servants understand and address anti-LGB hate crime. This thought will be developed in Chapters 9 and 10.

6.4.3 COMMITMENT ISSUES

The next two categories in Table 2 consist of 17 countries which have enacted sexual orientation hate crime laws (11 of which have also incitement to hatred laws), but do not return data on LGBT victimization to ODIHR. Countries in the group include mostly Eastern enlargement countries, six of which joined in 2004 or 2007, while six others are still candidates. Societies in all the above have strongly (e.g. Georgia 2/100), moderately (e.g. Hungary 24/100) or slightly (e.g. Slovakia 46/100) negative attitudes to homosexuality. The average level of GDP PPP *per capita* is also lower than in the above groups, ranging from \$8,000 in Georgia to \$30,000 in Malta.

In addition, the group includes Iceland, two old-EU countries – Portugal and Greece, and two micro-states – Andorra and San Marino, for which not all data are available. The case of Iceland is analysed above. EU-15 and EU-12 countries in this group are considered in section 5.4.5 on ‘regional contagion’ below. For the sake of clarity, the analysis in this section focuses on the EU-Candidates+Croatia subset, i.e. countries which have been subject to the ‘fundamentals first’ enlargement policy.

Although criminal laws have been reformed in most EU-Candidates+Croatia group, as Table 2 shows, none of the states in the group provides evidence that the legislation is used in a consistent manner (or even used at all) to address anti-LGB hate crime. Such a disconnect between law and law enforcement has already been noticed in literature, with authors such as Garland & Funnell (2016) and Turpin & Petrosino (2015) noting their concerns about the level of commitment in countries which do not return statistics. There are two possible explanations for this disconnect. The main explanation relates to the reasons why anti-LGB hate crime laws were enacted. Here, I argue that accession countries passed hate crime laws as part of the fundamental rights package, under EU influence. The lack of data means, however, that, while laws are enacted, the value of protecting LGB people from violence (or minorities in general) is not internalized, and countries are not actually committed to fighting hatred. This argumentation is based on the rational choice (external incentives) model of Europeanization, and in line with the findings of scholars who analysed adoption of LGBT rights legislation in the region (Ayoub 2015:201; Pelz 2014). I add to the scholarship by showing that shallow Europeanization includes also hate crime laws. On top of that, my contribution is in documenting the role of OSCE bodies in the Europeanization of hate crime in the Western Balkans (see below). The second explanation focuses not so much on the countries, but on the weakness of the model of the law itself. I argue that, confronted with limited financial resources to train personnel and set up data collection systems, the model is

difficult to use in practice. In the paragraphs below, I provide justification for the first argument, while the second one is discussed in the section on regional contagion.

As shown in Chapter 2, anti-LGB hate crime laws are expected to pass in richer states with accepting populations and supportive elites. In such polities, the passage is an effect of mainly internal factors. This is the case of the 'European leaders' group analysed above. In democratizing countries, such as those in the EU-Candidates+Croatia subset, in the absence of the internal factors, other reasons which encourage governments to pass hate crime laws come to the fore. Specifically, EU candidates enact legislation in the run up to accession as an expedient way to prove their commitment to fundamental rights. The potential consequences of non-compliance (delays in negotiations, international criticism) are so strong that they outweigh domestic costs associated with adopting the norm (e.g. protests of the homophobic electorate).

As mentioned in Chapter 2, homophobia in Eastern Europe has been explained through a combination of cultural, political social and religious factors. LGB visibility is framed by politicians as a Western threat to traditional values, national dignity, insult to public morals and religion (for recent commentaries, see contributions in Sloomaeckers, Heleen Touquet, and Vermeersch 2016). Over years, some Pride events have been banned and/or attacked in many CEE countries, with more or less overt support from politicians and religious figures, sparking international condemnation (Ejdus and Božović 2017), even leading to ECtHR adjudications. For example, in Georgia, the failure to protect participants of the Tbilisi Pride event from violence resulted in the ECtHR finding the state in violation of the ECHR (case of *Identoba and others vs Georgia*, ECtHR 2015).

While it is the EU that has the 'carrot' (promise of economic gains from the participation in the single market), on the ground it is the OSCE which provides templates to address hate crime. The influence of the OSCE's hate crime model on the criminal codes in the region is identifiable in the use of penalty top-ups, a broad list of victim categories, types of conducts under the umbrella of hate crime, and even the use of the term 'hate crime' in the law. For example, Albania, Croatia, Bosnia and Herzegovina, FYR Macedonia, Georgia, Kosovo, Montenegro and Serbia all address hate crimes using a general penalty enhancement (sometimes in combination with other provisions). FYR Macedonia, which did not have any hate crime laws before 2009, introduced a general penalty enhancement following ODIHR's recommendations provided in a law review (ODIHR 2009a). In the Federation of Bosnia and Herzegovina (one of two Bosnia and Herzegovina's constituencies), ODIHR suggested expanding the list of criminal acts to include property damage, as a reminder that any type of criminal act may be motivated by bias (ODIHR 2009c:4). In fact, even an actual definition of hate crime, based on that of the OSCE, found its way to some of the criminal laws in the region. For example, the Criminal Code of Croatia stipulates:

A hate crime is a crime committed because of race, colour, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person.⁹⁵

While inserting a general penalty enhancement for hate crimes in the criminal code is an easy fix (see below), the almost uniform inclusion of sexual orientation – a contentious topic in the homophobic region – may surprise. The explanation seems to be in the fact that the change of hate crime laws was a part of broader reform, and the protection of LGB people was in a way ‘buried’ in it. Sexual orientation was added because the provisions were copied from the templates provided by the OSCE or copied from anti-discrimination laws. In this sense, the deliberative process (and public discussion) as to whether sexual orientation should be included was limited to a minimum. This is confirmed by one of the informants interviewed in this research, who states that

... sexual orientation makes its way to criminal law without the government explicitly knowing or noticing. ... Often it ends up being there by accident. I think rarely there’s a specific public debate about how the hate crime law should look like.⁹⁶

This finding is a concretization of the argument advanced in the Europeanization literature, that ‘laws were passed quickly, without proper debate, because of the desire of political elites to ‘gain membership in the EU, as soon as possible’ (Ladrech 2011, cited in Pelz 2014:221–22). Adding a few provisions (in the extreme form, for example in Albania, only one)⁹⁷ is an easy and low-cost way for governments to prove their *bona fide* towards fundamental rights.⁹⁸ Commenting on this, one of the interviewees complains:

I find, speaking generally, that this is a stronger motivator than a real will to do something about hate crime. ... They’re not interested in solving domestic problems: They want to score points.⁹⁹

This finding confirms what newer studies on Europeanization argue, i.e. that laws passed under EU conditionality are enacted instrumentally, and compliance is ‘purely formal’ (Mungiu-Pippidi 2014:30). In doing so, it refutes the implicit assumption from the early Europeanization literature (Schimmelfennig and Sedelmeier 2005b) that the EU has contributed to the improvement of governance in accession countries, and that a change of laws will be sustainable.

⁹⁵ Article 87 para 20.

⁹⁶ Interview-21-International-civil-servant2-2016-05-30.

⁹⁷ Article 50.

⁹⁸ Interview-18-ECRI-2015-11-20, Interview-19-HRCtee-2015-11-21.

⁹⁹ Interview-21-International-civil-servant2-2016-05-30.

Lack of enforcement further suggests that the EU norm of safeguarding LGB people does not resonate well with the society and institutions, which do not see the value in protecting LGB people from targeted violence. Similar findings suggesting incongruence of new laws with dominant norms have been found in previous research. For example, Ayoub (2015:301) argues that accession countries 'were confronted with policy and programmatic frameworks before philosophical viability – favourable public sentiments – could be assured'.

The above interpretation (laws without implementation as an effect of the external incentives) is also supported by the fact that the enthusiasm for reforms seems to decrease once the country is inside the EU. One of the international experts interviewed in this research observes:

. . . I can compare them [current EU candidates], and their enthusiasm, and their openness, to those which are already in. And Croatia . . . Croatia is not very open nowadays. And I know from the annals of the OSCE history that once they were very open.¹⁰⁰

This is in line with previous research on the topic. For example, a Montenegrin activist interviewed by Pelz 'suggested that Montenegro needs to remain in the accession process for several more years to help build the LGBT movement, and to ensure proper implementation of laws while EU oversight remains significant' (Pelz 2014:15).

The FYR Macedonia and Bosnia and Herzegovina are examples of low-income jurisdictions where homophobia is rampant, but which, incentivized by the EU, have been gradually accepting the international model. The legal change in these countries was not a one-time reform, but rather a gradual process through which the international hate crime model has permeated the law. In the Federation of Bosnia and Herzegovina, sexual orientation (and gender identity) hate crime law was passed only in 2016 (Sarajevski Otvoreni Centar 2016), several years after Republika Srpska and after the hate crime law reform commenced. In the FYR Macedonia, the parliament has not included sexual orientation as a protected ground in hate crime laws until today, despite amending the law in 2009 and 2014, and despite ODIHR's recommendations (ODIHR 2009a). Instead, the list of protected grounds includes vague categories of 'belonging to a marginalized group', as well as 'any other ground provided in law or ratified international agreement' – which are supposed to cover 'any discrimination on grounds of any personal characteristic' (HRC 2013:7). The process of finding an acceptable solution, however, continues. Recently, the Macedonian authorities have started to work on the amendment of hate crime laws once again, and ODIHR was asked to provide another law review (ODIHR 2016). This suggests that either the country has learned that the flawed law contains gaps (this is an opinion of one of the experts

¹⁰⁰ Interview-21-International-civil-servant2-2016-05-30.

interviewed in this research),¹⁰¹ or it has capitulated under the external pressures, 'sacrificing' homophobic views for the benefits of joining the EU.

6.4.4 WEAK CONDITIONING (AND STRONG RESISTANCE)

The last group includes 12 countries that neither recognize anti-LGB hatred in the law, nor report on it to ODIHR. The group consists mostly of post-Communist countries. The average income in the group is low (Moldova, the poorest in Europe, has GDP PPP *per capita* of \$5,000), as is the level of acceptance of homosexuality (e.g. Armenia 2/100, Russia 13/100). The Czech Republic stands out in this group, as it is more accepting (44/100; the next country – Bulgaria, scores 20/100) and richer (GDP PPP *per capita* of \$28,000; the next country, Russia, has \$25,000) than the rest of the group. Three countries in the group (Azerbaijan, Belarus and Russia) are not in the process of EU accession, while the rest are at various steps of integration.

As explained in Chapter 2, there are powerful political narratives in Central and Eastern European countries which other LGB people as a Western threat to traditional values. Arguably, the 'epicentre' of the opposition towards the EU's fundamental norms is Russia, which not only does not accept them, but actively rejects them. Authoritarian countries (such as Belarus or Azerbaijan) are also not expected to recognize LGBT rights. But what about those that take part in the EU integration process?

While homophobia is an old problem in Eastern Europe, the requirement to tackle homophobic violence under the umbrella of 'hate crime' is, as explained above, a novelty. The standard is so new that it has 'missed' countries which democratized (and joined the EU) earlier, i.e. those in the EU-12 subset (including Poland). There, the European Union has understandably less leverage, but old problems remain. For example, Bulgaria, Latvia and the Czech Republic have long been criticized for inability (or lack of will) to address discrimination and discriminatory violence, targeting not only LGB, but also ethnic and national minorities, particularly Roma (e.g. Amnesty International 2015a for Bulgaria; Oakley 2008 for the Czech Republic and Latvia). The above is also confirmed by ECtHR rulings (e.g. *Nachova and Others v. Bulgaria* (ECtHR 2005); *Abdu vs. Bulgaria* (ECtHR 2014)). As the move to tackle anti-LGB violence usually follows or accompanies moves to deal with racist and xenophobic violence, the fact that the three countries still struggle with racism and xenophobia explains lack of achievements in fighting homophobia. Moreover, the problem may be also in the current frameworks used to fight racism and xenophobia in these countries. For example, As Perry (2014:78) observes, the Czech Republic links fighting hate crime with countering violence extremism (similarly to Germany), while Bulgaria treats it as hooliganism. These approaches mean that even if the country tries to counter hatred, effects of it will likely mean fewer cases recorded.

¹⁰¹ Interview-21-International-civil-servant2-2016-05-30.

Considering the countries that aspire to join the EU (Armenia, FYR Macedonia, Moldova, Turkey and Ukraine), all have been undergoing reforms, but, for various reasons, lag behind other candidate countries. For example, in the case of Turkey, Göktaş (2017) argues that both media and the parliament engaged in a campaign impeding the recognition of bias crimes in the law, while Bezirgan (2016) argues that the vision of 'ideal citizens' inhibits the criminal law protection of ethnic and sexual minorities. The case of the FYR Macedonia, as particularly interesting, is analysed separately below.

6.4.5 REGIONAL CONTAGION AND THE EVOLUTION OF THE NORM

Data in Table 2 show that, between 1981 and 1997, seven Western European states recognized sexual orientation as a protected ground in incitement to hatred laws in what appear as isolated incidents. Penalty enhancements for anti-LGB hate crimes, on the other hand, appeared in Europe in 1994 in Norway, which decided to add them to already existing hate speech provisions. Two more countries joined in 1996, adding hate speech and hate crime laws at the same time. The actual 'wave' of anti-LGB hate crime laws that we observe today started only in 2003.

In Europe, the difference between the shape of the law addressing hatred (incitement to hatred and penalty enhancement), resistance of those which adopted the law earlier and use it effectively to accept the new model, as well as the specification of protected statuses, is visible between first movers and norm followers, showing that there is an on-going process of learning. This is because countries that enter the domain later tend, ironically, to overtake first movers, as they pass the law in its most recent form, 'despite being followers on LGBT rights in earlier years' (Moravcsik, in Ayoub 2015:308). Democratizing EU accession countries accept the most recent version of laws (which, in the case of hate crime laws, means accepting the international hate crime model), and are open to suggestions coming from transnational institutions. One international civil servant comments on it, arguing that

. . . candidate countries are [a] really good kind of target for international organizations, because they are in this learning state (...). And they are very open to what's coming from the international environment. So, if the question is, 'are they more receptive?' Yes, they are much more receptive to new concepts – because it [hate crime] is a new concept – but also to solutions, and how to address them.¹⁰²

This is in line with hate crime literature from the US. Grattet et al. (1998:303) found that 'the content of a state's law is contingent upon *when* it enters the ongoing institutionalization process' (emphasis in the original). Jenness and Grattet (2001:14) observe that, as time went on, 'laggard states, those who passed the laws later, ironically tended to employ a more expansive and

¹⁰² Interview-21-International-civil-servant2-2016-05-30.

progressive definition of hate crime.’ Conversely, first-moving states which ‘had enacted either a data collection or a civil hate crime law earlier were slower to adopt criminal hate crime laws’ (Soule and Earl 2001:299).

The diffusion patterns and tendency for homogenization observed by US scholars (Grattet et al. 1998; Soule and Earl 2001), combined with recent literature on social learning (e.g. Kollman 2013), seems helpful in understanding the process of adoption of EU norms in countries where conditioning does not work. This is particularly the case of those EU countries that passed laws following accession. What would be helpful, however, is research looking at domestic factors surrounding the passage, such as, for example, if it was part of a broader reform of criminal law or an isolated incident; legislative initiatives by advocacy groups; framing, etc.

Furthermore, my analysis shows that the current model continues to evolve. This is a new finding which adds to our understanding of the globalization of hate crime as a policy problem. I mentioned above that, except for lack of will, there may be another reason why countries which have implemented the general penalty enhancement model do not return data. One potential problem is that the currently promoted template for laws is not enough to change the established practices of a country, particularly where financial resources are limited. In 2012, the FRA (2012:11) came to the realization that simply having a general penalty enhancement may not be sufficient to address hate crime and to collect data. This is because using a combination of specific offences plus penalty top-up is arguably more cumbersome for police officers and prosecutors than using a substantive offence. It is also more difficult to track when the general penalty enhancement was triggered in police and court statistical systems. Having this in mind, ODIHR, following the FRA, has recently turned to recommending the addition of a list of substantive ‘hate crime’ offences, together with a general penalty enhancement, when reviewing hate crime legislation in Poland (ODIHR 2015:10). The institution argues that such a combination ‘is likely to contribute to creating a framework within which cases can be more effectively identified and data collected’ (ODIHR 2015:10).¹⁰³ This shows further evolution of the template.

¹⁰³ Building upon FRA (2012), Hanek (2017) identifies more issues with using a general penalty enhancement for hate crimes. He argues that the balancing between mitigating and aggravating circumstances by the judge when considering the sentence ‘often results in only mild or no increase in sentence,’ observing that in the UK, the courts should add racial or other aggravation only after considering other mitigating and aggravating circumstances, ensuring that the sentence is increased in all hate crime cases (P. 478-479). Further, he argues that it is difficult to ensure the consistency of application of general penalty enhancements, which has ‘adverse impact on legal certainty and other principles of criminal law’ (P. 479). Next, as aggravating circumstances are invoked at a late stage of the criminal procedure, ‘police investigators are less likely to be aware of such provision’ (P. 479). One of my informants in this research, a senior police officer, contradicts this, arguing that as long as there is a hate crime provision in the criminal code, police officers will find it (Interview-12-police-human-rights-officer2-2015-08-26).

6.4.6 THE OSCE AS THE INSTITUTIONAL FACILITATOR

The above analysis shows that there is a link between the activities of OSCE bodies and changes in either the legal framework (e.g. Croatia's legal definition), or state behaviour (in some already EU members, such as Poland). This finding, on the one hand, shows a new type of agent whose actions produce measurable political impacts, while, on the other, it helps to understand the patterns of diffusion of the international hate crime model.

Through their characteristics and expertise, ODIHR and the field missions are in a unique position between the European Commission, which sets requirements and provides incentives for fulfilling them; human rights monitoring and review bodies, such as ECRI or CERD; and NGOs. From the point of view of social movements, OSCE bodies are a sort of '*quasi-activists*:' they are engaged in the work on the ground, but have intergovernmental credentials and recognized expertise, which gives them legitimacy and leverage. As *quasi-activists*, OSCE bodies form part of a transnational advocacy network (Keck and Sikkink 1999), bound together by a shared commitment to tackle hate crime. From the point of view of Europeanization theories, the OSCE, through sharing expertise and offering solutions to the issue of bias-motivated violence, helped activists in the accession countries to conceptualize their claims and governments to select legislative options. The enlargement process, in turn, gave visibility to the LGBT claims, and the external pressures resulted in passing the laws.¹⁰⁴ While the NGO work on the ground is important, the example of current EU countries, some of which are lagging behind candidate states in terms of legislative frameworks, shows that the EU pressure, particularly in the context of a broader reform, was crucial for the passage of the law. While OSCE interventions in accession countries contribute to changes in the legal framework, in existing EU member states, such as Italy (or Poland, see Chapter 10), they result in slow, but steady, changes in the behaviour of state agents. From the point of view of Europeanization theory, this can be explained by the logic of appropriateness, which dominates after accession. I expand this argument in Chapter 10.

Previous research reached opposite conclusions about the influence ODIHR has had on European countries. Garland and Funnell (2016) argue that the OSCE's interventions do not seem to encourage countries to 'actively seek to address and combat hate'. On the other hand, Goodall (2013:215) speaks about the 'under-acknowledged influence' of the OSCE, resulting in the hate crime concept permeating the criminal law domain of some countries. My findings show that the OSCE has contributed to the internationalization of the hate crime model, but the political changes are contingent upon the stage of the EU integration that the country is on. In the democratizing countries in the accession process, the change is visible in easy, cost-effective fixes, such as passing laws. In already EU members, the change is more incremental, and leads to improvements in policing and monitoring hate crime.

¹⁰⁴ I would like to thank Dr Koen Sloopmaeckers for helping me develop this argument.

6.5 CONCLUSION

This chapter sought to understand the patterns of diffusion of the norm of protecting LGB people from violence across time and space in Europe, and consider the role of international organizations in this process. The analysis involved a quantitative study of laws, policies and recorded cases across 49 European countries. The interpretation of results is enriched by insights from qualitative research.

Rich, Western European countries with accepting societies, such as Norway or the Netherlands, were the first to protect LGB people from bias-motivated conduct using criminal law. The earliest type of legislation was the incitement to hatred provision. In subsequent years, another model – penalty enhancement, first developed in the US – followed, and eventually became the preferred model. This model is now championed internationally by the OSCE and the European Union.

Candidate countries are subjected to the new EU accession policy ('fundamentals first'), which emphasizes respect for LGBT rights. In practice, this means that the EU expects aspiring countries to pass hate crime laws. Failure to comply may impede the integration process and delay benefits stemming from EU membership. The external EU pressure, coupled with the OSCE's and NGOs' work on the ground, results in the instrumental passage of hate crime laws inclusive of sexual orientation. As a result, some of the countries with the highest levels of social anti-LGB attitudes in Europe have the most progressive anti-LGB hate crime laws. Nevertheless, while the legal norm is adopted, the values which it is supposed to express are not internalized, and limited efforts are put into enforcement. As a result, new laws are rarely used in action. This finding is in line with newer research on Europeanization, which refutes the early assumption in the literature that EU conditionality promotes good governance, and that 'new member countries are better Europeans than older ones' (Mungiu-Pippidi 2014:30).

Considering that countries such as Germany, Italy and Poland are EU members, this chapter finds that among the reasons why they do not recognize sexual orientation in hate crime laws is that there is no hard-law requirement to do so; and external conditioning, which encouraged accession countries to enact such laws, does not work in these jurisdictions. The chapter finds, however, that, while there are no changes to the law, these countries have improved policing and monitoring, which results in an increase of the number of recorded cases. This is explained by the socialization opportunities provided for EU members. For European socialization to work, there need to be people who socialize and people who are socialized. The former group may include NGOs and international human rights bodies, the latter consists of personnel working in the criminal justice system. Above, I suggest that both types of actors operate in Poland, but we do not know how they work. This will be analysed further in this dissertation.

Finally, I find that the OSCE has contributed to the internationalization of the hate crime model, but that the political changes are contingent upon the country's stage of integration into the EU.

In the democratizing countries in the accession process, the change is visible in easy, cost-effective fixes, such as passing laws. In already EU members, the change is more incremental, and leads to improvements in policing and monitoring hate crime. I consider this in greater detail in Chapter 10, where I analyse the changes in policing and monitoring in Poland.

ADVOCACY CAMPAIGN FOR ANTI-LGB HATE CRIME LAWS IN POLAND: DEFINING, FRAMING AND PRIORITIZING

In my view, the number one priority for the global LGBT movement is defining concepts and strategies within a human rights frame, to persuade a majority of UN member states to recognize the issue as a legitimate human rights issue. To be able to do so, we must first put our own house in order; that is, define what it is that we want – and in which order.

Joke Swiebel, Dutch politician and women's and LGBT rights activist (2009:32)

7.1 INTRODUCTION

IN THE previous chapter, I argue that, as an EU member, Poland is not subject to external EU conditionality, which I see as the main reason why countries such as Bosnia and Herzegovina or Georgia passed sexual orientation hate crime laws. While external pressure no longer works in Poland, the EU integration process in the beginning of 2000s gave the LGBT movement visibility and led to LGBT rights being placed on the political agenda (Chapter 5). Yet, as the theoretical literature in Chapter 3 shows, placing an issue on the political agenda does not guarantee the success of a social movement. To effectuate political change (e.g. passage of law followed by its effective enforcement), movements need to define objectives and come up with strategies to attain them. Effective framing and prioritization of issues are key elements of strategy, which can 'make or break' the campaign.

In Poland, while there is a growing body of literature on LGBT activism (e.g. Ayoub 2013; Binnie and Klesse 2012; Chetaille 2011; Gruszczyńska 2009; Holzhacker 2012; Szulc 2017), the issue of anti-hate advocacy has never been considered in its own right. As a result, when it comes to how hate crime is conceptualized, where countering hate crime is placed in terms of advocacy priorities, and who fights to make it visible (research questions RQ(1) and RQ(2)), we have more questions than answers. With this in mind, this chapter aims to understand: (1) what the conceptual complexities pertaining to hate crime and hate speech in Poland are; (2) what the place of combating hate crime as a policy focus is among other advocacy priorities of the LGBT

movement; and, finally, (3) how advocacy groups frame the problem of hate crime, and how effective the framing strategy is.

The chapter is divided into five sections. First, I analyse the emergence of particular claims (e.g., protection from discrimination and violence, recognition of same-sex unions, adoption) over time. I argue that the claim to recognize registered partnerships was formulated (and reached the political agenda) before the claim to protect LGB people from hate crime. Also, organizational structures to advocate for marriage equality are more developed than those to advocate for better anti-hate crime measures. Next, I look at how anti-LGB hate crime is presented as a policy problem. The analysis finds that the issue is presented as part of the LGBT rights package and framed in terms of human rights/equality and Europe/modern values. I argue that such package framing is sub-optimal, because the disagreement with one element (same-sex unions) may lead to rejection of the entire package. Finally, I consider the relationship between hate crime and hate speech. I argue that the latter is understood very broadly and has been prioritized in advocacy. This, in turn, inhibits the possibility of recognition of anti-LGB hate crime as a legitimate policy issue.

7.2 PRIORITIZATION

In many countries across the globe, the road to equality of LGBT people has involved a gradual passage from the most 'basic' to the most 'advanced' rights. Waaldijk (2000:62) argues that the 'standard sequence' is 'that of decriminalisation, followed by anti-discrimination provisions, and then again by partnership legislation'. Each step paves the way for the next. The issue of marriage equality and parenting rights are, arguably, the most socially contentious. Ayoub (2015:305) asserts that 'this general pattern still plays out' in new-adopter states. Indeed, for example in Croatia, same-sex sexual acts were legalized in 1977, anti-discrimination and hate speech provisions were passed in 2003; hate crime law enacted in 2006; and same-sex couples were offered most rights attached to marriage in 2014 (ILGA 2016). Commenting on the pace of the developments in Croatia and Slovenia (and partially also other Eastern European countries), Kuhar (2011:30) observes that LGBT movements 'experienced a 'condensed' version of the development in the West,' quickly moving from demands for anti-discrimination measures to demands for legal recognition of the rights of same-sex couples.

But while the standard sequence from more 'basic' to more 'advanced' rights applies to the *adoption* of laws, it does not necessarily play out when we consider when *demands* emerge and are placed on the political agenda. This is the case of Poland. In this country, the demand for legal recognition of same-sex unions was formulated before the demand for enhanced penalties for hate crime. I will argue that this has inhibited the development of an effective advocacy campaign aimed at enhancing the penalties for anti-LGB violence. I explain this argument in the

paragraphs below based on the comparison of selected key developments (legislative initiatives and organizational developments) in both areas.¹⁰⁵

7.2.1 LEGISLATIVE INITIATIVES

Initiatives to recognize registered partnerships¹⁰⁶

As mentioned in Chapter 5, the first legislative initiative to recognize registered partnerships in Poland (bill 548 (Senate 2003)) appeared in 2003. Six more legislative proposals regulating the status of registered partnerships were prepared during the sixth and the seventh terms of the parliament by the SLD party, the Ruch Palikota party (jointly and separately) and a group of MPs from the PO party. These are:

- bill 4418 (SLD 2011a)
- bill 552+553 (Ruch Palikota and SLD 2012c, 2012a)
- bill 554+555 (Ruch Palikota and SLD 2012d, 2012b)
- bill 825 (PO 2012a)
- bill 2381+2382 (SLD 2013b, 2013a)
- bill 2383+2384 (Ruch Palikota 2013b, 2013a).

All the above bills were either rejected by the Sejm or works on them discontinued due to the end of the term of the Parliament. In addition, in 2014 and 2015 opposition parties unsuccessfully attempted to put bills on registered partnerships on the Sejm's agenda again (Gazeta.pl 2015; md 2014b). The dates of submission of bills on registered partnerships and hate crime laws (next to the dates of organizational developments) are presented in the Figure 4 below.

Initiatives to introduce anti-LGB hate crime laws

Archival research conducted for this study (see Chapter 4 for details) shows that the idea to amend the Criminal Code by recognizing sexual orientation as a ground for hate crime and hate speech was first expressed in a letter to the Ministry of Justice in 2005 (KPH 2005). In the letter, the KPH asked whether sexual orientation could be added to Articles 256 and 257 of the Criminal Code (see Appendix A). The reply of the MoJ (MS 2005) was that he did not see the change as necessary (see Chapter 9 for the justification).

¹⁰⁵ The main analysis included more aspects (e.g. strategic litigation; information politics and public campaigns). While developments in all these areas are worth recalling, it was decided that the first two aspects will be presented. There are two reasons for it. First, comparing all the above would be impossible in this PhD due to limited space. Second, while enhanced and more nuanced, the overall results of the analysis would remain the same.

¹⁰⁶ I would like to thank Sławek Wodzyński for providing me with the numbers of the bills on same-sex unions.

Six years passed before the first legislative initiative to stipulate for enhanced penalties for anti-LGB hate speech and hate crime was submitted in the parliament. Between 2009 and 2011, a group of LGBT organizations worked on a bill proposing to expand the catalogues of protected grounds in the provisions on hate speech and hate crime (Articles 119, 256 and 257 – see Appendix A) by adding sexual orientation, gender identity, age, gender, and disability to the already protected race, national and ethnic origins and religion (see Godzisz and Pudzianowska (2016) for more information about the works on the legislative initiative). The bill was officially announced in 2011 (KPH 2011) and subsequently presented in the Sejm as draft amendment 4253 (SLD 2011b), sponsored by the SLD party, which was then in opposition. The works on the draft amendment were discontinued due to the end of the Parliament’s term.

In the seventh term of the Parliament (2011-2015), four bills aimed at amending hate speech and hate crime laws were submitted in the Sejm. The SLD and the Ruch Palikota party submitted simultaneously two almost identical amendments (Ruch Palikota 2012; SLD 2012), based on the draft amendment 4253 (SLD 2011b) from the previous term of the parliament. The SLD’s draft amendment was later withdrawn for procedural reasons and resubmitted as draft amendment 2357 (SLD 2014). In addition to the initiatives by opposition parties, a third draft amendment (no 1078) was submitted by a group of MPs from the ruling party, the PO (PO 2012b).

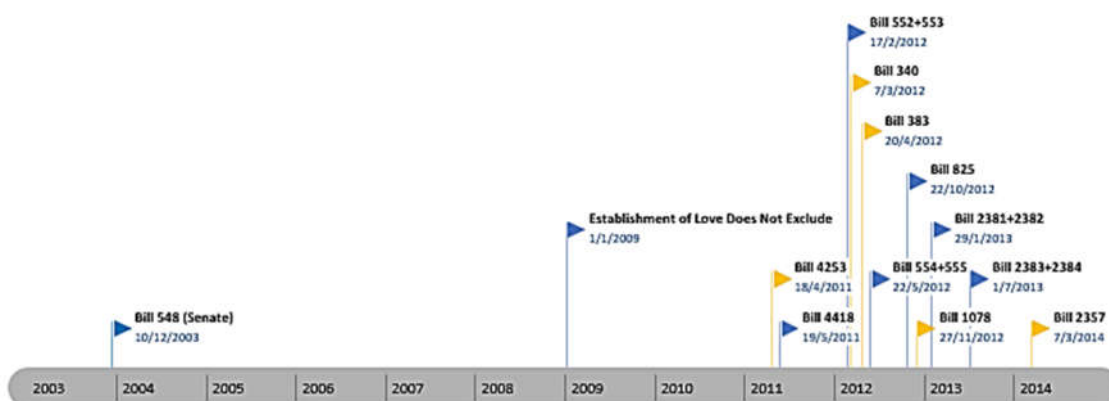


Figure 4 Timeline (issues history). Selected advocacy initiatives around same-sex unions (blue) and hate crime (yellow). Source: Author’s own analysis using the Office timeline free software.

As one can see from the issues history (Figure 4 above), the first legislative initiative to recognize same-sex couples’ rights preceded the first legislative initiative to enhance penalties for anti-LGB hate crimes by eight years. Between 2011 and 2014, however, legislative initiatives on both issues were simultaneously present in the Sejm.

7.2.2 ORGANIZATIONAL DEVELOPMENTS

Same-sex unions

As mentioned in Chapter 5, the first LGBT organization in Poland which focused on advocacy (rather than support, such as Lambda Warsaw) was Campaign Against Homophobia, established in 2001. The KPH campaigns at the same time in all areas of LGBT rights, including family law (rights of same-sex couples), criminal law (hate speech and hate crime), discrimination, health and education. For example, the strategy of the KPH for 2014-2017 includes 'Sejm reading of the bill institutionalizing unions of people of same sex' as well as 'Sejm reading of a draft amendment of the Criminal Code' that would make sexual orientation and gender identity protected categories under hate speech and hate crime laws (KPH 2014).

While the KPH works across LGBT rights, there is a clear specialization in parts of the movement. Considering the area of family law, apart from the KPH, the group Love Does Not Exclude (*Miłość Nie Wyklucza* - MNW), a specialist organization advocating for the rights of same-sex couples, was set up in 2009.¹⁰⁷ For the first few years, the organization demanded the passage of a law on registered partnerships. This claim was expanded in 2013, when the group decided to advocate for marriage equality including adoption rights (md 2013). The change in demands resulted in the diversification within the movement, as the KPH continues to advocate for registered partnerships, the postulate which is arguably more attainable. The two organizations, however, cooperate in the framework of a goal-oriented coalition (set up in 2015) aimed at facilitating recognition of the rights of same-sex couples in Poland through strategic litigation.¹⁰⁸ On top of that, the MNW prepared an action plan detailing the steps necessary to achieve marriage equality by 2025 (MNW 2016). The action plan includes, *inter alia*, the empowerment of members of the LGBT community and political lobbying.

Hate crime

Unlike in the area of same-sex couples' rights, where a dedicated organization exists, in the area of anti-LGB hate crime no specialized organization that would advocate for the passage and enforcement of anti-LGB hate crime laws (or that would focus on other areas of hate crime work, such as monitoring or victim support) has been set up. The bulk of advocacy work (e.g. lobbying, legislative initiatives and strategic litigation) is initiated and conducted by the KPH, while Lambda Warsaw is the largest provider of support services, such as legal and psychological counselling.

While there is a goal-oriented Coalition for Registered Partnerships and Marriage Equality, there is no such inter-organizational structure in the area of hate crime. The Coalition Against Bias-Motivated Crimes was founded in 2012 as a group of organizations dealing with violence based on sexual orientation, gender identity, gender, race, ethnic and national origins and religion (Pawłęga and Godzisz 2016). According to one of its leaders, the Coalition was born from the need to have a forum dealing with hate crimes specifically (as opposed to considering hate

¹⁰⁷ See the website of Love Does Not Exclude at <https://mnw.org.pl> (retrieved 5 May 2017).

¹⁰⁸ See the website of the Coalition for Registered Partnerships and Marriage Equality at <https://dostrasburga.pl/> (retrieved 5 August 2017).

speech and hate crime jointly; see below).¹⁰⁹ The Coalition's activities include court monitoring, capacity-building and advocacy. While the Coalition brings together some of the leading anti-discrimination NGOs (e.g. the KPH, Lambda Warsaw and the SIP), the theoretical potential to become a leader of the anti-hate crime movement has not been realized. There are at least two reasons for it. First, the advocacy activities conducted by the Coalition have been limited, due to its participatory character, and long-decision making processes.¹¹⁰ Second, the Coalition's activities were only funded for a two-year period, until April 2016. Lack of core funding inhibits sustainable development. One LGBT activist criticized this aspect of the Coalition's set-up, arguing that the visibility of the Coalition's activities was 'negligible', and that the Coalition was likely to dissolve after funding ended.¹¹¹ Indeed, after the end of the funding period, the activities of the Coalition stalled.¹¹²

Unlike in the case of marriage equality, a written action plan on how to achieve penalty enhancements for anti-LGB hate crimes has not been prepared. In addition to the lack of a specialized organization or coalition, the lack of a written action plan seems to slow down the campaign for penalty enhancements for anti-LGB hate crimes. Considering this, one LGBT activist, involved in the work of the Coalition against Bias-Motivated Crimes, voiced the need for a goal-oriented task-force that would be focused on hate crime advocacy.¹¹³

In summary, similarly to legislative initiatives, organizational developments also suggest that the issue of family rights was picked up earlier than the issue of hate crime. The social movement structures to advocate for the recognition of rights of same-sex couples are better developed than those to advocate for enhancing protection from anti-LGB hate crimes. Prioritizing recognition of civil unions over anti-hate crime measures seems to have impacted the public awareness of advocacy goals in both areas. As one activist involved in both areas of advocacy admits in an interview for this research, 'the basic difference is that, for civil unions, there is a decidedly higher understanding of the phenomenon and the need' than for hate crime laws.¹¹⁴ In comparison, it seems that the understanding of what hate crime is continues to be very low among both politicians and the society. As the same activist argues:

I have the impression that there is virtually no understanding, I mean that people, the public, do not understand what the difference is between a so-called common and bias-motivated crime. But, of course, also at the level of legislature, the government, this understanding is lacking. This is visible in Sejm committees, in talks with MPs, that they

¹⁰⁹ Interview-09-anti-racism-activist1-2015-08-26.

¹¹⁰ Interview-09-anti-racism-activist1-2015-08-26.

¹¹¹ Interview-03-LGBT-rights-activist1-2015-08-11.

¹¹² I was involved in the work of the Coalition between 2015 and 2017.

¹¹³ Interview-05-LGBT-rights-activist2-2015-08-19.

¹¹⁴ Interview-03-LGBT-rights-activist1-2015-08-11.

have absolutely no idea why this is important and what this solution is for at all.¹¹⁵

In addition, a lack of some sort of a coordinating body on hate crime resulted in the fact that the bulk of hate crime advocacy work, particularly the change of law, was on the shoulders of LGBT groups. The legislative initiative to amend the law and the text of the explanatory memorandum was prepared by experts from LGBT organizations. While mainstream human rights organizations (such as the Helsinki Foundation for Human Rights and Amnesty International), as well as anti-discrimination (Polish Society for Anti-Discrimination Law and the Association 'Open Republic') and anti-racism organizations (SIP) soon joined LGBT groups in lobbying for the adoption of the new law, groups working with people with disabilities or elderly people did not actively support the draft amendments in which disability and age were specifically mentioned. For example, they did not participate in the sessions of the subcommittee where the draft amendments were discussed, or in press conferences. Also, the shadow report on the implementation of the *International Convention on the Rights of Persons with Disabilities* (Zadrozny 2015) does not speak about the need to introduce changes in the criminal law that would provide for a better protection of people with disabilities.¹¹⁶

The perceived absence of disability rights and elderly rights groups from the coalition behind the draft amendments was pointed out during parliamentary proceedings by several right-wing MPs. For example, Stanisław Pięta MP, who presented the stance of the PiS party on all the draft amendments in 2011, 2012 and 2014, said that the authors of the draft amendments 'use disabled and elderly people instrumentally' (in Sejm 2012:223).¹¹⁷

7.3 FRAMING ANTI-LGB HATRED

As shown in Chapter 6, in the EU, equality is a core value, enshrined in the *Charter of Fundamental Rights* (European Union 2012), and the protection of LGBT rights is treated as a human rights issue (Swiebel 2009). For accession countries (and CEE states which joined in 2004 and 2007), the approach to LGBT equality is sometimes seen as a test for Europeanness, as the EU requires that member states protect LGBTs at least from discrimination in employment.

In Poland, the LGBT movement, the mobilization of which was linked to EU accession (Chapter 5), also uses the human rights/equality frame for LGBT rights. The human rights framing is connected with the EU/Western democracy frame. This frame is selected because most people in Poland (71 per cent) say that 'it is in their country's interest to work closely with the U.S. and

¹¹⁵ Interview-03-LGBT-rights-activist1-2015-08-11.

¹¹⁶ As an isolated incident, the Polish Association of Disabled People sent a letter to the MoJ in 2012 (PSO 2012), requesting that disability be added as protected ground in provisions on incitement to hatred and insults. The letter did not refer to the existing draft amendments, suggesting that there is a disconnect and miscoordination in advocacy efforts. The response of the MoJ (MS 2012) was negative, in line with the responses to the Bills, as discussed below.

¹¹⁷ Note also the speech by Bartosz Kownacki MP quoted in chapter 5.

other Western powers' (Pew Research Center 2017). Along these lines, Ayoub (2013:299) asserts that 'Poland's 'return to Europe' is often associated with security and independence from communist oppression,' and 'Poland's membership in the EU makes the issue [of LGBT rights] less foreign'. In the context of Pride parades, Graff (2010) argues that

LGBT activists and left-wing commentators would invariably respond in the discourse of universal human rights and Europeanization, pointing out that freedom of assembly is a right most needed by minorities and that Poland ought not to lag behind the EU in matters concerning equality (P. 584).

While several analyses of frames used by the Polish LGBT movement exist (e.g. Graff 2010), scholars have never considered whether frames used for specific claims vary, and how framing affects the effectiveness of advocacy in particular policy areas. As a result, there are no analyses of frames used specifically in hate crime advocacy. To understand how hate crime is presented by the LGBT movement as a policy problem, i.e. understand the diagnosis (current state), prognosis (desired change) and proposed solutions, the following paragraphs analyse the text of the explanatory memorandum attached to draft amendment 340 (Ruch Palikota 2012).

The explanatory memorandum (Ruch Palikota 2012) starts by presenting the grim reality (diagnostic frame) of Poland, where

... the prevailing culture does not provide for openness to diversity, treats acceptance and tolerance as superfluous, encourages and leads to social divisions, evaluative assessments, distrust, dislike, stigmatization and social exclusion (P. 4).

The divisions, distrust, stigmatization and exclusion which exist in Polish society cause 'discrimination, criminality motivated by hatred, prejudice' (Ruch Palikota 2012:4). The current state is contrasted with the desired one. This prognostic frame is built as an opposition to what Poland is today. The explanatory memorandum reads:

There is no doubt that *modern* society draws its strength, richness and flexibility from *tolerance* in matters of worldview (like religion) and the acceptance of *social diversity*, including gender, age, sexual orientation, gender identity, disability and racial, ethnic and national belonging (P. 3-4, emphasis added).

Modern societies are those in the west of Europe, to which Poland aspires. Ryszard Kalisz MP, presenting the draft amendment 383 in the Sejm (Sejm 2012), argued:

. . . I will say it now not so much from my own point of view, as from the point of view of my friends, who also deal with politics and function in left-wing societies in Europe, in France, in Germany, even in Spain, not to mention the Scandinavian countries. When they come here and see what is happening here, they are unable to understand it. Poland is considered the most conservative country in the European Union (...) (Wiesław Suchowiejko MP: You have complexes, Mr. Kalisz.) I have none. (Amusement in the hall) I want to change it. Mr. Suchowiejko, I want to make Poland an open country. (Applause) (P. 232-233).

As part of the diagnostic frame, the explanatory memo includes evidence of high levels of prejudice and victimization based on polls, survey findings, as well as police statistics. To move from the current to desired state (become an 'open country'), Poland needs to address inequalities based on gender, age, sexual orientation, gender identity, disability and racial, ethnic and national belonging. According to the authors, part of the move to address inequalities is the proposed draft amendment, which would allow for broader penalization of hate-based offences. It is argued that these would have educational, preventive and repressive functions, and would send a message that victimization of members of minority groups is not tolerated by the state. At the same time, the law would be a sign that Poland upholds its human rights commitments.

International human rights scripts play a significant role in the explanatory memorandum. In the absence of hard international law instruments requiring penalty top-ups for violence based on sexual orientation, gender identity, gender, age and disability, the memorandum references non-binding documents, such as the CoE *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* (2010). The text refers also to the concluding observations of UN human rights bodies, which recommend that Poland add new protected grounds in hate speech and hate crime legislation (see Chapter 8). The case *Vejdeland and Others v Sweden* (ECtHR 2012b), in which the ECtHR held that Sweden was entitled to treat anti-gay speech in the same way it treated racist speech, is referenced as a warning that not addressing homophobic hate speech may constitute a violation of the ECHR. Finally, there is a comparative analysis showing how countries to which Poland aspires (Western democracies) approach hate crime in law and policy.

Summing up, hate-motivated criminal conduct is presented as a product of a culture of intolerance. Hate crime is seen (and framed) in Poland as a human rights/equality and EU/democracy issue, in the same way as other LGBT rights. In this sense, anti-LGB provisions help to move towards greater openness of the society, which also means equality of LGB people. This means that frames used for advocating for anti-LGB hate crime laws in Poland are the same as general frames used to press for LGBT rights. The next section reflects on the political consequences of such framing.

7.4 SLIPPERY SLOPE

Having argued above that advocacy around hate crime and other LGBT rights (particularly rights of same-sex couples) coincide and use the same frames, and that the demand for the rights of same-sex couples seems to be better known (or understood) than the need for penalty-top ups for hate crimes, I now consider how this affects the passage of anti-LGB hate crime laws. I will argue that simultaneous advocacy based on the use of similar frames negatively affects the chances of passing legislation against anti-LGB hate crimes, because it allows critics to use the 'slippery slope' argument. Furthermore, I argue that, while framing anti-LGB hate crime as a human rights issue has some benefits (such as bringing in the international human rights machinery in support of domestic advocacy tools (see Chapter 8)), it is also the cause of nationalist critiques of Western cultural imperialism.

Documentary evidence collected in this research show that public debates on hate crime laws are rarely about hate crime as a policy problem that needs to be tackled. Rather, conservative politicians frame draft amendments adding sexual orientation as a protected ground in hate speech and hate crime laws as a way of legitimizing homosexuality. For example, Stanisław Pięta MP opposes the recognition of sexual orientation as a protected status because he does not believe in diverse sexualities. In the debate on the draft amendment 340 (Ruch Palikota 2012) he accused the draft amendment's sponsors of wanting to 'distort reality' by 'claiming stupidities about the existence of sexual orientation' (Sejm 2012:212).¹¹⁸ According to Mr Pięta, only 'a union between a man and a woman, a family, creates some good, children, allows for the survival of the human species,' while 'other relationships generate diseases, pathology, criminality' (in Sejm 2012:226).¹¹⁹ While authors of the draft amendments framed diversity and non-discrimination as a European standard of democracy, the PiS party politician (in Sejm 2011) argued back:

EU standards, including, *inter alia*, abortion, homo-marriages, adoption of children by homosexuals and euthanasia cannot oblige us to do anything. They only reflect the deepening social and civilizational degradation, auto-destruction of societies of some countries of the European Union (P. 79).

Mr Pięta's intervention on the 24th of May 2012 is the most salient example as to how the frames such as homosexuality as a deviancy/threat and Poland as an island of normality are often conflated. Commenting on the draft amendment 340, Mr Pięta (in Sejm 2012) argued:

Nature isn't perfect. Certain anomalies and 'freaks' exist within it. In a normal, healthy human the sex drive is directed at people of the opposite sex. When someone suffers from sexual disorders, people of

¹¹⁸ Consider also Mr Pięta's quote in Chapter 9.

¹¹⁹ Consider also the quotes by president Lech Kaczyński and Krystyna Pawłowicz MP cited in Chapter 5.

the same sex, minors, animals or things become the object of their sex desire. And even if the whole of the European Union ... *Gazeta Wyborcza*, President Obama and you, MP ... were to proclaim idiocies about the existence of sexual orientation, you will not falsify ... you won't falsify reality. Freedom of speech does not mean that this matter is to be trifled with. (...) I'd like to announce that this gay fascism that you are proposing ... it will never fly! (P. 213).

Politicians across the globe may be unsympathetic to legislative initiatives aimed at helping LGBT people, fearing the laws might 'legitimize' homosexuality (Chapter 2). For this reason, part of the critique uses categories such as 'normality', 'family,' and 'morals.' According to Haider-Markel and Meier (1996), morality politics predicts that LGBT rights debates 'reflect the influence of religious groups, party competition, and partisanship'. Morality politics in LGBT rights has been observed in Poland by Holzacker (2012), before the first draft amendment on hate crime was submitted in the parliament. As the above quotes show, arguments delegitimizing homosexuality are also present in hate crime law debates. Commenting on such arguments, a member of ECRI interviewed in this research observes:

The fear of regulating this [anti-LGB hate crime] here comes from the fact that you'd need to recognize reality. And recognizing reality is very difficult for many people who fear that recognizing reality will lead to what is called a slippery [slope] effect (...). If we don't name something it's not there, and we don't deal with it, and if we don't deal with it, it doesn't exist even more. And such 'ostrich politics' is possible.¹²⁰

The term 'ostrich politics' refers to the common misbelief that the African ostrich puts its head in the sand, thinking it can escape from danger this way. The interviewee refers to the fact that hate crime laws inclusive of sexual orientation would lead to reframing homosexuality from something deviant to something protected; from the category of sin to the category of citizenship. I will come back to citizenship in Chapter 9.

The ECRI member quoted above speaks about the fear of a *slippery slope* effect. A 'slippery slope argument' asserts that an initial, seemingly acceptable step or decision will cause a chain of further events leading to a dangerous outcome that is unacceptable (Rizzo and Whitman (2003) in Walton 2015:275). Such arguments are believed to be fallacious as they go far in the future, have complex, hard-to-grasp structures, use emotional terms and make emotional appeals (Bashford and Levine (2010) in Walton 2015:275).

In the case of hate crime law, politicians express the fear that recognition of homophobia in the law would curb Christian critique and promote homosexuality. This, in turn, would lead to

¹²⁰ Interview-18-ECRI-2015-11-20.

recognizing more LGBT rights, including the legalization of civil unions and adoption of children. Such step, in turn, would harm the family and lead to the annihilation of the nation and the society.

While the observation that putting together same sex couples' rights and hate crime legislation may negatively affect the latter was one of the first I made during the data collection period, I did not find evidence of any discussion or deliberative process on this topic. When asked in interviews, however, some activists agreed that the criticism against the change in the criminal code is often, in fact, the criticism against hate speech laws (see below) or other LGBT rights, particularly registered partnerships.¹²¹ For example, one trans rights activist said in an interview:

All those topics boil down to one – to same-sex unions, to say it simply. So, this is the problem. All of this is totally... the context is blurred and in some way warped (...) the topic of same-sex unions is very charged, and everything is hijacked by this topic (...). Even during the debate on gender recognition part of MPs said that the reassignment will be done by homosexual people to be able to get married.¹²²

The above quote confirms my observation that the topic of violence (or gender recognition) is 'hijacked' by the more charged and easier to discuss topics, such as rights of same-sex couples or public visibility of LGBT people. Because the progression of rights from more basic to more advanced was visible in other states, it is difficult for activists in norm-adopting countries to argue that the two issues are not connected and that there is not a 'slippery slope'. From the point of view of frame theories, framing protection from violence as part of the LGBT rights package and a step in the 'process of legally recognising same-sex love' (Waalwijk 2000:86) enables the slippery slope argumentation. This, in turn, negatively impacts the chances of passing anti-LGB hate crime laws. For this reason, it seems that another, discrete, framing is needed to separate hate crime from other LGBT issues.

7.5 HATE SPEECH AND HATE CRIME: CONCEPTUAL CONFUSION

In Chapter 2, I observe that finding a universal definition of hate crime has been difficult. Among the most pertinent questions that are still not decided is, for example, the relationship between hate speech and hate crime. There have also been discussions on how to decide which speech acts should amount to banned hate speech (Pejchal and Brayson 2016).

In Poland, too, the definitions of hate speech and hate crime, and the relationship between them, remain an open question. Lack of precise definitions leads to conceptual confusion and

¹²¹ Interview-05-LGBT-rights-activist2-2015-08-19, Interview-06-trans-rights-activist1-2015-08-19.

¹²² Interview-06-trans-rights-activist1-2015-08-19.

controversies, which, I will argue, have an adverse effect on the effectiveness of anti-LGB hate crime advocacy.

In 2009, the KPH published a report on homophobic hate speech in Poland (Czarnecki 2009). In the introduction, Biedroń (2009:7–8) attempts to disambiguate the terms hate speech [*mowa nienawiści*] and hate crime [*przestępstwo z nienawiści*], but does not specify whether the former is a type of the latter. Qualitative information gathered in this research suggests, however, that the majority view (among both activists and policy makers) is that hate speech is a type of hate crime. An LGBT activist who was at the forefront of the movement at the beginning of hate crime advocacy expresses a view to this end in an email interview, saying:

We were focused on hate crimes, part of which is hate speech, but planning our activities we didn't separate them and spoke all the time about other forms of violence.¹²³

Similarly, hate speech is understood as a form of hate crime in the explanatory memorandum to the draft amendment 340 (Ruch Palikota 2012):

The proposed amendments (...) aim primarily at providing people belonging to social groups that can be distinguished using the criterion of gender, gender identity, disability, age and sexual orientation with criminal law protection from so called *hate crimes* [English term used], bias-motivated crimes – primarily from manifestations of so-called hate speech, but also physical violence (P. 7-8; italics in the original).

The view that hate speech is a type of hate crime is shared by the Ministry of Interior and the Police, who have been using a working definition of hate crime inclusive of hate speech since 2011.¹²⁴ While the institutions assert that they use the OSCE definition of hate crime, in their understanding, the words 'any criminal offence' from the OSCE definition mean that bias-motivated speech offences which are criminalized in Poland are also included under the term hate crime, despite the fact that the OSCE clearly emphasizes that their concept excludes them (ODIHR 2009b). Also Woiński, a criminal law scholar, leans towards this bastardized version of ODIHR's definition of hate crime. Seeing hate speech as a type of hate crime, he describes it as a 'hate speech crime', a term – as Woiński (2011:1) himself observes – does not exist in English-language literature.

While the majority view is that hate speech is a form of hate crime, there are noteworthy exceptions. In particular, the Coalition against Bias-Motivated Crimes [*przestępstwa motywowane uprzedzeniami*] decided to use the latter term instead of the term hate crime [*przestępstwa z*

¹²³ Email-LGBT-rights-activist3-2016-10-12. Similar view is expressed by another activist, Email-LGBT-rights-activist4-2016-10-14.

¹²⁴ Interview-08-Mol-group-2015-08-20; see Chapter 10.

nienawiści] to differentiate the Coalition from other initiatives, particularly those on hate speech, as 'a mass of organizations is dealing with it'.¹²⁵

Just as there is no agreed definition of hate crime, nor is there a common definition of hate speech in Poland. What can be observed, however, is that, if definitions exist, they tend to be broad and not limited to illegal hate speech. For example, a definition contained in the report commissioned by the Sejm's expertise and analysis office defines hate speech as 'oral and written expressions and iconic presentation reviling, accusing, deriding and degrading groups and individuals because of reasons partially independent of them' (Łodziński 2003:5 fn. 24). The explanatory memorandum of the draft amendment 340 (Ruch Palikota 2012) defines hate speech as

. . . all manifestations of the use of language to insult, humiliate or slander a person or group of persons distinguished using the selected attributes or criteria, as well as calls to maintain hatred against such person or persons (P. 8).

Further in the text the draft amendment states that 'hate speech is based on and refers to group stereotypes,' such as 'bisexual people - regardless of gender - being emotionally disordered and requiring therapy, which will help them become heterosexual men and women' (P. 9). While the text does not assert that such statements should be criminalized, their inclusion in the text may suggest so. Even if not, their use in the definition may be read as understanding hate speech broadly.

In addition to the term hate speech, in the early 2010s, several new terms including the noun '*hejt*', and its operator form '*hejter*' and the verb form '*hejtować*', deriving from the English word 'hate', were recognized as officially existing and included in the dictionary of the Polish language. In its noun form, '*hejt*' is officially understood as an 'offensive or aggressive comment posted on the Internet' (PWN n.d.), which is synonymous to the colloquial term '*bluzg*,' defined by the dictionary as 'curse, insult' (PWN n.d.). But the popular definition, used also by activists, is broader than the dictionary one, and not limited to the internet. Projekt: Polska (n.d.), an NGO which runs the programme Hejtstop, an initiative to counter 'hejt' (see below), writes on the initiative's page, in one section:

We need you to counteract hate speech. Incitement to hatred on the Internet is a crime, same as in real [life]. You provide a link, and we report it to law enforcement authorities. Together we will block the disgusting hejt [emphasis removed]!

In another section, the organization writes (n.d.):

¹²⁵ Interview-09-anti-racism-activist1-2015-08-26.

We have a problem with hatred – there is so much of it that sometimes we don't notice it. Polish cities are full of hateful scribbles, racist doodles and stars of David on the gallows. Simply *hejts*. And even if we see them, we don't respond. Because how?

As it can be seen, *hejt*, in the understanding of those who fight it, does not need to be confined to the Internet. Racist or antisemitic graffiti, or other kinds of vandalism, which would also amount to hate crime under the OSCE definition, can be considered as forms of *hejt*. What is important is to note that to '*hejtować*' does not mean the same as '*nienawidzić*' (to hate). Bralczyk (2014), a linguist, observes that it is easier to "*hejtować*' than to '*nienawidzić*.' This is because, as Bralczyk argues

. . . hatred [*nienawiść*] is a serious and despicable feeling, worthy of condemnation. '*Hejtowanie*' [the act of *hejting*] has in its name something of fun. Acoustically, this word may be associated with a wistful cry or greeting.

The Polish use of the term seems to be somewhere between hate speech online (which is serious), hate mail, and the jolly expression 'haters gonna hate' (Polish: '*hejterzy będą hejtować*') used on message boards and in comment sections to predict negative comments coming in under a specific post. One can argue that '*hejtować*' is closer to 'express dislike' or 'disapprove' than 'hate'.

Unlike hate speech, '*hejt*' does not need to be based on belonging to a specific category of people defined by, for example, religion, disability or sexual orientation. It can refer to musicians, sports people, public officials, or in fact any social media users. It does not need to meet a criminal threshold (or even breach social media platforms' community standards) to be considered as such, but can as well include incitement to hatred or advocacy of violence; death threats; or identity theft.

Case law where the issue of incitement to hatred was considered is limited, thus the understanding of what constitutes incitement to hatred under case law is still unclear. Available evidence suggests however that judges are less inclined to label expressions as hate speech than activists. Kudyba (2015:6) observes that 'the Supreme Court is still developing the understanding of the expression "incitement to hatred", as two cases that were decided rendered two different outcomes as to what amounts to incitement. In the more recent case, the Supreme Court (Sąd Najwyższy 2011b) decided that

[i]ncitement to hatred' means attempting to incite in third parties the strongest negative emotions (similar to 'hostility') to a particular nationality, ethnic group or race. It is not in any way about inducing feelings of disapproval, dislike, prejudice, dislike (in Kudyba 2015:5).

This understanding has been an object of critique by anti-hate speech advocates, as it is considered to be unjustifiably narrow and inadequate.¹²⁶ Also Kudyba (2015:6) argues in favour of a broader understanding of incitement to hatred, which, in her opinion, is closer to the *ratio legis* of the Article 256§1 and the understanding set out in international human rights frameworks. Conversely, however, ODIHR (2015:17–20) and Amnesty International (2015b:15–16) believe that Article 256§1 is broader than it should be, and criminalizes more than ‘incitement to discrimination, hostility or violence,’ prohibited in the ICCPR (UN General Assembly 1966). I come back to this issue in Chapter 9.

As one can see from the above discussion, the boundary between hate-motivated violence, incitement to hatred and expressions of disagreement is blurred. The same word – *hejt* – is increasingly used to describe crimes as serious as death threats or property damage as well as light criticism or jokes. This leads to trivialization of the public debate, which is focused not on the additional harms inflicted by hate crimes and resulting need to provide penalty enhancements, but on whether particular expression is permissible or not. I consider this issue in the next section.

7.6 ADVOCATING AGAINST HATE: SPEECH OR VIOLENCE?

Qualitative evidence collected in this research (particularly documentary evidence of legislative initiatives and policy debates, court cases, awareness raising efforts and media coverage, academic studies) suggests that hate speech is significantly more salient than hate crime. There are several reasons for it, including: historical/cultural factors; the fact that hate speech cases were easier to find and litigate; the ‘charged’ character of hate speech due to potential for conflict with freedom of expression.

The first – and until the moment of writing – the last outdoor campaign aimed at tackling specifically the issue of homophobic hatred (as opposed to improving image of LGB people) was the campaign ‘Homophobia – this is what it looks like’, conducted by KPH in 2007 (Szypuła 2007). The campaign featured billboards with pictures of either a man or a woman and quotes ‘Faggot/Dyke! I hear it every day. Hatred hurts.’ The message was limited to speech acts, rather than violence (see Figure 5 below).

¹²⁶ View expressed by Paula Sawicka from the Open Republic association during a radio interview (Małecki 2016).



Figure 5 LGBT rights activist Greg Czarnecki, posing with a poster from the 2007 public campaign ‘Homophobia – this is what it looks like,’ organized by the KPH, in which he is depicted with words ‘Faggot! I hear it every day. Hatred hurts.’ Source: Greg Czarnecki’s private archive, with permission (2016).

While some initiatives aimed at raising awareness of anti-LGB discrimination (sometimes including hate crime and hate speech, but not focusing on them) were conducted between 2007 and 2012,¹²⁷ a significant boost was given to the movement between 2013 and 2016 thanks to the new source of funding - the EEA/Norway grants. One of the fund’s priorities was countering discrimination. Many initiatives in this area focused on hate speech and hate symbols – such as graffiti – in the public sphere, and were inclusive of sexual orientation-based hatred.¹²⁸ This is for example the case of Hejtstop, mentioned above, and activities of the Open Republic association. Both received a lot of attention in the media due to the refugee crisis in Europe (see the end of previous chapter on the rise of Islamophobia in Poland). They reported many of the offensive comments online to prosecution services, sparking controversies about the freedom of expression. As a result of the involvement in this work, Hejtstop project manager, Joanna Grabarczyk, became herself a victim of a wave of *hejt* (or, in other words, a social media smear campaign targeting a human rights defender) in early 2016 (Suchecka 2016). Even the Batory Foundation – the operator of the EEA/Norway grants and funder of some of the most important anti-hate initiatives in Poland to date – seems to be more concerned about hate speech than hate

¹²⁷ For example, two local public campaigns in Toruń (SPR 2011a, 2011b).

¹²⁸ See the list of projects funded in the three rounds of the programme on http://www.batory.org.pl/programy_dotacyjne/obywatele_dla_demokracji (retrieved 26 October 2017).

crime, as it operates a website dedicated to ‘the problem of hate speech and related phenomena’.¹²⁹

Only one project funded from EEA/Norway grants focused on responding to bias-motivated violence specifically. The ‘Equal and safe’ initiative was run by the SIP and Lambda Warsaw, and aimed at providing legal counselling for victims of anti-LGBT (Lambda) and racist and xenophobic (SIP) violence. Furthermore, as part of the project, the Coalition against Bias-Motivated Crimes (see above) was developed, as the only civil society initiative focused on bias-motivated violence rather than speech.

The focus on hate speech is also visible in various recommendations to the government produced in Poland. The first KPH publication concerning criminal law protection from homophobia was the *Report on Homophobic Hate Speech in Poland* (Czarnecki 2009). In the first report sent to the UN Human Rights Committee, the KPH (in FKPR, KPH, and CPK 2009) wrote that it

... would like to draw the attention of the Committee to the phenomenon of homophobic hate speech used by high-profile politicians, public administration representatives as well as Catholic Church officials (P. 9).

Because ‘[h]ate speech towards LGBT communities still remains as an urgent problem not only in the political context but also in Polish society in general,’ KPH (in FKPR et al. 2009:9) wrote that it ‘would like to underline the great lack of provisions concerning hate speech and hate crimes based on homophobia’.

The focus on hate speech rather than violence is also visible some texts produced by equality bodies. In 2014 and 2015, the Government Plenipotentiary for Equal Treatment requested twice that the Ministry of Justice ‘undertakes legislative works resulting in penalization of ‘*hate speech*’ based on, *inter alia*, sex, disability, age, sexual orientation and gender identity’ (PRdRT 2015:88, emphasis added). It is also visible in researchers’ and polling agencies’ interests. The issue of social perception and acceptance of hate speech, including that based on homophobia, was picked up by public opinion agencies in 2007 (CBOS 2007), and subsequently by academic research in the field of psychology and social sciences (Bilewicz 2009; Bilewicz et al. 2014). Simultaneously, the legal aspect of criminalizing hate speech, and, by extension, hate crime, started to be considered by legal scholars (Wieruszewski et al. 2010; Woiński 2011, 2012, 2014).

As one can see from the above examples, hate crime seems to be mentioned as an extension of hate speech, but rarely it is considered in its own right.¹³⁰ While hate speech is usually seen as a form of hate crime, it is the form that attracts the most attention and is most often talked about. If

¹²⁹ See the website at <http://www.mowanienawisci.info/> (retrieved 25 October 2016).

¹³⁰ Analogically, many texts use the acronym ‘LGBT’ or, more recently ‘LGBTI’, despite having a sole focus on sexual orientation issues.

bias-motivated violence is mentioned in the public debate at all, it is, arguably, presented exactly as that: a 'related phenomenon', or an 'extreme' version of discrimination, hate speech, or *hejt*.

The definitional confusion and focus on speech rather than violence raises the question if there has been a deliberative process regarding the prioritization of advocacy activities in this area. Despite the evidence to the contrary presented above, three of the four activists involved in advocacy on this issue interviewed as part of this research disagreed with the view that campaigning focused on hate speech. One explained:

We were focused on hate crime, part of which is hate speech, but planning activities we did not separate it and spoke all the time about other forms of violence. The campaign 'Faggot it hurts' [sic] was justified at that time by the expansion of the language of hatred among politicians and in the media, but it was not a 'focus'.¹³¹

Another LGBT activist offered a more nuanced explanation:

The focus on HS [hate speech, acronym in original] has not always had a place, and if we addressed mostly or exclusively HS, it was not the result of an analysis and finding that HS is more of a problem, and other manifestations of HC [hate crime, acronym in original] are less burning (or something to this end), so HS is a priority, and other forms of HC are not etc. (...) There was also no (and there still is not) a decision to be interested only in HS, litigate only HS etc. Our activities were accompanied by the awareness that HS is an introduction for even worse HC, that one needs to react for two equally important and connected reasons: that homophobia as such requires reaction and because a lack of reaction to HS is an invitation for other HC (...). Regarding the draft amendments of the CC [Criminal Code]: I don't think that their content and explanatory memorandum focused on HS, and if you see something that allows such a conclusion, I assure you, that there was never a decision, or even a discussion about putting a stronger emphasis on HS.¹³²

Among other activists, the opinions are mixed. Some agree that hate speech is more prominent than hate crime.¹³³ One hate speech activist said in the interview that everyone focuses on what someone says in the social media, but 'no one speaks about the fact that people who were beaten up – I don't know, like, shoved, real harm was done to them – go to the police.'¹³⁴ A trans rights

¹³¹ Email-LGBT-rights-activist3-2016-10-12.

¹³² Email-LGBT-rights-activist4-2016-10-14.

¹³³ Interview-02-anti-hate-speech-activist1-2015-08-11, Interview-06-trans-rights-activist1-2015-08-19.

¹³⁴ Interview-02-anti-hate-speech-activist1-2015-08-11.

activist provides one suggestion why the focus of advocacy may be on hate speech. According to her, it may be

. . . because all hate crimes are already proscribed, perhaps not with regard to bias motivation, but they are somehow taken care of, and hate speech absolutely not, it [the criminal code] does not address the rights of the victim.¹³⁵

According to that activist, the reason for focusing on homophobic hate speech in advocacy may be that, unlike physical violence, it is not at all addressed in the Criminal Code and thus impossible to prosecute.

One LGBT activist interviewed argues that the reason why the visibility of hate speech activities is greater is that cases of hate speech, particularly by politicians, were easier to find (due to underreporting of hate crime), and, because hate speech is more contentious, more easily picked up by media.¹³⁶ Indeed, between 2005 and 2015 there was no big anti-LGB hate crime case that would become a triggering event, galvanizing the debate on the issue and bringing down the political costs of passing the law. A few cases were publicized (e.g. the assault on Robert Biedroń in 2014 (es 2014), but they were insufficient in changing the mind of the politicians – perhaps they were not brutal enough to cause outrage.

Instead, cases that were litigated and publicized revolved around hate speech. The first case was brought against local representatives of PiS in Poznań, who in 2004 compared homosexuality to zoophilia, paedophilia, and necrophilia (HFPC n.d.). The case ended with a settlement in which defendants agreed to publicly express regret that gay people could feel offended by their words. Other similar cases include the 2009 *Our Case 2* case (md 2012), the 2011 *Radom* case (md/spr 2011), and the 2013 *Katowice* case (md 2014a).

Between 2005 and 2015, there was one brutal murder case which could potentially have become a 'horror story,' eliciting negative emotions by 'playing on the common fear that 'this could happen to anyone'' (Jeness and Broad 1997:68) and becoming a catalyst for anti-hate crime advocacy. I provide details of the case and its handling based on the report by Amnesty International (2015b:33), press reports (red n.d.; Redakcja MM 2015) and interviews conducted in this research.

In the beginning of January 2014, 20-year-old gay man went to a gay club in Szczecin in north-western Poland. The morning after, his body was found on a nearby construction site. His face was covered with bruises, his trousers pulled down and his jacket and shirt pulled up. Three men were soon identified as suspects. During investigation, more elements pointing to a possible

¹³⁵ Interview-06-trans-rights-activist1-2015-08-19.

¹³⁶ Email-LGBT-rights-activist4-2016-10-14.

homophobic motive emerged during the judicial proceedings, apart from the location and the victim's identity. For example, following the murder, one of the suspects wrote a message to a friend referring to the victim as a 'faggot'. In court, one of the attackers defended himself by saying: 'He pissed me off because he was hitting on me' and alleging that the victim had offered the perpetrators oral sex, which made them angry. The court allowed for the KPH to join the case as accessory prosecutor (*oskarżyciel posiłkowy* in Polish), stating that 'at this stage we cannot rule out a homosexual context'. In February 2015, one of the suspects was sentenced to 15 years in prison for homicide and robbery, while another was sentenced to two years in prison for participating in a physical assault resulting in death, suspended for five years. When passing sentence, the court did not mention a possible homophobic motive. The two men lodged appeals, but the Appeals Court upheld the judgment on June 11, 2015.

The Szczecin case bears significant resemblance to the case of Matthew Shepard (for example, the 'gay panic' defence). Theoretically, as with Shepard's murder, the Szczecin murder could have become a turning point and a catalyst for anti-LGB hate crime advocacy. This has, however, not happened. The case was not broadly publicized, and, apart from a few vigils, there was no public outcry. When I asked one activist why the case was not publicized more broadly as a homophobic murder and used in advocacy, they replied that 'we always call the situation depending on the facts that we have access to'.¹³⁷ In the case of Szczecin, the organization 'said that the motives are visible', because the victim's sexual orientation was made public before. However, members of the family 'were a little opposed [to calling the case a homophobic hate crime],' which inhibited the publicity possibilities.

Another reason why hate speech is more prominent in public debates is that it requires less technical expertise to engage in a discussion and make a meaningful comment. One LGBT rights activist observed in the interview:

... this topic is such a topic, I'm speaking about hate speech, that is easy to speak about, because everyone can say something about it. Even if you know absolutely nothing about it, you can utter something about freedom of speech. It is a little bit different to discuss, you know, e.g. some complicated reform of public finance, where the lack of knowledge simply eliminates you from discussion.¹³⁸

The same activist points to the last reason why hate speech is socially charged. This is because it is related to the issue of freedom of expression. He observes:

The question of freedom of speech is a very smart strategy – the limits of the freedom of speech are fluid; a lot is left for interpretation, one can

¹³⁷ Interview-03-LGBT-rights-activist1-2015-08-11.

¹³⁸ Interview-05-LGBT-rights-activist2-2015-08-19.

always say that freedom of speech will be threatened, because, for example, you will not be able to criticize homosexuality, which infringes the rights of, I don't know, religious beliefs, which is very catchy and lands on a very fertile soil in Poland.¹³⁹

This activist observes another reason why hate speech seems to be more often talked about in the public debate. He observes:

Just as physical violence does not evoke controversy, [verbal] violence that is a consequence of hate speech is more controversial, so perhaps the media feature this topic to ignite discussions about those issues. After all, the question 'Does it offend or not?', and people can somehow argue about it.¹⁴⁰

Arguably, even in cases involving actual violence, the centre of attention seems to be on the words. For example, in the 2010 *Plac Mirowski* case of police brutality against a gay man, litigated by the KPH (Siedlecka 2014), the main topic of public interest was whether the word 'faggot' is offensive or not. While the question 'does 'faggot' offend or not?' is important, the alternative question 'should hate violence be punished more severely than other types of violence?' is not often heard.

The above and one more activist,¹⁴¹ who are at the forefront of the LGBT rights movement, observe in the interviews that they have been realizing that the public is divided regarding criminalization of speech. According to one of them, '[hate speech] it is the main reason why it is so difficult for us to pass, to lead to the change of the Criminal Code.'¹⁴² Both observe that hate speech is a 'bone of contention' and that focusing on it can be counterproductive. These considerations are, however, not yet reflected in advocacy priorities. One of the activists speculates:

Perhaps if we gave up on hate speech, on penalization of hate speech, it would be definitely easier to add homophobia to the catalogue of hate crimes, without this element of hate speech, and here, I have the impression that this is the clue.¹⁴³

The activist then went on to speculate if it would be worthwhile to change the advocacy strategy in this regard and remove homophobic hate speech from any future draft amendments. She observes, however, that it would be difficult due to the construction of the Criminal Code, which

¹³⁹ Interview-05-LGBT-rights-activist2-2015-08-19.

¹⁴⁰ Interview-05-LGBT-rights-activist2-2015-08-19.

¹⁴¹ Interview-03-LGBT-rights-activist1-2015-08-11.

¹⁴² Interview-05-LGBT-rights-activist2-2015-08-19.

¹⁴³ Interview-03-LGBT-rights-activist1-2015-08-11.

criminalizes insults or threats and violence in the same provisions (see chapter 9).¹⁴⁴ Her colleague agrees with the idea of separation:

I am wondering if this should not be separated. If these two things should go together as a package, and whereas we should reconsider – I am thinking now about hate speech. This is our ball and chain, which causes general activities in the area of hate crime to be torpedoed due to the fact that the draft amendments always include provisions penalizing hate speech and we come across freedom of speech and enter this whole narrative. And that this may problematize it a little.¹⁴⁵

In this regard, however, trying to refocus the advocacy activities from hate speech to hate crimes might not be understood by other movement members. This could be because they could perceive that the move to refocus and remove hate speech from the centre of advocacy would be a mistake now, when the issue of hatred finally became an object of public attention. In this sense, some advocates see it as taking away a hard-won victory. Such views were expressed for example during a seminar organized in January 2016 at the Polish Academy of Science, where a proposal to move hate speech provisions to a misdemeanour code to facilitate policing was met with low enthusiasm by most experts (Włodarczyk-Madejska 2016).

7.7 CONCLUSION

The aim of this chapter was to explore the conceptual complexities pertaining to hate speech and hate crime in Poland; consider the place of combating hate crime as a policy focus among other advocacy priorities of the LGBT movement; and, finally, analyse how advocacy groups frame the problem of anti-LGB hate crime, and how effective the framing strategy is.

The empirical evidence presented in the chapter suggests that there are multiple conceptual complexities pertaining to hate crime and hate speech in Poland. Among them, the key problem has been the broad and vague understanding of hate speech. These complexities have inhibited the development of an effective advocacy campaign aimed at enhancing the penalties for violence based on sexual orientation.

The failure to effectuate change can also be attributed to the lack of identification and prioritization of key claims within the LGBT movement. The chapter suggests that more efforts have been put into campaigning for rights of same-sex couples than for anti-LGB hate crime laws. A central problem here has been the inadequate framing of the problem of anti-LGB violence. Sexual orientation hate crime laws are framed as a human rights/equality issue and presented as a necessity in a democratic European state. While the use of the human rights frame has important

¹⁴⁴ Interview-03-LGBT-rights-activist1-2015-08-11.

¹⁴⁵ Interview-05-LGBT-rights-activist2-2015-08-19.

benefits (see Chapter 8), such framing has enabled the nationalist 'slippery slope' argument that the passage of anti-LGB hate crime laws will be destructive for Poland. It also sparked important questions about the freedom of speech and the role of the law to counter hatred (see Chapter 9).

Considering the above, the number one priority for the Polish LGBT rights movement should now be to clearly define hate speech and hate crime, and to develop new strategies (within or outside of the human rights frame) that will help to persuade the government and the public to recognize the issue of anti-LGB hate crime as a legitimate policy concern. In that, there is an important role of scholars, who can help conceptualize the problems and evaluate the effectiveness of selected solutions.

8

FROM WARSAW TO GENEVA: INTERNATIONAL ANTI-LGB HATE CRIME ADVOCACY

'None of the public institutions, ministries, offices, came up on its own with an initiative to enhance the legal protection of LGBT people.'

Representative of the Office of the Commissioner for Human Rights¹⁴⁶

'The state won't do anything on its own, if it's not pushed to do it.'

Mirosław Wyrzykowski, ECRI¹⁴⁷

8.1 INTRODUCTION

EMPIRICAL evidence in Chapter 7 suggests that Polish NGOs frame anti-LGB hate crime as a human rights issue and use international references, particularly examples from other countries and recommendations from human rights bodies, to convince the government to improve the legal and policy framework to combat hate crime. Treating hate crime as a human rights issue has important benefits. As Brudholm (2016) puts it, it means that

. . . hate crime can be fought not just by the traditional means of the anti-hate crime movement, i.e. national monitoring, civic education, public campaigning, and domestic criminal justice, but also by the human rights machinery: international monitoring and review, human rights courts etc. (P. 96).

This being so, this chapter seeks to analyse how the LGBT movement in Poland uses the 'human rights machinery' to put pressure on key political decision makers to improve legal and policy

¹⁴⁶ Interview-13-Commissioner-for-human-rights-office-2015-09-16

¹⁴⁷ Lecture by Mirosław Wyrzykowski during an event organized by the Polish Society for Anti-Discrimination Law in Warsaw, on 5 October 2015.

responses to hate crime, and how effective this strategy is. The chapter is divided into four sections. First, I analyse why the Polish LGBT movement advocates against anti-LGB hate crime internationally. I argue that the turn to human monitoring and review bodies with anti-LGB hate crime issues was facilitated by, *inter alia*, human rights framing, professionalization of NGOs, changes in political opportunities at home, improved access to UN and CoE institutions, as well as changes in the human rights bodies themselves. Next, I analyse the relationship between shadow reports, subsequent international recommendations and the discursive positions of the government towards them. I observe that the LGB NGOs have been able to secure international recommendations on key issues, but the government's discursive approach to recommendations concerning LGBT rights depends on the issue at stake and strength of the recommendation.

From the point of view of internationalization of hate crime, the chapter shows that strategies used by Polish NGOs differ from those analysed in the US literature in that, apart from traditional anti-hate crime movement tools, the boomerang pattern of advocacy is also used. The empirical evidence in the chapter suggests that linking anti-LGB hate crime with racism and xenophobia is an effective strategy, and that transnational bodies have influenced how Poland responds to hate crime. This thought will be developed in Chapter 10.

8.2 CONDITIONS FOR INTERNATIONAL LGBT RIGHTS ADVOCACY IN POLAND

Most of the factors behind the decision to approach international organizations, and in particular, human rights monitoring and review bodies, with issues relating to LGBT rights have been mentioned before in various contexts. In this section, I bring these factors together, grouping them under three themes.

8.2.1 CHANGES IN POLITICAL OPPORTUNITIES

The first political opportunity structure offering a significant promise to advance LGBT rights in Poland was EU accession (see chapter 5). Before that, in the 1990s, LGBT rights were a peripheral issue and the LGBT movement's ability to effectuate political change was limited. For example, the Lambda Groups' Association unsuccessfully mobilized in favour of adding sexual orientation to the list of protected statuses in the anti-discrimination provision of the new constitution (Chetaille 2011:123; Chruściak 2010:657). While, in the early 2000s, LGBT rights were not yet officially part of the Copenhagen criteria (see Chapter 6), the accession process mandated the introduction of the existing EU equal treatment framework, which provides protection from discrimination based on sexual orientation. For this reason, LGBT activists in Poland turned to EU institutions in seeking external leverage to ensure that sexual minorities' rights were taken on board in accession negotiations. The introduction to the *Report on discrimination on grounds of sexual orientation in Poland* prepared by Lambda Warsaw (2001) openly expresses its advocacy purpose:

The information we have collected (used to draft the Report) will be presented to the Polish general public, Polish authorities, *and the European Commission in Brussels*. We believe this Report cannot go unanswered: we expect the public will learn about the extent of discrimination against sexual minorities in Poland and *we hope the European Commission's pre-accession report for the Polish Government will include recommendations on the rights of lesbians and gays* (P. 3-4; emphasis added).

Poland joined the EU in 2004, 'ending a long process in which the strength of their democratic institutions was carefully tested and validated by the European Commission' (O'Dwyer and Schwartz 2010:220). To comply with the *acquis communautaire*, Poland introduced anti-discrimination provisions in labour law, with both the European Union and NGOs closely monitoring the process.¹⁴⁸ Following the accession, particularly during the first PiS government, the chance to influence the positions of the authorities on LGBT rights using domestic measures became limited. As described by numerous authors, the years 2004-2006 were marred by a homophobic backlash, including banning Pride events and plans to ban gay teachers from schools (see chapter 5). The anti-gay backlash shut down any possible access routes to political decision makers. This in turn resulted in the LGBT movement organizations turning for help abroad, particularly in Brussels, Geneva and Strasbourg, hoping that it would help convince the government to listen. Speaking about the times of the first PiS government, Chetaille (2011) sums up that

. . . the closure of political opportunities at the domestic level contributed to the deepening of European connections. Encouraged and supported by transnational NGOs such as ILGA-Europe, Polish activists displayed an example of 'boomerang pattern' strategies (Keck and Sikking 1998:13), as they sought international partners able to pressure the Polish state from outside (P. 129).

For this, the Polish LGBT rights movement benefitted from the cooperation with the more experienced Polish women's rights movement and the expertise of the international LGBT organizations. I consider these connections below.

8.2.2 IMPROVED ACCESS TO HUMAN RIGHTS BODIES

Advocacy in human rights bodies was facilitated by building alliances with more experienced movements, particularly the feminist movement. US literature shows the importance of inter-

¹⁴⁸ While the so-called anti-discrimination act (Sejm 2010), and previous acts on labour law, supposedly implemented EU anti-discrimination framework in Poland, advocates claim that it does not cover all areas mandated by EU law (see, e.g. Kukowka and Siekiera (2014)).

sectional solidarity in hate crime advocacy. Jenness and Broad (1997:58–59) write that, having established their position, gay and lesbian groups needed to ‘build coalitions around intolerance’ with other social movements. The ability to engage in dialogue and incorporate issues of gender (and misogyny), race (and racism), as well as religion (and antisemitism), into their agendas, helped build trust among movement organizations, share expertise and gain legitimacy (Jenness and Broad 1997:58–59).

Authors writing about the LGBT movement in Poland, such as Graff (2006) and Binnie and Klesse (2012), emphasize the importance of political solidarity, arguing that LGBT groups received a lot of support from feminist organizations in the beginning of the struggle for LGBT rights. Empirical research centres on Pride events. For example, Binnie and Klesse look at the ‘significance of feminism in transnational activism around LGBTQ protest events, namely equality marches and associated festivals’ (2012:444). But the support offered by feminist organizations to the budding LGBT advocacy was not limited to that. The Polish women’s rights movement already had experience of advocating in front of international human rights bodies on issues such as sexual and reproductive rights as well as domestic violence. Feminist activists lent their support to claims made by the LGBT movement, giving LGBT groups the opportunity to write sections of shadow reports regarding their own situation (see below).

Apart from building intersectional coalitions at home, access to human rights bodies was improved by changes in the transnational LGBT movement. Two umbrella LGBT organizations, ILGA (in 2011) and its European region, ILGA-Europe (in 2006), obtained participative status in the United Nations (Freedom House 2011; ILGA-Europe 2006; see also Swiebel (2009) for analysis). This facilitated lobbying among UN officials and members of treaty bodies (e.g. the Human Rights Committee and the Committee on the Elimination of Discrimination against Women). Their physical presence in Geneva allowed the KPH to not only send reports, but also lobby and intervene during sessions, increasing the visibility of the problem, prompting the bodies to ask questions and improving the chance of the issue being raised in recommendations.

Finally, the access to international human rights bodies was improved thanks to changes within the LGBT movement itself, particularly NGOization and professionalization. The fact that professionalization impacts the effectiveness of advocacy is highlighted in the international literature (Paternotte 2016) as it helps to engage in ‘politicking’ (Swiebel 2009). In Poland, the professionalization was seen through both setting up specialized organizations and changes within existing structures. For example, in 2007, the Polish Society for Anti-Discrimination Law, an organization gathering lawyers interested in the issue of equal treatment, was set up. Between 2008-2009 the KPH changed its internal structure, transforming from multiple local branches to a smaller, advocacy-focused organization. The organization began to hire staff with technical knowledge of specific policy issues, such as public health, education or hate crime, as well as personnel responsible for communications and campaigning.

8.2.3 CHANGES IN THE HUMAN RIGHTS BODIES

There is a growing body of literature analysing the approach to LGBT rights in the United Nations (most recently, for example, Baisley 2016; Braun 2014; Cowell and Milon 2012; Gerber and Gory 2014; Schlanbusch 2013). Authors agree that opportunities to advocate for the human rights of LGBT people, including countering discrimination and violence, have been improving in the United Nations. For example, in 2011 and 2014, the Human Rights Council adopted resolutions concerning violence and discrimination based on sexual orientation and gender identity (HRC 2011, 2014). In 2011, the HRC expressed its 'grave concern' about violence and discrimination based on sexual orientation and gender identity. The 2011 report by the High Commissioner for Human Rights found that 'a pattern of human rights violations emerges that demands a response' and that '[g]overnments and intergovernmental bodies have often overlooked violence and discrimination based on sexual orientation and gender identity' (UN General Assembly 2011:24). It recommends, among other actions, that states investigate promptly incidents of anti-LGBT violence, hold perpetrators accountable, and establish systems for the recording and reporting of such incidents (UN General Assembly 2011:24). In the latest resolution (HRC 2016), the HRC appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

The 2011 report (UN General Assembly 2011) is based, *inter alia*, on evidence submitted to the UN by NGOs. There is a growing body of literature examining the interactions between the UN human rights monitoring and review bodies and NGOs (e.g. Baird 2015; Beckstrand 2015; Chauville 2015; Collister 2015; Moss 2010; Schokman and Lynch 2015). The International Service for Human Rights (ISHR 2011) observes that

. . . NGOs have made the UPR an integral part of domestic advocacy strategies, using it as a catalyst to set up national consultations to identify the human rights problems in a country, to generate coalitions and partnerships, and to coalesce strategies to follow-up on recommendations emanating from the UPR (P. 2).

In addition to the developments in the United Nations, other human rights bodies have also taken up the issue of anti-LGB discrimination and violence. For example, in the Council of Europe, following the passage of the recommendation *CM/Rec(2010)5* (CoE 2010), the Sexual Orientation and Gender Identity Unit was established to oversee its implementation.¹⁴⁹ ECRI, so far concerned with racism, had a shift in policy, which resulted in the inclusion of intolerance against LGBT and people with disabilities in the ECRI's periodic reviews, starting from the fifth

¹⁴⁹ See the website of the Unit at <https://www.coe.int/en/web/sogi/home> (retrieved 5 May 2017).

cycle.¹⁵⁰ Also ODIHR and FRA started to request that countries send them data on hate crime against LGBT people.

Summing up, closed political opportunities and the disconnect between government and civil society resulted in activists seeking allies abroad and turning to the boomerang pattern of advocacy. This was facilitated by changes in the LGBT movement and in international human rights organizations. The Polish LGBT movement has undergone professionalization, built strategic alliances with feminist organizations and became part of the transnational LGBT movement. On the other hand, international human rights bodies increasingly started to recognize discrimination and violence based on sexual orientation as a human rights problem. In the next sections, I will analyse how the above changes translated to a growing number of recommendations and influenced discursive positions of the Polish government on the issue of anti-LGB hate crime.

8.3 SHADOW REPORT – RECOMMENDATIONS

While the technical details of how to engage with international mechanisms established to monitor implementation of human rights commitments differ, the basic way of engagement for an NGO is a shadow report. Such a document is a written evidence submitted to the body, through which ‘NGOs can highlight issues not raised by their governments or point out where the government may be misleading the committee from the real situation’ (International Women’s Rights Action Watch 2013). Shadow reports form part of the movement’s information politics, linking ‘testimonial information along with technical and statistical information’ (Keck and Sikkink 1999:96).

Polish NGOs started to use shadow reporting to advocate on anti-LGB hate crime issues in 2009. That year, a report was sent to the UN HRCtee for the 6th review of the implementation of the ICCPR (FKPR et al. 2009). It was part of a joint submission, prepared by two women’s rights groups (Federation for Women and Family Planning and Centre for Women’s Rights) and the KPH. In the report, the KPH complained about the ‘lack of provisions concerning hate speech and hate crimes based on homophobia’ (FKPR et al. 2009:9).

Since 2009, intersectional coalitions of NGOs approached many other human rights bodies on the issue of anti-LGB hate speech and hate crime, including CEDAW (Karat Coalition 2014) and ECRI (PTPA et al. 2014). In addition, the Helsinki Foundation for Human Rights included the issue of stalled works on the amendment of the Criminal Code’s provisions on hate speech and hate crimes in the shadow report to the CAT (HFPC 2013). Table 3 summarizes the presence of recommendations on anti-LGB hate crime included in the shadow reports to UN bodies between

¹⁵⁰ Lecture by Miroslaw Wyrzykowski during an event organized by the Polish Society for Anti-Discrimination Law in Warsaw, on 5 October 2015.

2007 and 2015 and shows the outcome of such interventions, i.e. whether the shadow report translated into recommendations included by the bodies in their concluding reports.

	Body	NGO shadow report	IGO recommendations
	CAT (2007)	No	Yes
	(2013)	Yes	Yes
	HRCtee (2010)	Yes	Yes
	HRC (2012)	Yes	Yes
	CEDAW (2014)	Yes	No
	ECRI (2015)	Yes	Yes
	CRC (2015)	No	Yes

Table 3 Shadow reporting by Polish NGOs to international human rights bodies on anti-LGB hate crime and recommendations. Source: Own analysis, based on information from OHCHR,¹⁵¹ as of 2015-12-31.

As Table 3 above shows, the issue of anti-LGB hatred in Poland was first taken up by a treaty body already in 2007, i.e. even before the first shadow report (the possible reasons for this are discussed below). That year, the UN CAT (2007) noted

. . . with concern reports of intolerance and hatred towards minorities and other vulnerable groups in Poland, including alleged recent manifestations of hate speech and intolerance against homosexuals and lesbians (P. 6).

With this in mind, the Committee recommended that Poland ‘incorporate in its Penal Code an offence to punish hate crimes as acts of intolerance and incitation to hatred and violence based on sexual orientation’ (CAT 2007:6) despite the lack of a shadow report which would recommend this. While the specific reason as to why the Committee picked up the issue of homophobia in Poland without a shadow report is unclear, it is probable that the recommendations were a reaction to the anti-gay backlash in Poland in 2005-2007 (see, for example, O’Dwyer and Schwartz 2010), resulting, *inter alia*, in the European Parliament’s condemnation of homophobia in Poland (European Parliament 2006).

Following the path taken by the CAT, the HRCtee (2010) wrote in its concluding observations in the sixth review of Poland:

The State party should ensure that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated. It should also: legally

¹⁵¹ See the OHCHR website at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=POL&Lang=EN (retrieved 5 August 2017).

prohibit discrimination on the grounds of sexual orientation or gender identity; amend the Penal Code to define hate speech and hate crimes based on sexual orientation or gender identity among the categories of punishable offences; and intensify awareness raising activities aimed at the police force and wider public (P. 2-3).

The conclusions of the HRCtee partially correspond to the evidence provided by the shadow report (FKPR et al. 2009). Following this example, other monitoring and review bodies, including the Human Rights Council (2012), the Committee Against Torture again (2013), the Committee on the Rights of the Child (CRC) (2015) and the European Commission against Racism and Intolerance (2015), made recommendations specific to anti-LGB hate crime. For example, ECRI (2015) recommended 'that sexual orientation and gender identity be added to the prohibited grounds in Articles 118, 119 and 255 of the Criminal Code' (P. 21) and that Poland

. . . rationalise the system for collecting data and producing statistics in order to provide a coherent, integrated view of cases of racial and homo/transphobic hate speech reported to the police or processed through the courts (P. 20).

The Committee on the Elimination of Discrimination against Women did not make recommendations regarding hate crimes targeting LBT women in its concluding remarks from 2014, despite this issue being raised in the shadow report submitted to the Committee (Karat Coalition 2014). In this context, it is worth considering the irregularities in the presence or absence of recommendations in the final report of the committee. As mentioned above, in 2007, CAT provided recommendations despite the issue not being raised in any shadow report. A similar situation took place in the CRC in 2015. While it is not possible to explain the inclusion/non-inclusion of anti-LGB hate crime issues in the recommendations with 100 per cent certainty, data from interviews (below) analysed in the light of secondary sources (e.g. Schokman and Lynch 2015) suggest that this might be due to lobbying. In this regard, several experts interviewed in this research emphasize *couloir* lobbying and interventions during sessions.¹⁵² One anti-racism advocate interviewed describes the importance of the physical presence during sessions on the content of the report by saying:

It is important which delegations are part of an initiative group that prepares the comments, because they then set the tone of those reports (...). The drawback is that very few organizations then go to Geneva or NYC to meet with committee members (...). This is a huge opportunity to influence the change that is happening (...). But for example, with CEDAW, because it was women's rights and LGBT rights

¹⁵² Interview-09-anti-racism-activist1-2015-08-26, Email-LGBT-rights-activist1-2017-01-16, Interview-19-HRCtee-2015-11-21.

organizations that went there, our issues connected with migrants are completely absent in the final recommendations of the committee, because the people who went there promoted totally different issues.¹⁵³

While the activist argues that LGBT organizations influenced the CEDAW recommendations for Poland, it is worth remembering that the CEDAW report did not mention anti-LGB hate crime. In this context, one LGBT activist explained in an email:

If a recommendation is missing, this means that we did not try hard enough.;) A converse situation, CRC – there was no shadow report, but apparently someone fought for that behind the scenes.¹⁵⁴

Finally, a few words should be said about the role of ODIHR and FRA in monitoring the human rights situation in member states. One can notice that the list of bodies in Table 3 does not include FRA or ODIHR. While both bodies regularly request statistics on this issue from member states, they do not have a mandate to regularly review member states' practices and provide recommendations. Nonetheless, both FRA and ODIHR have attempted to assess the quality of the work conducted by countries regarding hate crime data collection. In 2012, FRA published a report in which it provided a classification of official data collection mechanisms pertaining to hate crime (FRA 2012:8). The agency divided countries into three categories – those collecting limited data, good data and comprehensive data (FRA 2012:8), with Poland in the middle group. Also in 2012, ODIHR started to provide 'key observations' on the quality of hate crime reporting by states (ODIHR 2014b). Observations pertain, *inter alia*, to bias motivations recorded by police, and tackling underreporting. Regarding Poland, until 2014 ODIHR complained that 'Poland has not reported on hate crimes separately from cases of hate speech.' In 2015 ODIHR noted an improvement in the data collection mechanism (see chapter 10), but observed 'that recording of bias motivations by police should be further strengthened and such data reported to ODIHR'.¹⁵⁵ While the observation wording is vague, it can be implied, from the complete lack of reports, that it is particularly about anti-LGBT and disablist crimes.

Summing up, the above section shows that the information politics of NGOs in Poland results in the increasing number of transnational human rights institutions recommending Poland to amend hate speech and hate crime laws by adding sexual orientation, improve investigation of such acts, and set up recording and reporting mechanisms. The emergence of international recommendations is an example of the boomerang pattern of advocacy, which was not observed in the context of anti-LGB hate crime advocacy in the US.

¹⁵³ Interview-09-anti-racism-activist1-2015-08-26.

¹⁵⁴ Email-LGBT-rights-activist1-2017-01-16.

¹⁵⁵ See the Hate Crime Reporting Website's section on Poland at <http://hatecrime.osce.org/poland> (access 2017-09-25).

8.4 THE GOVERNMENT'S POSITION ON INTERNATIONAL RECOMMENDATIONS

While Table 3 above shows the link between NGO claims and various international bodies' recommendations for Poland, it is not clear what the stance of the government to these recommendations is. Specifically, even after a detailed lecture of national reports to human rights bodies, it is not always possible to say whether a recommendation is accepted, disputed or ignored by the government. The lack of a formal acceptance procedure, and lack of effective monitoring in the work of treaty bodies, were parts of the criticism which led to the setting up of the Universal Periodic Review in the UN Human Rights Council (Bassiouni and Schabas 2011). Unlike in treaty bodies or the ECRI, each of the recommendations contained in the report and prepared by a working group needs to be addressed by a country, which stipulates whether it accepts ('supports') or rejects ('notes') the recommendation.

Previous research on the UPR found that there are regional differences regarding both recommendations given and accepted by countries. According to the Resolution 60/251 (UN General Assembly 2006), there are five regional groups in the UN: the African Group, the Asia-Pacific Group, the Eastern European Group, the Group of Latin American and Caribbean States, and the Western European and Others Group (WEOG).¹⁵⁶ Schlanbusch (2013:54) found that 76 per cent of sexual orientation and gender identity-related recommendations came from WEOG states, and that 'recommendations concerning SOGI rights are going from the 'West' to the 'Global South'. She also found that LGBT-related recommendations are less frequently accepted than other recommendations (Schlanbusch 2013:35). She concludes that the differences reflect the international community's polarization on LGBT human rights. In other words, it reflects the discussion on universalism v. relativism of human rights, which is one of the most debated issues in the philosophy of human rights (Baehr 2000; Hayden 2001).

Schlanbusch (2013:41) suggests that, in the Human Rights Council, focusing on the legal framework and basic rights (such as freedom from violence) is a 'political strategy, as anti-discriminatory laws are seen as a first step before changing attitudes and tolerance in society.' According to her,

... demands for the individual safety of persons regardless of their sexual preferences is [sic] easier to promote than initiatives that might be interpreted as 'pro-gay', such as information campaigns or positive rights, e.g. the right to marry (P. 41).

While Schlanbusch's (2013) study is helpful and otherwise impressive, her research questions do not include levels of acceptance of recommendations in various areas of LGBT rights. Therefore, it is impossible to say with certainty that recommendations on violence, for example, are more

¹⁵⁶ WEOG includes Western European countries, as well as Australia, Canada, Israel, Malta, New Zealand, Turkey, and the US (United Nations n.d.).

often accepted than those on the rights of same-sex couples. This question can be answered (on a considerably lower scale) by analysing which recommendations regarding the situation of LGBT people are acceptable for the Polish government. To do that, I analysed the stance of the Polish government towards the recommendations which targeted hate crime or LGBT rights made during the 2nd session of the UPR in 2012, based on the report of the UPR working group (HRC 2012). Table 4 below shows the relationship between the analysed recommendations and the position of the Polish delegation. For the sake of clarity, the table includes recommendations that specifically address LGBT people only. All recommendations on racism and xenophobia, as well as hate speech and hate crime without mentioning LGBT, were accepted (this was part of the analysis, but is not reported in Table 2). The implementation of the accepted recommendations is considered in chapters 9-10.

Recommendations	Government position
90.66. Include sexual orientation and gender identity in the hate speech provisions of the national Criminal Code, and adopt appropriate legal measures making sexual orientation and gender identity as possible discrimination grounds in any context (Slovenia);	<i>Supported</i>
90.67. Guarantee the full enjoyment of the rights of the LGBT community (Spain);	<i>Supported</i>
90.68. Recognize gender identity as possible grounds for discrimination and gender identity and sexual orientation as an aggravating circumstance for hate crime (United Kingdom of Great Britain and Northern Ireland);	<i>Supported</i>
90.69. Adopt regulations recognising the rights of same-sex couples and of self-defined gender or transgender persons (Australia);	<i>Noted</i>
90.70. Strengthen anti-discrimination laws with regard to the better protection of LGBT persons and persons with disabilities (Austria);	<i>Supported</i>
90.71. The adoption of policies that safeguard the rights of LGBT people and fight discrimination based on sexual orientation (Brazil);	<i>Supported</i>
90.94. Institute outreach by police and law enforcement to LGBT persons and communities to increase reporting of hate crimes (United States of America);	<i>Supported</i>
90.97. Pass legislation giving same-sex couples the possibility to enter into a civil union contract (France).	<i>Noted</i>

Table 4 HRC recommendations for Poland in the 2nd UPR cycle specifically addressing LGBT people, and the position of the government. Source: Matrix of recommendations (OHCHR n.d.).

In the 2nd round of the UPR in 2012, Poland received multiple recommendations regarding racial discrimination and non-discrimination (names of rights areas used in the UPR nomenclature).

Some of the recommendations mentioned specific groups or group-related rights (e.g. Muslims, Roma, same-sex unions), while others referred to problems (e.g. hate speech, hate crime, racism, or discrimination) generally. Recommendations targeted both legal framework (e.g. amendment of the Criminal Code) and practice (e.g. encouraging reporting). As Table 4 above shows, eight countries made statements referring to sexual orientation and/or gender identity specifically, providing a total of 12 recommendations. Four of the recommendations referred to discrimination. Hate crime/hate speech laws, LGBT rights in general and same-sex unions received two recommendations each, while hate crime reporting and gender recognition were mentioned by one country each. Recommendations were made mainly by countries from the WEOG group. This is in line with observations of Schlanbusch (2013).

Almost all recommendations which mention sexual orientation and / or gender identity have been accepted. Particularly, all recommendations to enact anti-LGB hate speech and hate crime have been supported. Two recommendations that were 'noted' advised Poland to adopt regulations recognizing the rights of same-sex couples (one additionally concerned gender recognition). While recommendations asking for a specific action ('adopt regulations' rather than 'consider passing') are generally accepted less often than softer recommendations (Schlanbusch 2013:35–36), it is important to note that, in the case of Poland, recommendations on hate crime were accepted, while those on same-sex unions were rejected. This suggests that the 'positive rights' of LGB people are less acceptable for the Polish government than 'negative rights'. While the finding cannot be generalized, it supports the argument made in Chapter 7 that advocating for an 'LGBT rights package' may be ineffective, as disagreement with any part of the package may render the passage of any of the elements of the package impossible. At the same time, the fact that all recommendations on racism and xenophobia or hate crime have been accepted suggests that this issue has become a legitimate policy domain. From the perspective of the social movements theories, both findings show the importance of effective issue linkage.

While recommendations on hate crime are accepted, we will not learn from reading the UPR working group report (HRC 2012) whether the state behaviour actually changes. Chapters 9 and 10 consider the government's action (and inaction) with regards to the accepted recommendations, showing which recommendations are implemented and which ones are 'forgotten,' and providing explanations for these behaviours.

8.5 INTERNATIONAL ADVOCACY – ASSESSMENT BY THOSE INVOLVED IN THE PROCESS

The first international recommendation to address homophobic hate crime in Poland appeared a decade ago (CAT 2007). Since then, CAT and other bodies reiterated this recommendation numerous times, but, despite the government's pledges of support, the law has not changed. The fact that recommendations have been made for so long, yet the law has not changed, may

suggest that transnational human rights institutions have little influence on how Poland responds to hate crime. While Haynes and Scheppe (2016) make this argument about Ireland (see Chapter 6), the important difference is in the fact that the Irish state *rejects* recommendations to change the law, while the Polish state *accepts* them, but does not implement them. From the perspective of activists engaged in the boomerang advocacy, the disconnect between symbolic statements (accepting recommendations) and actual behaviour (change of laws) may be quite disillusioning. In this context, there is a need to evaluate existing strategies. These issues were explored in elite interviews.

In general, most experts interviewed in this research, activists and public officials alike, agree that the fact that anti-LGB hate crime has been put on the political agenda is a result of pressures on the government. For example, one public official said that '[n]one of the public institutions, ministries, offices, came up on its own with an initiative to enhance the legal protection of LGBT people.'¹⁵⁷ According to this person, 'it is not like we ourselves want to deal with these issues, but for years there have been recommendations of ECRI or CERD which speak about it.' Activists with experience in international advocacy interviewed in this research believe that international recommendations can amplify NGOs' claims.¹⁵⁸ For example, one anti-racism advocate said in the interview:

I believe they have certain power in the sense that they help NGOs to bring up certain issues. If we say something and we back it up, and this is not only our idea, but also a few international organizations recommended that to Poland, then our voice is decidedly treated more seriously – be it by the media, or in various letters that we send around.¹⁵⁹

Another anti-racism activist interviewed in this research focuses on the coordinated approach between local movements and international organizations as a way of effectuating change: 'You know what I mean. Joint action. Because NGOs can say whatever, and, you know, they're being ignored. And NGOs with some international support can achieve a lot, no?'¹⁶⁰ The activist believes that 'NGOs are key' in advocacy, as they work on the ground. The 'first-hand knowledge' offered

¹⁵⁷ Interview-13-Commissioner-for-human-rights-office-2015-09-16. See also Chapter 8.

¹⁵⁸ Interview-15-trans-rights-activist2-2015-10-08, Interview-14-anti-racism-activist2-2015-09-25, Interview-09-anti-racism-activist1-2015-08-26.

¹⁵⁹ Interview-09-anti-racism-activist1-2015-08-26.

¹⁶⁰ Interview-14-anti-racism-activist2-2015-09-25. While believing in the amplifying power of international recommendations, the same activist expresses scepticism related to the perceived 'detachedness' of IGOs, which lack specific on-the-ground knowledge and experience. The activist argues that 'the support of such big international organizations is always useful, but the truth is that those organizations will never work on the grass roots level'. This perceived 'detachedness' of IGOs can sometimes result in 'crazy recommendations' (to use the words of a civil servant interviewed (Interview-08-Mol-group-2015-08-20)), i.e. recommendations that are difficult to understand and not relevant to the situation.

by NGOs was also reflected in interviews with two experts with experience of sitting on international human rights committees.¹⁶¹

Regarding other opportunities provided by boomerang advocacy, Polish NGOs also have learnt to use the recommendations in advocating at home, using it for legitimacy (support for legislative initiatives), generating media attention and keeping the government accountable. For example, one of the activists observes:

. . . [if there are] recommendations you can always try to convince the media to make a broadcast about it, they are interested in it (...). These issues are important in the sense that they can help in media activities and [change of] discourse.¹⁶²

Indeed, mainstream Polish media tend to report on recommendations surrounding human rights, including LGB issues. For example, following the publication of the report by ECRI, a group of NGOs organized a press conference to present the recommendations, resulting in a broad media coverage (e.g. *Gazetaprawna.pl* 2015; PAP 2015). Furthermore, the authority of ECRI seems to have contributed to the convening of the session of the Sejm subcommittee charged with criminal law reform, which until that time was dormant. It also prompted the MoJ to order another legal opinion on the draft amendments on hate crime waiting in the Sejm (see chapter 9). This is an example of accountability politics, i.e. ‘the effort to oblige more powerful actors to act on vaguer policies or principles they formally endorsed’ (Keck and Sikkink 1999:95).

While the majority view among activists is that they see the value of producing shadow reports to international bodies, some, among them leaders of the movement, speak about the ‘political will’ as a decisive factor for the change of law (see Chapter 5).¹⁶³ Explaining why the attempts to pass the anti-LGB hate crime laws have been unsuccessful, one activist observes that ‘neither the PO nor the PiS are interested in LGBT issues’.¹⁶⁴ A trans rights activist adds that ‘without the political will, [the impact of NGOs] is very small.’¹⁶⁵ Considering the lack of political will, an activist who is at the forefront of the movement expresses an opinion that only hard legal requirements can force Poland to change the law. She says:

I think that it [the European Union] will be the institution that will (...) lead to changes in the Criminal Code (...). Looking at the history of changes regarding LGBT in Polish law, these changes have been forced by the European Union. So, I really hope that this will happen.

¹⁶¹ Interview-18-ECRI-2015-11-20, Interview-19-HRCtee-2015-11-21.

¹⁶² Interview-09-anti-racism-activist1-2015-08-26.

¹⁶³ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-15-trans-rights-activist2-2015-10-08. See also chapter 5.

¹⁶⁴ Interview-03-LGBT-rights-activist1-2015-08-11.

¹⁶⁵ Interview-15-trans-rights-activist2-2015-10-08.

Probably within five-seven years, maybe longer, but this will happen sooner than the Polish legislator changes anything.¹⁶⁶

The above statements suggest that some leaders of the movement, while continuing their work, see the non-movement factors, such as political interest and EU pressure, as decisive in determining the outcomes of hate crime advocacy. This raises questions about the effectiveness of the strategies and the point of continuing anti-hate crime advocacy in the current form (e.g. shadow reporting and legislative initiatives sponsored by opposition parties). Engaging in the same activities knowing that they will not bring effects is a sign of ritualism. As the recommendations are already secured, the efforts should now on finding new and effective ways of framing anti-LGB hate crime, and on other forms of advocacy, such as building case-law evidence of the inadequacy of current provisions on hate crime (not hate speech), encouraging reporting and raising awareness of hate crime through public campaigns. Such activities are not directly dependent of political will, but may, in a longer run, in turn influence the electoral support for the change of law. On this note, last but not least, the movement should prepare a new and improved draft amendment of the Criminal Code's provisions on hate speech and hate crime, taking into account the dogmatic critique of the past legislative initiatives (see Chapter 9), to be ready to submit when the time is right.

Before concluding, there is a need to consider the OSCE's role in the international debates on hate crime laws in Poland. Despite involvement and influencing data collection and training in Poland (see Chapter 10), representatives of the OSCE did not work with legislators in Poland on hate crime laws, as they did in the Western Balkans. ODIHR has also actively approached legislators in other countries offering a law review, upon learning that a reform is considered.¹⁶⁷ As a matter of fact, despite close cooperation with the government, until 2015 there has been no attempt, on the part of ODIHR, to assist Poland in the hate crime law amendment process. In effect, NGOs were alone in working with legislators. The view that it is NGOs on whom the whole struggle depends is shared almost unanimously by the civil society representatives interviewed in this research.¹⁶⁸

While law reviews provided by ODIHR, such as the reviews for Bosnia and Herzegovina (2009c) and Macedonia (2009, 2016), are not the reason why anti-LGB hate crime laws are passed (as explained in Chapter 6, the reforms were initiated as part of the general democratization process and continue during the EU accession process), they have informed the ongoing debates and helped shape the laws which were eventually passed (i.e. it provided the templates).

¹⁶⁶ Interview-03-LGBT-rights-activist1-2015-08-11.

¹⁶⁷ Email-ODIHR2-2015-11-20.

¹⁶⁸ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-05-LGBT-rights-activist2-2015-08-19, Interview-06-trans-rights-activist1-2015-08-19, Interview-09-anti-racism-activist1-2015-08-26, Interview-14-anti-racism-activist2-2015-09-25, Interview-15-trans-rights-activist2-2015-10-08.

Even though ODIHR has been cooperating with civil society organizations engaged in combating hate crime in Poland, representatives of Polish NGOs interviewed in this research were unaware of ODIHR's mandate to review hate crime legislation, and did not consider using ODIHR in their advocacy efforts to change the law.¹⁶⁹ Because they did not know about ODIHR's mandate to review the law, they did not, for example, consider approaching the Commissioner for Human Rights, the MoJ, or the parliament, in order to propose that one of those institutions send a letter to ODIHR requesting the law review.

Such a request was eventually sent to ODIHR by the Chair of the Subcommittee where the draft amendments were proceeded in September 2015, just before the end of the term of the parliament. This was done on the suggestion of one of the NGOs, whose representative heard about the possibility of conducting a law review in the course of this research. As a result, ODIHR has conducted a review of hate crime laws in Poland (ODIHR 2015). The review, however, was published after the works on the draft amendments 340, 2357 and 1078 were discontinued due to the end of term of the Parliament. While the review has not been as effective an instrument as it could have been had. it reached legislators on time, it is still useful. For example, it helped inform the explanatory memorandum of a new draft amendment 878 (Nowoczesna 2016), submitted by the Modern (*Nowoczesna*) party in July 2016. Finally, it also helped in the process of evaluation of the current efforts to change the law – particularly, it pointed out the need reconsider the current approach and consider other legislative options, particularly involving a general penalty enhancement.

8.6 CONCLUSION

The chapter aimed to analyse how the boomerang pattern of advocacy works in Poland in the context of anti-LGB hate crime and how effective this strategy is. The chapter provides empirical evidence that the Polish anti-hate crime movement has made the use of the international and regional human rights monitoring and review systems an integral part of its advocacy strategies. The analysis of the government's stances to international recommendations shows that the government accepts recommendations on hate crime (including that based on sexual orientation), but not on the rights of same-sex couples. This is an original finding and confirms the argument that the latter issue is more charged and less acceptable for the government. From the perspective of framing strategies, it suggests that linking the issue of anti-LGB violence with racist and xenophobic violence is more effective than framing it as part of LGBT rights. This is because some framework to counter racism and xenophobia is already in place and the issue is recognized as a valid policy problem. On the other hand, some LGBT rights, particularly claims for legal recognition of same-sex unions, are still strongly contested.

¹⁶⁹ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-05-LGBT-rights-activist2-2015-08-19, Interview-09-anti-racism-activist1-2015-08-26, Interview-14-anti-racism-activist2-2015-09-25, Interview-15-trans-rights-activist2-2015-10-08.

In 2012, the Polish government pledged to introduce laws proscribing anti-LGB hate crime and hate speech, but failed to do so. This shows that, despite *taking up commitments*, the government was never fully *committed* to proscribing anti-LGB hate crime and speech. Moreover, it suggests that there are powerful domestic norms operating against adopting such laws. I consider this problem in Chapter 9.

DRAWING THE LINE AT SEXUAL ORIENTATION: THE HATE CRIME LAW DEBATE IN THE POLISH PARLIAMENT

9.1 INTRODUCTION

CHAPTERS 7 and 8 present strategies used by the Polish LGBT movement in hate crime advocacy, focusing on how hate crime is defined and framed as a legitimate policy issue. This chapter, in turn, will analyse the counter-arguments used to delegitimize attempts to add new protected statuses to hate speech and hate crime laws by key political decision makers. Through the analysis of texts related to the legislative process, the chapter will present frames used by conservative speakers to legitimize their own positions and delegitimize the human rights/equality and European Union/democracy reasoning used by the proponents of anti-LGB hate crime laws. As such, the chapter responds to research questions RQ(1), RQ(2) and RQ(5).

The constructionist (institutionalist) branch of Europeanization predicts EU norm adoption if 'domestic rules are absent or have become delegitimized' and if EU norms resonate domestically (Schimmelfennig and Sedelmeier 2005b:19). Conversely, EU norms are less likely to be accepted if they clash with 'domestic rules that enjoy high and consensual domestic legitimacy, perhaps as symbols of the national political culture' (Schimmelfennig and Sedelmeier 2005b:20). The social learning model (e.g. particularly the presence/lack of domestic norms) helps us understand the different outcomes of social movement mobilization (or internationalization of hate crime) in criminal law on the one hand and in policing and monitoring on the other (see Chapter 10).

The chapter starts with an analysis of the existing provisions proscribing hate speech and bigoted violence in Poland. I argue that victims of anti-LGB hate crimes do not benefit from the same level of protection as victims of racist crimes, for which penalties are higher and the mode of prosecution more favourable. The next section describes official works on the amendment of the law until 2015. Building upon analysis of the political factors in Chapter 5, I argue that the government, despite taking up commitments, has not been committed to changing the law. The government and parliamentary work on the issue has been a façade (which is still more than work on the registered partnership bills, on which the Sejm refused to debate). The next section considers the arguments used by the MoJ, as well as the Supreme Court, the Prosecutor General and criminal law scholars to delegitimize the draft amendments. The arguments are divided into

four categories: historicism; criminal law doctrine, freedom of speech and ideology. I argue that LGB people are denied the enhanced protection because they fail to meet the standards of the ideal victim of hate crime laws, which, in Poland, is the same as the ideal victim of international crimes and because conservative politicians are unsympathetic to laws 'legitimizing' homosexuality. I argue that most reasons against adding new grounds are technical and could be overcome if there was a political will to do so.

9.2 EXISTING LEGAL PROVISIONS

To understand why the LGBT movement and international human rights bodies have been challenging the existing hate speech and hate crime legal framework for leaving out important groups, there is a need to analyse the current hate speech and hate crime provisions in Poland. The analysis below focuses on the types of laws, kinds of offences covered, and victim categories selected for protection. The origins of the provisions are analysed in the section about historicism below.

The Polish Criminal Code (Sejm 1997) contains substantive offences proscribing both hate-motivated violence and speech acts. Regarding the former, Article 119§1 penalizes unlawful threats and violence on the grounds of national, ethnic, racial, religious belonging and political views.¹⁷⁰ Article 257§1 penalizes minor physical assaults ('breach of bodily integrity') motivated by bias based on national, ethnic, racial, or religious belonging. Regarding the latter, Article 256§1 prohibits promoting a fascist or other totalitarian system of state or inciting hatred based on national, ethnic, racial, or religious differences, or for reason of the lack of any religious denomination. Article 257§1 prohibits public insulting of a group or an individual because of national, ethnic, racial, or religious belonging. Article 126a penalizes incitement to unlawful threats and violence based on national, ethnic, racial, religious belonging or political views. In addition to the Criminal Code's provisions, Article 55 of the Law on the National Remembrance Institute (Sejm 1998) proscribes the denial of crimes committed by totalitarian regimes (for example, genocide denial).

Articles 119 and 257 provide for harsher sentences for threats, insults and physical assaults based on racism and xenophobia than comparable common (base) crimes. For example, Article 257§1 provides for up to three years for 'breaching bodily integrity' because of someone's ethnic or national belonging, race or religion. In contrast, the basic offence of 'breaching bodily integrity' (Article 217) may result in a fine, limitation of liberty or up to a year of imprisonment. In addition to the difference in penalty, there is a difference in the mode of prosecution. Crimes recognized in Articles 119, 256 and 257 are prosecuted publicly (*ex officio*), i.e. prosecutions of these offences are not dependent on reports or accusations made by victims. Conversely, the basic form of the offence of insult or breach of bodily integrity require the victim to make a private

¹⁷⁰ The text of the provisions mentioned in this paragraph can be found in the Appendix A.

complaint. This is because certain offences affecting personal dignity do not trigger automatic public prosecution, but instead depend on the victim to take legal action if they feel that their rights were violated. In such cases, the bill of indictment must be written and then supported in court by the victim. This involves costs, time and legal knowledge, and may discourage the victim from pressing charges (Rzepliński 2008:36).

Articles 119, 256 and 257 have closed catalogues of protected statuses. These include: race, national or ethnic belonging, religion (or lack thereof) and (in Article 119) political convictions. The enumeration means that the provisions cannot be used to prosecute cases not involving racism or xenophobia, i.e. non-bias crimes or bias crimes based on other motivations. In addition, in the case of speech acts, such as threats, insults or incitement motivated by racism and xenophobia, groups are also protected, as opposed to base offences. For example, if someone posts offensive antisemitic comments online, the proceedings may be initiated without an individual victim being identified, which would not be the case if the comments were homophobic (Ruch Palikota 2012:12–14).

The Criminal Code does not contain a general penalty enhancement for crimes committed with bias motive. This has consequences for the types of crimes and bias motivations that that may trigger enhanced penalties. First, since there are no penalty enhancements for other types of offences, even if crimes such as homicide, arson, damage to property or theft are based on the victim's national, ethnic or religious belonging, the motivation will not be reflected in the legal qualification, unless the crime can be considered jointly with any of the above provisions (Brzezińska and Słubik 2016:12). This would be the case, for example, of racist threats painted on the door of a Chechen family. Second, the closed catalogue of protected grounds in Articles 119, 256 and 257 and the lack of penalty top-ups for other bias motivations means that crimes motivated by bias based on sexual orientation do not attract higher penalties.¹⁷¹

Theoretically, bias based on sexual orientation *may* be considered by the courts as an aggravating circumstance when deciding on punishment based on general sentencing principles. In practice, however, it has been very rare (Jabłońska and Knut 2012:140). Also theoretically, prosecutors have the power to decide to prosecute publicly cases that would otherwise depend on the accusation made by victims. This could happen, for example, if the victim is vulnerable, or the prosecutor otherwise believes that it is in the public interest to step in. The use of this procedure for homophobic hate crime has, however, been rare, as 'public interest' is considered narrowly. For example, in 2014, a prosecutor in Warsaw failed to see public interest in joining the case in which an openly gay politician was slapped in the face (es 2014).

¹⁷¹ Neither are there any official guidelines for prosecutors to press for higher charges (as is the case in the Netherlands; see Chapter 5).

Summing up, those experiencing racially- and religiously-motivated insults and physical assaults are selected for enhanced protection purportedly offered by not only higher penalties, but also a more favourable mode of prosecution. Other strands of hate crime, including that based on sexual orientation, are treated as ordinary crimes, and the bias is not reflected in the legal qualification. Moreover, while the law recognizes incitement to hatred based on racism and xenophobia as a specific crime, incitement to hatred based on sexual orientation is not mentioned in the Criminal Code. This creates a hierarchy of victims, which the legislative initiatives presented in Chapter 7 and international recommendations presented in Chapter 8 attempt to challenge. While the government pledged to change the law, the efforts to this end have been limited. I consider them below.

9.3 OFFICIAL WORK ON THE AMENDMENT OF HATE CRIME LAWS

International recommendations to recognize hate speech and hate crime based on sexual orientation have been appearing since 2007 (see Chapter 8). The government has committed itself on the international arena to amending the law in the 2nd cycle of the Universal Periodic Review. Pursuant to the commitment, the government included the issue of anti-LGBT hate crime in its *National Action Program for Equal Treatment 2013-2016* (PRdRT 2013a). The draft *Programme* (PRdRT 2013b) was published in February 2013 and opened for consultation with, *inter alia*, civil society organizations (SPR 2013b). It included, *inter alia*, an objective to amend the Articles 119, 256 and 257 of the Criminal Code by adding these grounds. The MoJ was put in charge of the implementation, in collaboration with the Government Plenipotentiary for Equal Treatment. The deadline for the implementation was set for 2014.

Following the consultation period, the *Programme's* assessment of the situation as well as the objectives were watered down (SPR 2013). The objective to amend the Criminal Code was substituted with a possibility of amendment, subject to the results of an 'analysis of the legal order, including criminal law, for appropriate organizational or legislative changes' (PRdRT 2013a:94). The deadline for implementation remained 2014. The status report for 2014 informs that the MoJ reviewed the draft amendments attempting to add new grounds to Articles 119, 256 and 257 negatively (see explanation below), but is still in favour of 'introducing a special type of a discriminatory crime based on disability, sexual orientation or gender identity of the victim' (PRdRT 2015:87). It further states that the Government Plenipotentiary for Equal Treatment disagrees with the MoJ and prompted the MoJ twice (in 2014 and 2015) to 'undertake legislative works resulting in penalization of 'hate speech' based on, *inter alia*, sex, disability, age, sexual orientation and gender identity' (PRdRT 2015:88). The status report for 2015 (prepared already after the election of the PiS government) omits the realization of the objective altogether (PRdRT 2017).

As mentioned above, the MoJ's opinion on the draft amendments 340 (Ruch Palikota 2012), 2357 (SLD 2014) and 1078 (PO 2012b) was negative (officially, due to the reasons presented below). Despite a declaration of support for 'introducing a special type of a discriminatory crime based on disability, sexual orientation or gender identity of the victim' (PRdRT 2015:87), and being charged with it in the *Programme*, the MoJ remained passive, and has not started working on its own amendment that would lead to penalization of new types of hate crimes. Neither were the existing draft amendments 340 (Ruch Palikota 2012), 2357 (SLD 2014) and 1078 (PO 2012b) further worked on in the Sejm. Having been forwarded to the subcommittee charged with the amendment of the criminal law, they stayed there until the end of the term of the parliament, sharing the fate of draft amendment 4253 (SLD 2011b). Before then, the subcommittee met twice only (in 2014 and 2015), but did not agree on anything substantial.

Instead of initiating the drafting of a new proposal, the only action undertaken by the MoJ with regard to the change of the law was requesting, in 2015, an additional expert opinion on draft amendments 340 (Ruch Palikota 2012), 2357 (SLD 2014) and 1078 (PO 2012b). The expert report, prepared by criminal law scholars Kulik and Budyn-Kulik (2015), also reviewed the draft amendments negatively, repeating the criticism expressed previously by the MoJ. According to a civil servant from the MoJ interviewed in this research, this provided the MoJ with an argument to drop (or further delay) the works on the issue.¹⁷² I consider the elements of the official critique of the draft amendments below.

9.4 CRITIQUE OF THE ATTEMPTS TO RECOGNIZE ANTI-LGB HATE SPEECH AND CRIME

Sponsors and supporters of the draft amendments 4253 (SLD 2011b), 340 (Ruch Palikota 2012), 383/2357 (SLD 2012, 2014) and 1078 (PO 2012b), including LGBT and mainstream human rights NGOs, opposition parties, the Commissioner for Human Rights and the Government Plenipotentiary for Equal Treatment presented arguments in favour, showing the inadequacy of the existing provisions, presenting statistical evidence, citing international commitments of Poland and emerging case law from the ECtHR. The frames used by these actors, particularly the human rights/equality and European Union/democracy frame, are analysed in Chapter 7.

Conversely, bodies such as the Minister of Justice, Prosecutor General and the Supreme Court, as well as conservative politicians, criticized the initiatives to change the law in written statements and during parliamentary debates. Their arguments frame the criticism of the draft amendments as questions of origins and rationale of the laws (history), legal certainty and other dogmatic aspects, freedom of speech and traditional values. I analyse these frames below.

¹⁷² Interview-16-MoJ-2015-10-08.

9.4.1 HISTORICAL ARGUMENTS

As discussed in Chapter 2, what we now call hate crime law in Europe often has roots in provisions enacted after WW2 (Goodey 2007). In that sense, laws proscribing racism and xenophobia, enacted to prevent genocide and threats to international security, are historicized, as they are based on *past* experience, rather than as a response to *ongoing* victimization. Glet (2009), Savelsberg and King (2005) and McGuire and Salter (2012) observe such historicism particularly in Germany. For example, Savelsberg and King (2005:579) argue that the law in that country is shaped by the cultural trauma of WW2, particularly 'the Holocaust, typically in the context of the destruction of the democratic state.' This results in 'coupling of minority and democracy protection,' impacting the types of offences and victim categories recognized in hate crime laws.

The atrocities of WW2 and the experiences of the subsequent totalitarian regime have shaped the laws aimed at protecting minorities (and their interpretation) in Poland as well. In one of the opening sentences of the opinion on the draft amendment 4253, the MoJ observes that '[o]ne cannot forget that the direct reason for separating the selected discriminatory crimes by the law maker were the tragic experiences of World War II' (Rada Ministrów 2011:3). The history frame, citing the origins of the laws and their rationale as a reason not to expand protection to new groups, is possibly the most popular argument used to delegitimize the draft amendments in the written opinions. I consider it in detail below.

As shown above, the Polish Criminal Code punishes propaganda of fascism and other totalitarian regimes, as well as threats, violence and incitement to hatred based on race, ethnic or national origin, religion and political affiliation. These provisions have their direct origin in the tragic events of WW2 and its immediate aftermath and have barely changed since then (Rzepliński 2008:36). Indeed, as Woiński (2014:156–57) shows, a decree criminalizing public expression of contempt based on national, ethnic, racial or religious belonging, and creating a special offence proscribing hate-motivated violence resulting in death, serious bodily harm or disrupting public order, was issued already in 1945. The Criminal Code 1969 (Sejm 1969) contained provisions criminalizing public propagation of fascism (Article 270); incitement to discord on the ground of national, ethnic, racial or religious differences (Article 272); as well as public insults and assaults based on religious (Article 193) or national, ethnic or racial (Article 274) belonging. In the current Criminal Code 1997 (Sejm 1997), Articles 256 and 257 correspond to similar provisions of the previous Code. Since then, the laws have not changed and, until 2010s, they have rarely been used (see Chapter 9).

The origins of the laws are visible in their location in the Criminal Code and presented in legal commentaries to the Criminal Code (Barczak-Oplustil et al. 2008; Fleming and Wojciechowska

2010) as decisive in interpreting the rationale of the law. This rationale is analysed below, as it forms the basis of the critique of the draft amendments.

Article 119 is located in the section penalizing crimes against peace, crimes against humanity and war crimes, the fact 'undoubtedly provides an indication as to the weight and character of the protected legal goods' (Sąd Najwyższy 2014:2). According to the MoJ, Article 119 targets '[b]ehaviours typically threatening the peaceful coexistence of people with different political or ideological attitudes, or belonging to a particular race, nationality, or ethnic group' (Rada Ministrów 2011:3). The Prosecutor General cites legal scholars, who see various goods as objects of protection. For example, according to Szewczyk (2008:26, cited in Prokurator Generalny 2012a:4), they involve 'humanity, i.e. the total of people on Earth, mankind. It is also the freedom of a man and international public order established by law'. Budyn-Kulik (2010:376, cited in Prokurator Generalny 2012a:4) argues that the Article protects 'freedom from coercion.' Fleming & Wojciechowska (2010:26 in Prokurator Generalny 2012a) see the object of protection as

. . . basic values and human rights and [rights of] communities, and most of all right to life and free development of individual and group differences existing on the national, racial religious, world view or political background (P. 4).

While legal commentaries on Article 119 tend to agree with each other, they reveal that some of the commentators are detached not only from scholarship on hate crime, but also from the practice of using the provisions that they comment on. In an extreme case, Hofmański (2016) asserts that

. . . the subject of protection are human rights (...) *during military actions*, as well as on the territories occupied and other grounds towards persons using international protection during military actions (P. 860; emphasis added).

According to this understanding, Article 119, which penalizes racist threats and violence, is not to be used during times of peace, but, rather, the law should be used during military conflicts to protect people using international protection. Such an interpretation, which is clearly grounded in the fact that the provision is located among war crimes, seems misguided for two reasons. First, there is nothing in Article 119 that would limit its use to the time of military actions only or even suggest so. What is more, it would mean that, for the past 20 years, police, prosecutors and courts have been using the provision incorrectly.

Articles 256 and 257 (dealing with fascist propaganda, incitement to hatred, insults and assaults), as well as the ban of genocide denial contained in the Act on the Institute of National

Remembrance (Sejm 1998), also have a clear historical origin. They are born from the 'Never again!' movement after WW2. The movement, as the Council of Europe writes (2011:74), aimed at preventing 'history repeating itself at all costs'. The ban of fascist propaganda and incitement to hatred can also be traced to the efforts of the Communist governments, who not only feared a resurgence of fascism, but also wanted to use the provisions to limit freedom of speech (Puchalska 2013:34).

The justification for higher penalties for public insult and physical assault based on racism and xenophobia, compared to crimes without such motivation, is in the fact that the former not only threaten the person's personal goods, but, in addition, they threaten public order and 'invoke social unrest, thus targeting a good of a common character which is public order' (Rada Ministrów 2011:3). This means that the legislation recognizes the additional harms caused by racist and xenophobic hate crimes, which affect not only immediate victims, but also the society as a whole.

The historical origins of the laws have implications for hate crime advocacy and protection of LGB people from violence. The historicism of the law makes it largely immune to the work of social movements looking to expand the protection to other commonly victimized groups. Origins and rationale of the laws are used to delegitimize the attempts to add sexual orientation and other terms as protected grounds to the current provisions. This argument has, however, two facets. The circumstances of their enactment (Never Again!) may indeed be a valid reason why adding new grounds and reinterpreting provisions dating back many decades is troublesome. While adding new categories seems like an easy thing to do, it 'erodes the legitimacy' of laws enacted to protect national minorities, and 'leaves legal practitioners on the ice,' to use the words of Goodall (2013:221). The above argument, however, does not seem to be a reason why a motivation based on sexual orientation (or other new grounds) should not lead to penalty top-ups at all. Offences aggravated by bias based on sexual orientation, gender identity or disability do not need to be contained in the same provisions as racist and xenophobic crimes and may be placed in other parts of the Criminal Code.¹⁷³ An idea that the new types of hate crime could be recognized elsewhere in the Criminal Code was expressed by Deputy Minister for Justice Jerzy Kozdroń in 2014. He suggested that 'a correctly construed provision should be located in developed Chapter XXVII: Crimes against honour and bodily inviolability' (Sejm 2014:128).

While the above analysis shows that criminal law provisions aimed at protecting minorities in Poland originate from the country's experiences during and after WW2, they also implement the international human rights framework (which has also been influenced by the plight of national, ethnic and religious minorities). In particular, they implement the provisions of the ICCPR (UN

¹⁷³ This is the case, for example, in England and Wales, where racially and religiously-aggravated offences are separate from provisions providing penalty enhancements for crimes motivated by hostility based on sexual orientation, transgender identity or disability. Excerpts of hate crime laws from the OSCE participating states are available at <http://www.legislationline.org/topics/subtopic/79/topic/4> (retrieved 12 October 2017).

General Assembly 1966), but more recent ethnic conflicts also impacted the Polish criminal law. Article 118a of the Criminal Code proscribes, *inter alia*, war rape, ethnic cleansing and persecutions based on political, racial, national, ethnic, cultural, religious, world-view or gender grounds. According to the MoJ, the addition of war rape and recognition of gender as a protected ground in this provision follows the jurisprudence of the International Criminal Court, which added gender and rape to its definition of crime against humanity following the mass violence in Bosnia and Herzegovina and in Rwanda (Królikowski in Sejm 2012:218).

The focus of the international (and Polish) legal discourse on the inhumanely abused national, ethnic and religious minorities (instead of a broader term of 'protected categories' as the international hate crime concept proposes) creates a hierarchy of offences. While various groups may experience bias-motivated behaviours, only acts which threaten the 'peaceful interpersonal coexistence' and 'public order' (Rada Ministrów 2011:3) warrant enhanced penalties. In this sense, the 'ideal victim' in hate crime laws in Poland is construed similarly to the ideal victim of international crimes (Van Wijk 2013:159). That, in turn, is similar to the archetype of the 'ideal victim' described by Christie (1986). Van Wijk (2013) argues, however, that, while 'the characteristics of the ideal victim of genocide, crimes against humanity and war crimes largely overlap with the ideal victim of conventional crimes',

... victims of international crimes face much more difficulty in publicizing their fate and consequently 'benefiting' from their status as victim. It is only when potential status givers are aware of the victims' existence that the victim status can be granted (P. 159).

In this sense, the ideal victims of international crimes are similar to the ideal victims of hate crime in that recognition depends 'upon the capacity of victim groups to engender compassionate thinking that helps reconfigure perceptions of them as dangerous, illegitimate or inferior Others' (Mason 2014a:75).

In Poland, the notion of an ideal victim of hate crime does not include sexual or gender minorities, or people attacked because of their disability. For example, Stanisław Pięta MP argued, during the debate on the draft amendment 340, that hate crimes against people with disabilities do not exist (in Sejm 2012:223). The Supreme Court (2011a:2) wondered if 'threats to a child because of ADHD syndrome should constitute an offence from Article 119 para 1 located in the chapter with crimes against peace, humanity and war crimes'. The above quotes show that incidents based on someone's learning disability, or crimes where children are targeted, or crimes where no blood is spilt, are not only 'not fitting' in Article 119 (which might be understandable, given the object of protection and origins), but are even trivialized. While, indeed, certain types of hate crime that only now emerge in public discourse may not fit in old categories (invented for different purposes decades ago), it is not an argument that, morally speaking, disability hate crime is less worthy of recognition. Rather, it is a rationale for not including a category of bias-motivated act

that is distant from the kind of scenario targeted by those provisions. Explaining this position of the MoJ, an MoJ employee interviewed in this research said that the MoJ is willing to implement recommendations (see Chapter 8), but also wants to have 'a logical and coherent' Criminal Code.¹⁷⁴ According to this person, the problem with the draft amendments was in 'mass adding' of new protected grounds to already existing provisions.

But while the example used by the Supreme Court may be trivial, it shows that victimization of people perceived to be gay, or people with disabilities, who were also persecuted by the Nazi regime (Council of Europe 2011:74; Fioranelli et al. 2017; Plant 1988), does not exist in the collective memory. While Fioranelli et al. (Fioranelli et al. 2017:1) observe that the victimhood of groups other than European Jews is little known, during the parliamentary debate on the draft amendment 340 Robert Biedroń MP argued that it is deliberately ignored. He said, addressing another MP:

. . . you're well aware that disabled people were one of the categories of prisoners, homosexual people were a category of prisoners... Only we have left it unsaid for cultural, social reasons (Sejm 2012:219).

Commenting on those reasons, Małgorzata Sekuła–Szmajdzińska MP, asked:

Does that mean that this conditioning will remain forever and detached from the reality of today's life? What about the attack on Robert Biedroń MP? After all this is a form of aggression caused simply by belonging to a group absolutely not accepted by the assailant, vulnerable to violence today (Sejm 2014:121).

The absence from the collective memory of a trauma (see Alexander et al. 2004 for the description of cultural trauma) and different patterns of victimization result in the fact that victimization of LGB people and people with disabilities is not seen as equally serious as victimization of national or religious groups.

Summing up, technical problems related with the origins of current provisions and their placement in the Criminal Code are presented by political and judicial authorities as an argument against adding new protected grounds to hate crime laws. In the context of hate crime scholarship, while authors (for example, Garland and Chakraborti 2012; Goodey 2007) observed before that national circumstances impact the shape and focus of hate crime laws, the above empirical evidence suggests that Poland's history is actively used to delegitimize attempts to adopt the international hate crime model.

¹⁷⁴ Interview-16-MoJ-2015-10-08.

9.4.2 ARGUMENTS RELATED TO THE CRIMINAL LAW DOCTRINE

Apart from the above arguments about the origins and rationale of the Articles 119, 256 and 257, the MoJ, the Prosecutor General and the Supreme Court provide a list of doctrinal reasons to delegitimize the draft amendments. This critique revolves around basic criminal law principles and values, particularly legal certainty, foreseeability and specificity of criminal provisions, as well as equality under the law.

Legal certainty is one of the most important principles of criminal law (Ashworth 2009:37). Writing about hate crime victims from the perspective of the principles of the criminal law, Bakalis (2017) argues:

The decision to extend hate crime provisions needs to be founded on a clear justification that gives due regard to the theoretical underpinnings of the criminal law, and must correlate with the function and purpose of hate crime legislation (P. 2).

Bakalis (2017) argues that the principled way of selecting victim categories could be the human rights approach, same as in the anti-discrimination legislation. According to her, this framework can provide a firm foundation for the formulation of victim categories.

Using similar logic, and observant of the proliferation of hate crime laws in Europe, authors of the draft amendments believe that the inclusion of race, ethnicity, religion, sexual orientation, gender identity, gender, age and disability in the broad anti-discrimination framework (including hate speech and hate crime law) constitutes a 'certain international standard' (Biedroń, in Sejm 2012:219). In their opinion, the enumeration of specific victim categories leaves no doubt as to who is protected (legal certainty), while the inclusion of most common bias motivations ensures that the selection is justified and not arbitrary (equality). However, both the legal certainty and equality elements are contested.

The first element, legal certainty, has two aspects to it. One is that, according to some critics, the notions of sexual orientation, gender identity and disability are vague and undefined. The second aspect concerns the possibility of having an open-ended catalogue.

Considering sexual orientation and gender identity as possible hate crime grounds, the MoJ (Rada Ministrów 2012:4) argues that they are too vague to be added, because they originate from soft international law instruments, such as the UN and CoE recommendations (see chapter 6 and 7). According to the MoJ, as the draft amendments do not define sexual orientation or gender identity, it would be too difficult to ensure that these characteristics will be understood universally across the criminal justice system.¹⁷⁵ Indeed, the Polish legal system does not contain any

¹⁷⁵ While this dissertation's period of analysis ends in 2015, it is worth noting that, in 2016, the deputy Prosecutor General submitted, *inter alia*, that the lack of definition of the notion of sexual orientation could

definition of sexual orientation or gender identity. Apart from the lack of definition, the Prosecutor General (2012b:7) and authors of the expertise for the MoJ (Kulik and Budyn-Kulik 2015:9) problematize gender identity, because this notion does not exist in the legal framework in Poland at all. Thus, they fear that adding a category that is both undefined and unknown would lead to uncertainty as to how and when to use the law.

During the parliamentary debates, some MPs also undermined the legitimacy of the term 'sexual orientation'. Stanisław Pięta MP said:

. . . Sexual orientation is a verbal construction that is not reflective of reality, internally contradictory and completely ideological. Separating sexual orientations is an attempt to place a sign of equality between what is a norm, nature and order and what is a deviation, a freak of nature and destruction of order' (in Sejm 2011:79).

Concerning disability as a protected ground, the Supreme Court (2011a) argues against adding it to hate crime laws, complaining that '(...) it is not, however, clear, how this ability should be understood: (physical? mental? social? professional? intellectual?).' Indeed, as Zadrożny et al. (2015:10) observe, while various legal acts in Poland explain how they understand disability, '[t]here is no single universally applicable definition of disability in Polish law'. As a result, critics of the draft amendments fear that the undefined categories might not be interpreted universally by legal practitioners.¹⁷⁶

The second aspect of legal certainty is the question whether the catalogue of protected statuses should be exclusive (closed list of predefined characteristics) or inclusive, which allows to extend protection to possibly unlimited number of categories. In other terms, this is a question whether the decision who is protected under hate crime laws is a political or judicial one.

International anti-discrimination provisions, as well as EU equality laws use open catalogues of protected ground. The open catalogue in the European Convention for Human Rights allows the ECtHR to judge cases where sexual orientation discrimination was concerned (ECtHR 2016). The Article 32 of the Polish Constitution 1997 does not enumerate protected statuses, stating simply that '[n]o one can be discriminated against in political, social or economic life for any reason.' In practice, this institutes an open catalogue.¹⁷⁷ Yet, while an open catalogue is allowed in equality

lead to extending the protection to paedophiles in the future (Prokurator Generalny 2016:12–13). While the cases from Australia reported by Mason (2014b) were not referenced, this is an argument for inclusion of clear definitions in the future legislative initiatives.

¹⁷⁶ On the other hand, the lack of definitions has not precluded the inclusion of such contested terms as 'ethnic or racial belonging' in the Criminal Code. Also, neither the 'intellectual impairment' nor 'mental disease', found in several places in the Code, are defined.

¹⁷⁷ According to Mac (2001), the initial draft of the Article 32 contained a catalogue of protected grounds inclusive of sexual orientation. The Catholic Church and conservative politicians, including the then president Lech Wałęsa, criticized such solution, arguing that it would threaten family and moral upbringing of children. This suggests the morality politics pattern, which is also present in debates about hate crime laws (see below).

laws, criminal legislation cannot be imprecise. This is because criminal law is the last resort (*ultima ratio*). Authors of the opinion issued on the request of the MoJ (Kulik and Budyn-Kulik 2015) argue:

Criminal law protection should be in the Polish legal order treated as a sort of last resort when other means of protection fail. For this reason, criteria of criminalization should be selected cautiously. If protection realized by other means is sufficient it should be realized every time it is possible (P. 7–8).

Mindful of the need to be as precise as possible, authors of the draft amendments do not include an open catalogue, putting a full stop where equality laws (and hate crime laws in some states) add ‘and other similar grounds’. But while this should be applauded by the guardians of the legal doctrine, selecting sexual orientation, gender identity, gender, age and disability for enhanced protection is seen as ‘arbitrary’ and harming for those socially disadvantaged and vulnerable groups which are left out. For example, authors of the expertise prepared for the MoJ (Kulik and Budyn-Kulik 2015:6) believe that adding selected grounds only ‘can be seen as leading to discrimination of certain social groups, which also meet with exclusion, but are not enumerated in the draft amendments’. They believe that people characterized by ‘a disease (AIDS, mental), addiction, obesity, homelessness, joblessness, childlessness or having many children’ could suffer from being left out. The Supreme Court argues that criminal law should avoid enumerations, fearing that adding new protected grounds will lead to amending the law ‘in infinity,’ which undermines stability of the legal system. Moreover, according to the Court, instead of casuistry (enumerating possible cases), an abstract, but clearly delineated term (‘the lowest common denominator’) should be found (Sąd Najwyższy 2012).

The draft amendment 1078 (PO 2012b), submitted by a group of MPs from the PO party, is believed to be a response to the critique of the Supreme Court (Kozdroń, in Sejm 2013:163). Instead of enumerating many categories (thus being casuistic), the draft amendment proposed that protected characteristics include ‘national, ethnic, racial, political or *social affiliation* or their *personal characteristics, natural or acquired*, or beliefs (emphasis added).’ The inclusion of the expressions ‘social affiliation’ and ‘natural or acquired personal characteristics’ was an attempt to ensure that

. . . no one under the law can be subjected to discrimination, including to violence, threat, insult, or so-called hate speech, on the ground of his/her natural features, such as, e.g. gender, health, sexual orientation or disability (PO 2012b:3).

Opinions about the draft amendment 1078 were almost uniformly negative. The Prosecutor General saw the creation of an open catalogue as a realization of the general prohibition of discrimination on any ground (Prokurator Generalny 2013:2), but worried that the wording of the draft amendment is still ‘broad and vague’. The Supreme Court (2013:4) applauded the attempt

to avoid 'unallowable casuistry,' but did not recommend the draft amendment for further consideration. Authors of the opinion issued for the MoJ (Kulik and Budyn-Kulik 2015:3) believe that the wording in the draft amendment 'blurs the border between banned and allowed behaviours, undermining one of the fundamental (constitutional) principles of criminal law - specificity of the criminal provision'. Also the Helsinki Foundation for Human Rights (2012) and ODIHR (2015:14) criticized the draft amendment. ODIHR (2015:14) argued that, '[b]y leaving a wide margin of interpretation to public authorities, the wording of amended Article 256 para 1 of the Criminal Code appears too vague to meet the requirements of legal certainty, foreseeability and specificity of the criminal law'.

Parliamentarians from both left and right-wing parties also hammered the draft amendment. Beata Kempa MP called the draft amendment 'a legal monstrosity' (in Sejm 2013:162). Zbigniew Babalski MP asked (in Sejm 2013:166): 'How a judge in Gdańsk, Olsztyn or Katowice, or maybe in Poznań, will define what acquired and natural features are?' Krystyna Pawłowicz MP argued:

The law is for defining grounds for punishment (...). It should not only say that something will be punished, it should define it and I need to know beforehand, taking a stance, for what I will and for what I won't be punished (in Sejm 2013:159).

Robert Biedroń MP, one of the sponsors of the draft amendment 340 (Ruch Palikota 2012), said: '... rarely, extremely rarely, I agree with Professor Pawłowicz, but in this regard – complete agreement' (in Sejm 2013:160).

In criticizing the draft amendment 1078, Polish legislators, the Supreme Court, NGOs and ODIHR share the view expressed by Bakalis (2017:4), who warns against counting on judges to define who deserves protection under hate crime laws. Evidence from other countries also shows that leaving the decision to judges may be problematic. For example, in Sweden, Granström (in Godzisz and Flett 2016) observes that while sexual orientation is listed in the catalogue of protected grounds, transgender hate crime is understood to fall under 'other similar circumstances'. Conversely, however, there are difficulties in prosecuting disablist hate crimes under this provision.

The *ultima ratio* principle means that criminal law should be used to address unwanted phenomena only if less draconian ways of controlling it (e.g. civil and administrative law) are insufficient. Critics of the draft amendments ignore the needs analysis provided in the explanatory memorandum, arguing that there is no justification for enhanced protection from homophobia, transphobia, disablism, ageism and misogyny. This shows that some of the institutions responsible for criminal justice, particularly the MoJ – are unwilling to engage in real dialogue with NGOs and hear their arguments about the inadequacy of the current provisions. Instead, they use legal rhetoric to delegitimize the attempts to improve protection of (particularly sexual orientation) hate crime victims.

The above suggests that, behind the legal rhetoric of the arguments of the MoJ, repeated in the expertise prepared by Kulik and Budyn-Kulik (2015), there is a deep conviction that victims of sexual orientation-based crime do not deserve the same status as victims of racist crimes. They are not the ideal victim: their victimization is not associated with inhumane treatment of minorities in the history of the 20th century; homophobic hate crime does not threaten democracy and peace. The evidence of the legislative lacuna, as well as evidence of high levels of victimization, is ignored.

While the inhumane abuse of national and ethnic minorities can justify their recognition in some criminal laws, such as provisions proscribing ethnic cleansing, genocide and genocide denial, it should not be an obstacle in accessing justice by victims of sexual orientation hate crime. As McGuire and Salter (2012:239) observe in the context of Germany, '[w]hereas the historical context renders such differentiations legitimate in the very specific area of genocide denial, this surely cannot be held to apply more generally.'

9.4.3 ARGUMENTS RELATED TO THE FREEDOM OF SPEECH

The requirement of maximum precision in drafting criminal laws is connected with one more argument used by critics of the draft amendments. In their opinions, several constitutional bodies warned that fiddling with hate speech provisions might interfere with the freedom of expression. For example, the Supreme Court (2011a) submitted that 'the law maker needs to be maximally precise because this provision [Article 256] refers directly to the sphere of the freedom of speech as a constitutional value establishing its impassable borders'.

The issue of freedom of expression was also salient during parliamentary debates. The authors of the draft amendments were accused of attempting to limit the freedom of expression, particularly the possibility of expressing the conservative critique of homosexuality. For example, Marek Ast MP asked: 'Why do you want to limit freedom of speech in Poland using the Criminal Code?' (in Sejm 2012:216). Two years later he went on to say that the draft amendments are 'about creating a situation where it will be impossible to criticize LGBT environments from traditional positions, so this is about limiting public discourse' (in Sejm 2014:122).

Authors of the draft amendments counter that expanding the catalogue of protected grounds infringes on the freedom of speech. They argue that the freedom of speech is not an absolute right, and that it should not allow for 'insulting whole social groups or threatening their representatives' (SLD 2014:37). Also some Polish scholars argue that current provisions are constitutional (Wieruszewski et al. 2010; Woiński 2012). This argument is backed by case law, as judges tend to be restrictive when using hate speech provisions (Kudyba 2015).

Nevertheless, the argument that the draft amendments curb freedom of speech is not only rhetorical. In fact, the Supreme Court (2012:2) suggests that 'already in the current form of the

Article 256 it is not obvious if it fulfils all requirements of criminalization'. This point is raised by some civil society organizations, even those involved in hate crime advocacy. For example, Amnesty International (2015b) points out in the report about hate crime in Poland that

. . . criminalization is a disproportionate restriction on all forms of expression, including discriminatory expression, which do not reach the threshold of intent of 'advocacy of hatred that constitute incitement to discrimination, hostility and violence', established by Article 20.2 of the ICCPR (P. 15).

While the question as to whether the proposed amendments (and the current law) are constitutional remains open, what is clear is that conservative speakers see the attempts to criminalize homophobic hate speech as curbing their freedom to criticize homosexuality and frame it as deviant and threatening. These groups see the attempts to add sexual orientation to hate speech provisions as part of a well-planned strategy. Politicians form a mental bridge between the two issues and are concerned that criminalization of homophobic hate speech may land them in jail for expressing negative opinions about homosexuality and same-sex marriage. For example, Stanisław Pięta MP said that the proposed legislation 'would be used like a gag silencing the critics of gay propaganda,' and that it would be 'a gay stick for normal people who are not afraid to defend religion, rights of family and good morals' (in Sejm 2011:79). Krystyna Pawłowicz MP considered if she could be in trouble for speaking her mind (in Sejm 2013:159, see the section about doctrinal arguments above). Michał Królikowski, the then deputy MoJ, asked: 'But why should we introduce a Trojan horse to the Criminal Code?' (in Bodnar et al. 2014). Minister Królikowski's 'Trojan horse' exemplifies the fear that, once the conservative critique is shut down, the gate for further advancement of sexual minorities would open. This, in turn, is seen as a threat to 'normality', 'religion, family rights and good morals' (Pięta in Sejm 2011:79). This theme is analysed below.

9.4.4 IDEOLOGICAL ARGUMENTS

In Chapter 7, I present evidence that discussions about hate crime in Poland follow the pattern of morality politics, as homosexuality is linked by conservative speakers with deviancy and threat. The problem is not anti-LGB hate crime, but the fact that some 'people speak about their sexual inclinations or preferences on floats driving through Warsaw' (Pięta in Sejm 2012:223). In the discourse of conservative speakers, LGBT people are deviant for bringing up their sexuality in public, i.e. transgressing the boundary between private and public.

Another form of the argument about blurring the private/public divide is the 'false concern' argument, where a conservative speaker denounces discrimination, but sees the solution to the problem of homophobia not in emancipation and policy measures, but in keeping sexuality 'to oneself'. Such arguments have commonly been used in the debates about hate crime. For

example, the MoJ (MS 2009:4) argues that 'the sphere of sex life, regardless of sexual or gender identity, is a sphere so intimate' that it is justified to leave the decision to the victim if they want to make a complaint about a homophobic hate crime. According to the MoJ, the change of the mode of prosecution from private to public would force the victim to disclose their sexual orientation even against their will. This, in turn, might have negative consequences for the victim's private life and result in their secondary victimization.

While this argumentation is framed in criminal law terms, it is clearly grounded in the assumption that sexual orientation belongs in the private and should not be made a political issue.¹⁷⁸ The quote from the Joanna Kluzik-Rostkowska, Government Plenipotentiary responsible for equality between 2005 and 2007, is representative of this attitude:

The sexuality of every human being should be treated as a private matter, respecting his dignity. On the other hand, I am not convinced that the inclusion of the problem in the political context helps people discriminated against because of sexual orientation (cited in Biedroń 2009:15).

LGBT activists refute statements that it is better for victims to stay quiet or to use the private mode of prosecution as 'downright false' (KPH 2009). According to KPH (2009), the argument that victims should be free to choose whether to initiate criminal proceedings 'de facto means shifting on them the responsibility for lack of reaction of the state and its organs for more and more daring and widespread manifestations of homophobic behaviours'.

9.5 CONCLUSION

The aim of this chapter was to analyse how the Ministry of Justice and other constitutional bodies frame their critique of attempts to add sexual orientation to hate crime laws. As such, the chapter responds to research questions RQ(1), RQ(2) and RQ(5).

The empirical evidence presented here suggests that the ideal victim of the Polish hate crime law is a member of an ethnic or religious minority group which was historically subject to inhumane oppression. Precautions for the protection of minorities are linked with the precautions regarding peace and public order. As this understanding is shared across most of the legal scholar community and key political decision makers, the likelihood of adopting the international hate crime model seems low.

While most opponents of the draft amendments focus on technical aspects of legislation in their critique (such as the boundary between hate speech and free speech or place of provisions in

¹⁷⁸ See also the discussion about the compliance of attempts to monitor sexual orientation hate crime with laws aimed at protecting personal data in the next chapter.

the Criminal Code), part of the debate reflects patterns of morality politics present in other areas of LGBT rights. While technical arguments prevail in terms of quantity, they could be overcome if political will was there. But, as analysis of the political context (Chapter 5) and ideological arguments (Chapter 7) suggest, the political will was lacking.

The discussion, which started over a decade ago, has now stalled, as no new solutions appear.¹⁷⁹ The priority for the anti-hate crime movement should now be to reconcile these two positions. To be acceptable for criminal law theorists, the new solution should have, to use Bakalis's (2017:5) words, 'a robust and compelling basis in criminal law doctrine'. While limiting the catalogue of victim categories to grounds known from equality legislation is a good start, future draft amendments must respect the Polish jurisprudence and legislative technique. Otherwise, the changes will be contested, or if they pass, they will leave legal practitioners on ice. For example, concerns about the vagueness of the terms sexual orientation, gender identity and disability could easily be solved by defining them in the Criminal Code's vocabulary. Another thing that seems necessary is educating criminal law scholars and practitioners in Poland about hate crime. A priority for engaged academics should be to prepare a legal commentary on hate crime that would refute the clichés in the current commentaries on Articles 119, 256 and 257.

As one can see from the analysis in Chapters 5-9, there are many reasons which prevented the passage of laws proscribing homophobic violence between 2005 and 2015. Conversely, in the area of policy (e.g. police training and hate crime data collection), the claims made by the Polish LGBT movement found a more fertile ground. The reasons for that are analysed in the next chapter.

¹⁷⁹ The draft amendment 878 (Nowoczesna 2016), submitted after the elections in the new Sejm, is essentially the same as the draft amendment 340 (Ruch Palikota 2012), with the exception of the explanatory memorandum, which has been improved. As a footnote in history, I was one of the drafters of the explanatory memorandum.

CREEPING CHANGE: POLICING AND MONITORING OF ANTI-LGB HATE CRIME

'Simply, the needs came before the law'

Jacek Mazurczak, Ministry of Interior (iTV Sejm 2015)

10.1 INTRODUCTION

EMPIRICAL evidence presented in previous chapters suggests that there are multiple reasons why Poland does not recognize sexual orientation as a protected status in hate crime laws: the issue was highly politicized; there was a lack of genuine political will to combat homophobia among key political decision makers; hard international obligations and external conditioning were lacking; criminal law doctrine operated against norm adoption; the human rights/equality framing was inadequate. The combination of internal and external factors impeded the amendment of the Criminal Code.

While the LGBT movement was struggling to influence the legal framework, the international hate crime concept started to permeate the policy area, influencing how hate crime is policed, prosecuted and monitored. In the decade between 2005 and 2015, over 80,000 police officers have received basic hate-crime training, the numbers of hate crime cases recorded by the police have increased tenfold, and the police have started to monitor anti-LGB violence (MSWiA 2016; Policja.pl n.d.). How should such changes be understood, particularly in the light of the failed attempts to change the law?

This chapter looks at the question as to why Poland, a state which refused to legislate against sexual orientation hate crime, recognizes homophobia in some policing and prosecuting practices. First, I analyse the improvements in hate crime training and monitoring. I argue that these changes should be seen as a result of a set of internal and external factors, including: criticism for failing to tackle racism and xenophobia, particularly at football stadiums; capacity building opportunities provided by ODIHR; framing the changes as technical; and focusing on racism and xenophobia rather than homophobia in publicity. While mindful of the efforts of civil society groups, I argue that much of the changes was possible because of active and sympathetic

public officials. For this reason, I argue that people 'within the system' should not be seen as mere objects of socialization and advocacy efforts, as they man sometimes take on the role of activists. The challenge for future research is to learn from the experience of countries like Poland to help inform debates and improve responses hate crimes in other European jurisdictions.

10.2 POLICING AND PROSECUTING OF HATE CRIME

10.2.1 IMPROVEMENTS IN POLICE AND PROSECUTOR'S TRAINING PRACTICES

Having been criticized for systematic failures in dealing with racism and antisemitism by most human rights monitoring and review bodies in the beginning of the 2000s (CERD 2003; ECRI 2000; HRCtee 2004), Poland began to change the way in which hate crime is policed and prosecuted. In 2006, the police, in cooperation with ODIHR, introduced the *Law Enforcement Officer Programme on Combating Hate Crimes* (LEOP). The programme, which continues until today, covers various bias motivations, including not only racism and xenophobia, but also sexual orientation (Mazurczak, in iTV Sejm 2015). Basic hate crime training is obligatory for all police, and, by the end of 2015, 86,249 officers had taken part in the training (MSWiA 2016:17). In 2015, the programme was rebranded as *Training Against Hate Crime for Law Enforcement* (TAHCLE), which is the name used by ODIHR (see ODIHR 2012).

Apart from improvements in training curricula, changes were implemented in the structure of the police service. Initially, as hate crime issues were linked with discrimination and police violence, police treated it as a human rights issue, and police Human Rights Officers (one in every voivodeship, the largest administrative unit) were responsible for anti-hate trainings. In 2015, hate crime ceased to be a human rights matter only and became recognized as a specific type of offence, requiring specific investigation methods. A network of cybercrime units, responsible, *inter alia*, for monitoring the Internet to identify cases of hate speech, was established in 2014 (ODIHR n.d.). A year later, a network of Hate Crime Coordinators (one in each voivodship) was created. The coordinators' role is mainly to compile hate crime statistics (see below), but sometimes they are also responsible for conducting investigations. A specialist training programme for the coordinators is in place, with sessions taking place a few times per year.¹⁸⁰ One police officer interviewed in this research called the changes in policing a 'breakthrough', observing that 'there is an understanding that hate crime needs to be treated seriously. Operational work, detective work, investigative work, prevention'.¹⁸¹

Prosecution services also improved their practices. Following criticism from transnational human rights bodies, prosecutors stopped dismissing racist cases for low social harm of the act (Mikulska 2010:17). In 2004 cases qualified as racist and xenophobic received a special oversight by higher-level prosecutorial offices, which led to further improvements. While in 2012 the supervising

¹⁸⁰ I was invited to one of the trainings as an expert on anti-LGBT hate crime in 2016.

¹⁸¹ Interview-10-police-human-rights-officer1-2015-08-25.

prosecutor's offices questioned the adequacy of 34 per cent of the decisions to decline to prosecute or to dismiss preparatory proceedings, the number fell to 14 per cent in 2014 (Prokuratura Generalna 2015). Between 2011 and 2012, the Prosecutor General's Office conducted an analysis of several investigations into cases of hate crime and online hate speech with a view to 'identify shortcomings and develop methodology to address them' (ODIHR n.d.).¹⁸² As a result of the analysis, the Prosecutor General's Office launched two sets of guidelines for prosecutors. The first document (Prokuratura Generalna 2014b) contains guidelines on conducting proceedings in hate crime cases and deals with hate crime recording. The second document provides prosecutors with a methodology on investigating cyber hate (Prokuratura Generalna 2014a).

Improvements were made also in the organizational structure of prosecuting services. In 2013, the Prosecutor General appointed two district prosecutor's offices per region to lead investigations into hate crimes. Subsequently, 96 selected prosecutors received training on hate crime (ODIHR n.d.). In September 2015 Poland signed an agreement with ODIHR to implement the *Prosecutors and Hate Crime Training* programme (OSCE 2015). 76 prosecutors were trained by the end of 2016.¹⁸³

10.2.2 ASSESSMENT OF CHANGES IN CAPACITY BUILDING PRACTICES

The impressive numbers of police officers who received hate crime training are presented as a success and sign of commitment in the reports by the Polish government to human rights monitoring bodies (for example, MSW 2012). The implementation of the hate crime training programme in the Polish police has also been recognized as a good practice by the FRA (2016d).

While officials present capacity building programmes as a success, their actual effectiveness is unclear. Recent reports (Brzezińska and Słubik 2016; FRA 2016a; Górska et al. 2016), as well as some activists interviewed in this research suggest that hate crime cases still fall through the cracks.¹⁸⁴ For example, the recent KPH report shows that 57 per cent of anti-LGBT hate crime victims who tried to report to the police were discouraged from doing so by a third person, such as a police officer (Górska et al. 2016:31). Also, the investigations into anti-LGB hate crimes may be less effective than investigations into racist and xenophobic crimes. For example, a representative of the Mol admitted in an interview that 'police officers are taught the definition, but then, when it comes to an investigation, they still look at the Criminal Code rather than motivation'.¹⁸⁵ The questionable effectiveness of the training has been an object of critique by two representatives of CSOs interviewed in this research.¹⁸⁶ One of them criticized the cascading

¹⁸² One of the cases whose handling was analysed – the case of anti-Semitic attacks in Lublin – is presented below.

¹⁸³ Email-KSSiP-2017-06-20.

¹⁸⁴ Interview-20-anti-racism-activist3-2016-03-30.

¹⁸⁵ Interview-08-Mol-group-2015-08-20.

¹⁸⁶ Interview-03-LGBT-rights-activist1-2015-08-11 and Interview-09-anti-racism-activist1-2015-08-26.

formula of the training programme, saying ‘I have an impression that it gets stuck somewhere, that this knowledge is not being transferred down,’ adding that ‘nobody is interested in evaluating it,’ because ‘in this case the evaluation would show the failure of both ODIHR and the Ministry’.¹⁸⁷

Another point of concern is the coverage of the training. Training materials, particularly the trainer’s book (MSWiA 2010), contain a definition of homophobia and some of the case studies cover hate crimes based on sexual orientation. Nevertheless, as the KPH observes, ‘[t]here is a lack of specific data which would demonstrate what concrete knowledge and skills in this regard are transferred to programme participants’ (Jabłońska and Knut 2012:134). Indeed, compared to propaganda of fascism, incitement to hatred or race and religion hate crime, attacks based on sexual orientation seem to be treated marginally in police and prosecutors’ education. Compared with ODIHR’s training curriculum, the training in Poland places a greater emphasis on offenders, such as football hooligans and skinheads. A prominent role is given to fascist and neo-Nazi symbolism. For example, the training manual (MSWiA 2010:79–84) contains a 5-page annex listing some of the most popular hate symbols.

10.3 MONITORING OF HATE CRIME

10.3.1 IMPROVEMENTS IN HATE CRIME MONITORING PRACTICES

Apart from policing and prosecuting practices, another area where progress has been made is the monitoring and collecting data on hate crime. While the current system is still unable to capture all reported incidents, the improvement is significant. For example, police statistics show that, in 2015, 254 investigations were launched pursuant to Article 257 (public insults and breach of bodily integrity based on racism and xenophobia), ten times more than a decade before (Figure 6 below).

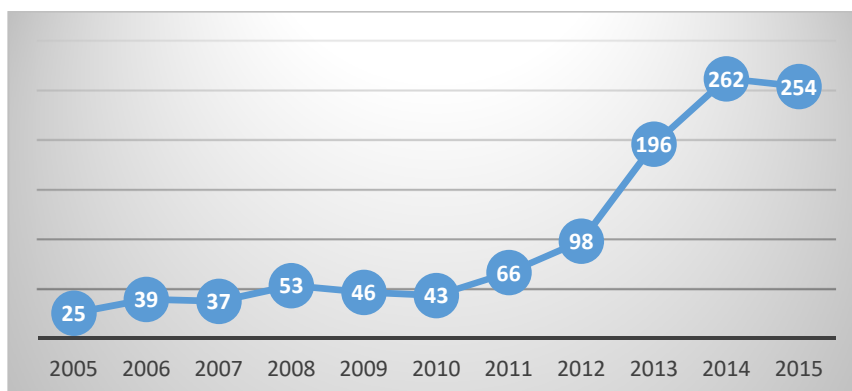


Figure 6 Investigations launched pursuant to Article 257 of the Criminal Code 2009-2015. Source: Official police statistics (Policja.pl n.d.).

¹⁸⁷ Interview-09-anti-racism-activist1-2015-08-26. While an evaluation report was planned to be published (FRA 2016d), it has not been prepared (Personal-comms-former-Mol1-2017-06-06).

The increase in the number of recorded crimes can be linked to improvements in policing practices (above), as well as changes in the methodology of collecting data. Considering the latter, the first major change came in 2011. That year, the Human Rights Protection Team, the unit responsible for hate crime data collection and police training within the Ministry of Interior, introduced the working definition of hate crime.¹⁸⁸ According to the Mol,

Hate crime is:

- a) any offence of a criminal nature, including offences against people and their property, in which a victim, place or other object of offence is selected because of their actual or alleged affiliation, relationship, belonging, membership or support for group defined in point b),
- b) The group may be distinguished on the basis of characteristics common to its members such as actual or implied race, national or ethnic origin, language, colour, religion, sex, age, physical or mental disability, sexual orientation or other similar characteristics (in Pudzianowska et al. 2016:101).

The Polish definition is based on that used by ODIHR (OSCE 2009). Unlike ODIHR, however, the Mol definition covers hate speech (see Chapter 7). It also includes an open-ended catalogue of protected grounds, broader than the list in the Criminal Code. Therefore, while the Ministry claims to follow ODIHR's definition of hate crime, in fact, the definition used is a bastardized version. This is another example showing that hate crime is understood differently across different European jurisdictions (see Perry (2016a) for recent analysis).

The change of what strands of hate crime are monitored was impeded, as the government argued, by the need to observe data protection laws. This is because information about someone's sexual orientation is considered sensitive and data protection laws prohibit authorities from gathering sensitive information (CAT 2012:92).¹⁸⁹ According to two activists interviewed in this research, the issue with data protection laws was an excuse to not work on homophobic hate crime.¹⁹⁰ The technical argument was used to mask the real issue, i.e. lack of political commitment. The discussion about compliance with data protection regulations was put aside in 2011/2012, following the reasoning that '[e]ven in states with strict data-protection laws, police can record the bias motivation of the offender(s) without having to record the background of the victim or perpetrator' (ODIHR 2014a:18).

¹⁸⁸ Interview-08-Mol-group-2015-08-20.

¹⁸⁹ Such approach reflects a resistance observed in several CEE states to collect data about 'ethnicity' and other sensitive issues 'because of the sinister purposes to which it was used in the past', such as identifying Jews by the Nazi authorities (Goodey 2007:432).

¹⁹⁰ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-05-LGBT-rights-activist2-2015-08-19.

In 2015, the new data collection system was put in place. In this system, police officers can flag a case as a hate crime by ticking a checkbox in the police case management software. This allows hate crimes to be recorded even when the bias motive is not explicitly prohibited by the Criminal Code, such in the case of sexual orientation hate crime (FRA 2016b). Data in each voivodship are collated, monthly, by the regional Hate Crime Coordinator and sent to the National Hate Crime Coordinator, who then produces a national report for the Ministry of the Interior. The MoI supplies it with information from courts on cases which were judged.

10.3.2 ASSESSMENT OF CHANGES IN MONITORING

Thanks to the improvements in data collection, in 2014, Poland was one of nine out of 57 OSCE states which reported on crimes targeting LGBT people (and one of three which reported despite lack of relevant legal provisions). Nevertheless, the numbers are negligible. For example, in 2014 Poland reported to ODIHR only seven incidents targeting LGBT people, and no cases of disablist violence. In 2015, Poland did not report a single case of anti-LGBT or disablist violence (ODIHR n.d.). While underreporting, in the same way as in other jurisdictions, remains a significant reason why the cases are not captured, the fact that these crimes are not recorded as heinous also plays a role in the low numbers of cases collected.

Apart from underrecording, there are other shortcomings in how hate crime is monitored. Among them, arguably the most important one is the insufficient coordination between various agencies responsible for catching data on the different levels of the criminal justice procedure. While both the prosecution services and the MoJ have also improved their mechanisms in recent years, unlike the police, they have not introduced a working definition of hate crime. For this reason, it is difficult to track cases, which 'disappear' as they progress through the criminal justice system. For example, the prosecution services record only crimes based on provisions proscribing racism and xenophobia. Cases based on other biases are recorded sporadically.¹⁹¹

10.4 FACTORS CONTRIBUTING TO THE IMPROVEMENTS IN THE HANDLING OF HATE CRIME CASES

In previous chapters, I provided evidence that the issue of legal recognition of LGBT rights in Poland is highly politicized; conservative legislators are unsympathetic to laws that they see as contradicting 'traditional values' by 'legitimizing' homosexuality; and that criminal laws proscribing racism and xenophobia have a set, historicized meaning. All the above factors combined mean that the domestic costs of enacting anti-LGB hate crime legislation exceeded the benefits of

¹⁹¹ Interview-08-MoI-group-2015-08-20. Detailed information about the ways of capturing data can be found in Godzisz (2015) and FRA (2016b).

complying with recommendations to legislate against homophobia. In other words, too many factors operated against the adoption of the international hate crime model in the law.

Whereas there were few circumstances conducive to the change of the law, the situation was different in the policing and data collection areas. While pressures to improve responses to hate crime (for example in the stadiums) came from similar sources as the pressures to change the law, they fell on more fertile ground. After the analysis of the improvements in the policing, prosecuting and monitoring of hate crime above, it is now time to consider why the behaviour of state agencies has changed, whereas the law remained the same. In the section below, I identify five main factors which contributed to improvements in policing and monitoring hate crime in Poland. These include:

1. Pressure from NGOs and IGOs
2. Preparations to the EURO2012 football championship
3. Institutional reflectivity resulting from high-profile cases
4. Human factors.

The findings are explained by a combination of social movement (political opportunity structures and framing) and regulatory theories (ritualism), in the context of Europeanization (social learning). It should be noted that the factors listed here are not a typology; rather, they often overlap and create synergies. For example, experience of European socialization (1) may inspire public officials to become 'activists within the government' (5). The same international body may request data and help build a system to gather it. In this sense, this list is a proposition of categories that emerged from the primary research.

10.4.1 PRESSURE FROM IGOs AND NGOs

While the political costs of enacting anti-LGB hate crime legislation were high, the political costs associated with improvements in policing and prosecuting of hate crime, as well as monitoring, were low.

At the turn of the century, a push to tackle bigotry came from the leaders of the United Nations itself, as the organization held the *World Conference against racism, racial discrimination, xenophobia and related intolerance* in Durban in 2001.¹⁹² Before that, in 1999, ECRI rapporteurs found that 'Poland remains a society in which the issues of racism, xenophobia, antisemitism and *intolerance* are still relatively unacknowledged' and recommended Poland to step up efforts to counter bigoted violence (ECRI 2000:4). For example, they wrote in the report:

Cases of racial hatred and contempt are relatively rarely brought before the courts (...). ECRI considers that the implementation of legislation in

¹⁹² The website of the conference is available at: <http://www.un.org/WCAR/> (retrieved 8 August 2017).

this field should be improved and encourages Poland to examine the current implementation of legislation more closely (P. 6).

ECRI further recommended 'the setting-up of a system of data collection by which the ethnic origin of victims of crimes may be voluntarily given and recorded (P. 6-7). Regarding training and awareness raising, ECRI (2000) recommended

... that Poland take all possible measures to ensure that police, prosecuting authorities and judges are made fully aware of the importance of the fight against racial hatred, and instructed to take the necessary measures to ensure the full implementation of the legislation in force (P.7).

Other human rights monitoring and review bodies (CERD 2003; HRCtee 2004) provided similar recommendations. The HRCtee (2004:4) added also that '[t]he State party should provide appropriate training to law enforcement and judicial officials in order to sensitize them to the rights of sexual minorities'. Criticism that Poland systematically fails to respond to acts of hate speech and targeted violence came also from NGOs in Poland (e.g. Abramowicz 2007; Mikulska 2010; Otwarta Rzeczpospolita 2006). The internal and external pressure to deal with racism, xenophobia and related intolerance mounted.

In response to calls to fight racism and xenophobia, particularly following the 2001 Durban conference, the Ministry of Internal Affairs and Administration established the Team for Monitoring of Racism and Xenophobia.¹⁹³ The Team (later: the Human Rights Protection Team) was selected to work with international bodies involved in countering these phenomena, including the European Monitoring Centre on Racism and Xenophobia (later: FRA) and ODIHR.

The political decision to step up efforts to eradicate racism, xenophobia and intolerance was operationalized into activities aimed at countering various aspects of hate speech and hate crime, as well as discrimination within the police force, by civil servants and police officers who were increasingly influenced by agendas they worked with, such as ODIHR. Indeed, ODIHR was the first body to introduce the hate crime nomenclature in Poland with the 2006 police training. For example, one of the police officers said:

One could say that LEOP started, or at least largely facilitated the intensification of the discussion on hate crime in Poland. Before the programme was created the knowledge on hate crime, at least in the police, what is this crime, what it is characterized by, how to counter it, was low, while after the implementation of this programme, after the

¹⁹³ Interview-08-Mol-group-2015-08-20.

introduction of these trainings, this knowledge was significantly improved.¹⁹⁴

The linguistic change from 'racist and xenophobic crimes' to 'hate crimes,' connected with calls for sensitizing the police to discrimination, helped pave the way for the inclusion of other bias motives in policy, which was first institutionalized in 2011 with the introduction of the working definition of hate crime. This was done with tacit support from the government, which allows it, because the change did not generate political (or economic) costs and helped to relieve international pressure. Interviews with civil servants and police officers conducted in this research confirm this. For example, a representative of the MoI said:

Most important decisions are taken on the political level. There is a general direction, and our approach follows the general policy directions. We work within our mandates, but we can also influence decision makers.¹⁹⁵

One police officer said:

The Chief Police Commander expects that human rights will be respected in the police. I get a task and can decide how to deal with the task. It has never happened that any project was stopped because it concerned LGBT.¹⁹⁶

While efforts were mostly focused on fighting racism, the vague wording allowed to mainstream anti-racism into broader policy. As a result, the notion of homophobia (in the context of, e.g. police brutality, but also hate speech and hate crime) started to permeate the community of policy makers. This tactic of 'coat-tail riding' (or, alternatively, as Swiebel (2009:31) provides after other authors, 'the bandwagon effect' or 'double frame bridging'), i.e. expanding the frame of countering racism to include sexual orientation in the broad anti-discrimination policy, has been observed before in other contexts. For example, Dunn (2010:11) argues that, in the UK, 'the legislation and policing of homophobic crime have developed largely from reforms designed to improve responses to racist victimisation'. On the international level, the sexual orientation discrimination was recognized through the vague language such as 'other social status' under anti-discrimination provisions of Article 14 of the ECHR (CoE 1950).

While legislative initiatives (Chapter 5 and 7) were highly visible for the public, the changes in policing practices and data collection methods were technical, and neither the police nor the ministry has publicized them. As a result, one activist interviewed observes: 'I didn't see any resistance and outcry about this topic from the right-wing, which always appears, even for the biggest nonsense.'¹⁹⁷ By fulfilling recommendations, but keeping this under the radar of

¹⁹⁴ Interview-10-police-human-rights-officer1-2015-08-25.

¹⁹⁵ Interview-08-MoI-group-2015-08-20.

¹⁹⁶ Interview-10-police-human-rights-officer1-2015-08-25.

¹⁹⁷ Interview-03-LGBT-rights-activist1-2015-08-11.

conservatives, the government could satisfy international demands while keeping the noise down. The economic costs of improvements in policing and data collection were also low. Many activities, such as some police trainings, or the outreach campaign *Racism, say it to fight it* (FRA 2016c), run by the Mol in 2014, were externally funded. The addition of the 'hate crime check box' was also cost-effective, because it was factored into a larger reform of the police case management system.¹⁹⁸

Officials interviewed in this research confirm that the main drive for improvements in policing and data collection came from outside of Poland. For example, a representative of the Mol said simply that the 'source [of monitoring racism and xenophobia] was international,' adding that the work on data collection 'is motivated by what is going on with different international covenants and the necessity to report to the committees.'¹⁹⁹ One police officer said:

In my opinion, it all started from international organizations (...). It seems to me that it's these recommendations, and, next to it, the presence, strong presence, of ODIHR in Warsaw (...) and the possibility of such experimenting with the Polish police (...) allowed that there was someone who could raise awareness having the proper tools for it. After all, if we sign a covenant (...), we have a duty (...) to accept these recommendations and implement them (...).²⁰⁰

The police officer brings in another aspect of internationalization of hate crime. ODIHR and FRA are 'quasi-activists,' in that they support governments and provide them with tools to meet international commitments in fighting hate crime (see Chapter 6). The benefit of collaborating with ODIHR is observed across the board by police officers and prosecutors,²⁰¹ representatives of the Mol,²⁰² and international civil servants²⁰³ interviewed.

One international expert interviewed in the research, commenting on the influence ODIHR has on national authorities, said that 'the most important role is in influencing the key movers, that then took this agenda on themselves, and then sort of began implementing whatever they seemed important'.²⁰⁴ According to this interviewee, ODIHR's influence is limited to 'motivating a few people', 'being there, providing impetus, making sure that everybody, on a quite working level,

¹⁹⁸ Personal-comms-former-Mol1-2017-09-28

¹⁹⁹ Interview-08-Mol-group-2015-08-20.

²⁰⁰ Interview-10-police-human-rights-officer1-2015-08-25.

²⁰¹ Interview-07-prosecutor-general's-office-2015-08-20, Interview-10-police-human-rights-officer1-2015-08-25, Interview-12-police-human-rights-officer2-2015-08-26.

²⁰² Interview-08-Mol-group-2015-08-20.

²⁰³ Interview-01-International-civil-servant1-2015-06-17, Interview-21-International-civil-servant2-2016-05-30.

²⁰⁴ Interview-21-International-civil-servant2-2016-05-30.

understand that this is an important issue, and the international community is watching, this kind of stuff.²⁰⁵ I will come back to this 'human factor' later in this chapter.

More recently, another platform of cooperation with ODIHR was provided by the FRA, within the framework of the Hate Crime Working Party, which brought together several IGOs and governments. The aim of the Working Party was to improve the response to hate crime in the EU through the development of effective national instruments (FRA 2014). As part of the activities of the group, for example, Poland's representatives participated in workshops where good practices on collecting data, including in countries where there are strict data protection laws were shared. One of them described the meetings as having an 'inspirational character'.²⁰⁶

While public officials feel that changes were brought because of the requirements and recommendations from IGOs, most activists interviewed in this research see NGOs as instrumental in bringing about the change in the response to hate crime.²⁰⁷ For example, one activist says:

This is the [result of] activity of non-governmental organizations, which have forced various state structures to act for many years. I have absolutely no doubts about it, I witnessed it many times.²⁰⁸

The above activist attributed the changes in the approach of the MoI to hate crime to NGO activities – a clear contrast to what representatives of the MoI said.²⁰⁹ Another activist said: 'I think to a great extent NGOs influence [the government] with what they're doing, particularly those working for LGBT rights, but also those working more broadly'.²¹⁰ The view that NGOs had a leading role is shared by the representative of the Office of the Commissioner for Human Rights, who said that the change was brought 'primarily by NGOs', while 'the second case are the rulings of international courts, and, in general, activities of international organizations active in the field of human rights'.²¹¹

A possible explanation of the differing perception of officials and NGOs may be the fact that NGOs are quicker to recognize themselves as the source of first-hand information for IGOs, which then filter and amplify their claims (see Chapter 8). This does not mean that officials do not know about

²⁰⁵ Interview-21-International-civil-servant2-2016-05-30.

²⁰⁶ Interview-08-MoI-group-2015-08-20. The Hate Crime Working Party worked between 2014 and 2016, meeting several times during that period (FRA 2015). In 2016, the European Commission asked FRA to join its High-Level Group to combat racism, xenophobia and other forms of intolerance, which serves to foster exchange of good practices between countries and concrete discussions on how to fill existing gaps and better prevent and combat hate crime and hate speech. The Commission also asked that FRA coordinate the Subgroup on methodologies for recording and collecting data on hate crime (FRA 2016e).

²⁰⁷ For example, Interview-06-trans-rights-activist1-2015-08-19, Interview-09-anti-racism-activist1-2015-08-26, Interview-14-anti-racism-activist2-2015-09-25.

²⁰⁸ Interview-14-anti-racism-activist2-2015-09-25.

²⁰⁹ Interview-14-anti-racism-activist2-2015-09-25.

²¹⁰ Interview-09-anti-racism-activist1-2015-08-26.

²¹¹ Interview-13-Commissioner-for-human-rights-office-2015-09-16.

shadow reports. For example, one police officer I interviewed said about NGOs that 'they have influence through shadow reports during defences [plenary sessions], showing that these activities are not quite perfect'²¹².

The disparity is also less surprising if we consider the focus of the LGBT movement advocacy. For activists working on sexual orientation hate crime, the imperfect Criminal Code is the main issue.²¹³ As one of them said:

The biggest problem [in addressing anti-LGBT violence] is the fact that there is a threshold of seven days which is required for physical assaults, for bodily harm. This causes the cases to be discontinued... That there is, in fact, no case... That they are not prosecuted publicly, as it would be the case, theoretically, if they were in the catalogue of hate crimes. This is the real obstacle.²¹⁴

Because the unsuccessful prosecutions are seen as the main problem, NGOs have put a lot of resources into advocacy around the change in the law. As a result, they succeeded in making the issue of hate speech and bias-motivated violence visible publicly and in bringing the legislative initiatives on anti-LGB hate crime to the parliament. In the meantime, public officials interviewed in this research worked mostly on training and data collection, i.e. two areas of policy which do not require a change of law.

NGOs, however, have also played a role in the development of the data collection system. They have done it through, *inter alia*, repeatedly bringing this topic up during various consultations and through reports, such as a report on the legal aspects of collecting hate crime data (Klaus and Frelak 2010). Most of all, however, they have contributed by providing evidence of high level of hate victimization (e.g. Abramowicz 2007; Kornak 2013; Makuchowska 2011). One of the civil servants interviewed added that the expansion of the catalogue of characteristics monitored by the Mol resulted also from such reports published by NGOs.²¹⁵ In this sense, the role of civil society organizations was mostly in information politics, i.e. providing evidence of the victimization, particularly of the groups not covered by the legislation. They were also – as the next subsection shows – involved in training and the development of training curricula.

10.4.2 PREPARATIONS TO THE EURO2012 FOOTBALL CHAMPIONSHIP

The fear that Poland was not able to counter racism and xenophobia expressed by international human rights monitoring bodies in the beginning of 2000s (CERD 2003; e.g. ECRI 2000; HRCtee 2004), was not unwarranted. At the time, football stadiums were often a common site of racist

²¹² Interview-12-police-human-rights-officer2-2015-08-26.

²¹³ Interview-03-LGBT-rights-activist1-2015-08-11, Interview-05-LGBT-rights-activist2-2015-08-19.

²¹⁴ Interview-03-LGBT-rights-activist1-2015-08-11.

²¹⁵ Interview-08-Mol-group-2015-08-20.

behaviours (e.g. antisemitic banners and chants or mocking black footballers with monkey noises and gestures).²¹⁶ In 2007, however, it was revealed that the country would have a major stress test coming. In April, the Union of European Football Associations (UEFA) announced that Poland and Ukraine would host the 2012 European Football Championship – EURO2012 (UEFA 2007). The event was the first major sporting event to take place in the CEE and a test for Poland's preparedness to deal with large numbers of people from diverse backgrounds, both footballers and fans. As Junuzović (2016) reminds us, many feared whether the Polish authorities would be able to address racist violence at football stadiums.

To help ensure safety of footballers and fans (as well as to prevent an international disgrace), the UEFA sponsored a social responsibility programme *Respect Diversity – Football Unites*. The action was designed and implemented in Poland and Ukraine by the NEVER AGAIN Association, with assistance from other organizations, and it came with significant international funding for, *inter alia*, training and awareness-raising activities.²¹⁷ As part of the programme, several hundred police officers in Poland received anti-hate crime training. NEVER AGAIN also cooperated on the drafting of the hate crime training manual for police officers (NEVER AGAIN Association and FARE Network 2012:5–6), which resulted in the extensive coverage of extremist symbolism in the book (MSWiA 2010).

Literature on sports and hate crime (e.g. Garland and Rowe 2001) has considered policing racism in football stadiums. In such context, Hawkins (2015:318) argues that 'sport has often led the way in highlighting and tackling hate crime, and thereby placing the issue into the public domain'. The impact of mega sporting events on promoting international solutions to counter hate crime has not been an object of interest. There is emergent literature looking at international sports events' ability to promote human rights. For example, Van Rheenen (2014) analysed the identity politics and liberal internationalism within the realm of global sport diplomacy in the context of the 2014 Sochi Olympic Games, which was a scene of protests against the Russian ban of 'propaganda of non-traditional relations'. Van Rheenen (2014:1) argues that the 'implications of the Sochi case study reveal the potential of mega sporting events to advance human rights for lesbian, gay, bisexual and transgender citizens in Russia and perhaps elsewhere'.

While useful, Van Rheenen's (2014) research focuses on contention (protest) rather than cooperation strategies and activities implemented by the country in question. This is where the finding that, in Poland, the EURO2012 championship has facilitated the implementation of the international hate crime model makes the contribution to scholarship. Interestingly, only two people interviewed in this research mentioned UEFA, or more generally, football, in the context of improving response to hate crime in Poland.²¹⁸ One of them, an activist who had been involved

²¹⁶ Interview-14-anti-racism-activist2-2015-09-25.

²¹⁷ Interview-14-anti-racism-activist2-2015-09-25.

²¹⁸ Interview-14-anti-racism-activist2-2015-09-25, Interview-22-International-civil-servant3-2016-10-26.

Also the KPH publication (Jabłońska and Knut 2012) mentions EURO2012 in the context of anti-hate crime activities undertaken by the police.

in the work, said that 'UEFA, on the stadium level, did a thousand times more than any other institution'.²¹⁹ Even public officials, while acknowledging cooperation with anti-racism organizations, including NEVER AGAIN, did not mention the stress test and risk of international disgrace connected with EURO2012. One possible explanation why the event was rarely brought up is that interviews model focused on anti-LGB hate crime, rather than combatting racism in football. But – as the next section will show – improvements aimed at tackling racism, but under the broad umbrella of hate crime resulted in improvements for LGBT people as well.

Furthermore, while the influence of the EURO2012 tournament on policing hate crime in Poland is evident, its legacy is different in the two host countries. While the work between NEVER AGAIN and UEFA in Poland continued after EURO2012,²²⁰ Junuzović (2016) observes that, in Ukraine, authorities did not follow up with similar actions, despite funding and support from international agencies. This suggests that, apart from reputational risk, availability of international funding and support from specialized NGOs, ODIHR and other organizations, there are other factors that need to be considered. Particularly, the question is what facilitated the cooperation post-EURO2012? In the sections below, I will argue that it is a combination of political and social factors.

10.4.3 COMMITMENT AND AGENCY OF PEOPLE 'WITHIN THE SYSTEM'

I have spoken above about the lack of political commitment to put in actual effort and resources to tackle hate crime in all its forms. The lack of commitment on the one hand, but no active rejection on the other is manifested by the use of 'excuses.' For example, in the lack of (or inability to express officially) ideological arguments, technical obstacles against amending the Criminal Code or setting up effective hate crime monitoring systems are presented as insuperable. As a result of such situation, some activists²²¹ see the change in policy approach to anti-LGB hate crime as superficial. One activist describes this by saying:

If there was a command from the top they would obey. There is no command, so they pretend that they're doing something. The phrase 'they're pretending that they're doing something' is adequate because some activities are undertaken, but they are a façade, so there are a lot of meetings, smiles, handshakes, but it doesn't produce any concrete effects when it comes to a concrete change in policing.²²²

Yet, the limited political commitment to putting in efforts and resources to counter hate crime could lead to the discussions on data protection continuing until today. Something happened, however, that broke the chain and resulted in those responsible for the data collection opening their eyes

²¹⁹ Interview-14-anti-racism-activist2-2015-09-25.

²²⁰ Interview-14-anti-racism-activist2-2015-09-25.

²²¹ Interview-09-anti-racism-activist1-2015-08-26, Interview-05-LGBT-rights-activist2-2015-08-19 Interview-03-LGBT-rights-activist1-2015-08-11.

²²² Interview-09-anti-racism-activist1-2015-08-26.

to new solutions and taking initiative to test them, despite obstacles. This finding warrants specific attention, because the agency of people within the authorities' structures is rarely acknowledged. Scholarship on social movements and agenda setting 'perceive social movement actors too readily as the main originators of ideas and demands, reducing politicians and civil servants in the institutions to mere objects for lobbying activities' (Swiebel 2009:31). Hate crime and Europeanization studies emphasize the role of NGOs in convincing officials to take their claims seriously. Summing up, all theoretical aspects which provide a framework for this research tend to treat public servants as *objects* of socialization. There is rarely a distinction made between different types of actors within the system, or a consideration of their individual roles, motivations and strategies. Without considering it, we are not only unable to understand what happened in countries such as Poland (or Germany, Italy and Ireland), where there are signs of internationalization of hate crime despite lack of political leadership. Such explanations are dearly needed also in countries, particularly those further east, which have implemented hate crime laws, but rarely use it. This is because, as Baisley (2016:134) argues, 'norms constructed by states are less radical than those constructed by UN experts and civil society organizations, but they are more effective'. More research is needed to understand the motivation, but, in particular, to uncover the strategies that they employ.

Indeed, while speaking about lack of political commitment, many activists interviewed point to the role of individual public servants as an important factor conditioning effective cooperation.²²³ For example, one of them described the difference in the cooperation with the Mol and the MoJ by saying:

And this is what happened, perhaps, with the Mol, that this team is quite go-ahead, if you can say that. At least they are not some bewildered civil servants who leave at 4pm and, you know, are afraid to breathe (...). Whereas with the Ministry of Justice it is not quite the same. They treat us as if we are on the opposing side of the barricade, which comes with something and often wants something.²²⁴

Many interviewees, both from civil society and international organizations, praised people working at the Mol for their commitment.²²⁵ One activist said:

It has changed a little since [name removed] is there. Because this is a person who is really committed, who is really engaged, he really understands this topic, and he really pushes from different angles to

²²³ Interview-01-International-civil-servant1-2015-06-17, Interview-02-anti-hate-speech-activist1-2015-08-11, Interview-03-LGBT-rights-activist1-2015-08-11, Interview-09-anti-racism-activist1-2015-08-26.

²²⁴ Interview-02-anti-hate-speech-activist1-2015-08-11.

²²⁵ Interview-01-International-civil-servant1-2015-06-17, Interview-02-anti-hate-speech-activist1-2015-08-11, Interview-03-LGBT-rights-activist1-2015-08-11, Interview-09-anti-racism-activist1-2015-08-26, Interview-21-International-civil-servant2-2016-05-30.

make some change and he manages to do it, this is incredible. (...) This is also my sort of conclusion for a change in Poland, that if you want to change something in Poland, you simply need to have a person who's inside the system, and who is willing.²²⁶

Having met representatives of the Human Rights Protection Team for the first time in 2013, having interviewed them for this research project in 2015, and having subsequently met them several times at various occasions, I also got an impression that they are committed, while constrained in their role as government workers. For example, during the interview in 2015, one person, commenting on low number of reported cases, said that 'every LGBT case [reported] is gold', as it constitutes evidence that the problem exists.²²⁷ During the session of the parliamentary subcommittee in 2015, where draft amendments on hate crime were discussed, a representative of the Mol argued for the change of the law, saying that the Mol already monitors anti-LGBT violence because, '[s]imply, the needs came before the law' (iTV Sejm 2015). In this sense, the approach of the Mol is more understanding of the social reality than that of the MoJ, which oversees the law reform.

In the context of the development of hate crime data collection mechanisms in countries where there are no hate crime laws, specific civil servants may give the push towards improvement in combating of hate crime, despite the lack of political buy-in for changing of laws. As one international civil servant said in the interview:

For this kind of people, this sort of activist person, what they do is they say: 'OK, I'm working for the government, these are the constraints I'm under, this is where we are: on police training, on police forms, on our electronic system (...) This is what our legal framework is. So, this is my scene. And on that scene, I'm going to try and do some innovative things.' (...) And, so, these people in these situations who are interested in moving forward will identify these small things that might be done, and make a case for it.²²⁸

The same interviewee considered also the question of motivations of people within the system who are 'activists within the government', asking:

What's their experience, why do they do this, what do they find works, what are the arguments that make police sit up and listen, that make

²²⁶ Interview-03-LGBT-rights-activist1-2015-08-11.

²²⁷ Interview-08-Mol-group-2015-08-20.

²²⁸ Interview-01-International-civil-servant1-2015-06-17.

politicians sit up and listen, ministers, internally. How do they build bridges between the outside and the inside?²²⁹

This led me to include questions to uncover reasons for such 'activism' of policy makers in the interviews with civil servants, police officers and prosecutors. Based on my own research and secondary literature, I identify three personal-level factors which may result in policy makers stepping up efforts to counter hate crime without a clear command from above. These factors are not mutually exclusive; rather, one stems from the other and they work together. They include shaming, inspiring/teaching and personal activism.

Shaming

People who repeatedly need to present doubtful 'achievements' in countering hate crime at international fora may experience psychological difficulties, such as strain or shame. Strain emerges when someone is unable to attain socially-proscribed goals because of external difficulties (Agnew 1992; Merton 1968). Keck and Sikkink (1999:97) write about 'mobilisation of shame', 'where the behaviour of target actors is held up to the bright light of international scrutiny' as part of leverage politics of advocacy networks. In Poland, one activist interviewed in the research said that '[s]haming politicians, personally, has a bearing on what is then happening in the country'.²³⁰ Particularly if they are sympathetic to the issue (or sensitized), public officials may not want the lack of achievements to be seen as their own incapacity or ineffectiveness. For this reason, civil servants may pressure their superiors to allow for some improvements or dedicate more resources for an issue before the next monitoring.

Inspiring / teaching

Human rights bodies, such as ODIHR and FRA, as well as NGOs, provide regular training, mutual learning and good practice exchange opportunities on the European level (European socialization). This allows the policy makers to improve professional knowledge and understanding and become empowered and inspired to implement changes.

International meetings of peers are, on the one hand, a place where strain is generated, and, on the other, where concerns and solutions for relieving strain may be discussed. For example, one civil servant found inspiration for improving the data collection methods in the meetings of the FRA hate crime working group,²³¹ and one prosecutor learnt about hate crime during conferences and thanks to educational materials produced by ODIHR.²³² Explaining the role of IGOs in this process, one international expert interviewed said that '[w]e can do precisely this. We can

²²⁹ Interview-01-International-civil-servant1-2015-06-17.

²³⁰ Interview-15-trans-rights-activist2-2015-10-08.

²³¹ Interview-08-Mol-group-2015-08-20.

²³² Interview-07-prosecutor-general's-office-2015-08-20.

motivate a few people, provide some impetus and keep looking (...). Often they simply don't know where to start from.'²³³

Personal circumstances

Swiebel argues that '[p]olicymakers inside the institutions are in many cases also political entrepreneurs who originate ideas and behave like activists' (Swiebel 2009:31). Some people within the system (e.g. politicians, civil servants, police officers and prosecutors) may be sympathetic to LGB issues, may like challenges or may have been socialized and inspired to act against homophobia. For example, one police officer said that their motivation lay in the fact that 'you need to help people who are in the minority.'²³⁴ Such 'closeness to victims' was provided by a cause of improvements in policing, as opposed to lack of changes in the law by one activist. The interviewee argues that

. . . they [police] are those who work with that [hate crime]. Members of parliament are a bit more detached from this reality, they do not see it with their own eyes, they do not work with it.²³⁵

Another police officer felt that they 'can do what they do with passion because they have pension rights.'²³⁶ This gives them the feeling of security and stability, and empower them to 'stick their neck out.' In fact, there may be multiple factors which can lead public officials to take on the roles of challengers of the *status quo*. Whatever the reasons behind the motivation, once empowered, these individuals become 'willing to battle through bureaucracy and hostility to bring this issue ... to lead on this issue to get some positive change on it.'²³⁷ To effectuate change despite the lack of political commitment, NGOs need to 'find allies'²³⁸ in the system, i.e. activists on the outside need to connect with 'activists within government.'²³⁹

10.4.4 BIG CASES AND MEDIA

One reason which is often seen as a contributing factor to improving responses to hate crime are particularly heinous murders, such as the deaths of Matthew Shepard or Stephen Lawrence, which are publicized and spark public outcry (Becker 1999; Giannasi 2015; Hall, Grieve, and Savage 2009; Munro 2014). Chapter 7 provides empirical evidence that, in Poland, in the period between 2005 and 2015, there was no case of bias-motivated homicide which became a triggering event. There were, however, cases of antisemitic symbols, vandalism and threats which

²³³ Interview-21-International-civil-servant2-2016-05-30

²³⁴ Interview-12-police-human-rights-officer2-2015-08-26.

²³⁵ Interview-06-trans-rights-activist1-2015-08-19.

²³⁶ Interview-10-police-human-rights-officer1-2015-08-25.

²³⁷ Interview-01-International-civil-servant1-2015-06-17.

²³⁸ Interview-09-anti-racism-activist1-2015-08-26.

²³⁹ Interview-01-International-civil-servant1-2015-06-17.

were poorly handled. Following publications in the media, internal investigations were launched, leading, in some cases, to changes in prosecuting practices. I consider two of such cases below.

One of the cases with significance to how hate crimes are prosecuted in Poland involved a series of anti-Semitic threats and attacks against Tomasz Pietrasiewicz, an activist and a community leader in Lublin. I present details of the case based on Amnesty International's report on hate crime in Poland (2015b:24). Not Jewish himself, Mr Pietrasiewicz was the target of a series of antisemitic threats and violence for several years, starting in 2010, due to his engagement in promoting Jewish culture. The investigations into these attacks were discontinued as the perpetrators were not found. On one occasion, in 2011, an explosive device was left under his window. The authorities then offered to move him to another house, but he declined. From 2011 until 2014, Mr Pietrasiewicz was the target of another antisemitic campaign. After the initial failure of the police to protect the victim and mishandling of the case by prosecution services, in 2012 a new investigation was launched. In 2014, six suspects who allegedly organized the campaign against Mr Pietrasiewicz were arrested.

The analysis into the handling of the case, conducted by the Department of Preparatory Proceedings of the Prosecutor General's Office, helped inform the *Guidelines on conducting proceedings in hate crime cases* (Prokuratura Generalna 2014b). *Inter alia*, the *Guidelines* state that the bias motive should be considered and hate crime charges can be triggered even if the victim does not belong to the group, such as in the case of Pietrasiewicz in Lublin (Prokuratura Generalna 2014b:point 2).

Another case featured the symbols of swastika, which were discovered painted on electrical transformers in 2013. A district prosecutor in Białystok declined to initiate an investigation into the alleged crime of promotion of fascism (see Appendix A). As a justification for the decision to not launch the investigation, the prosecutor argued:

Currently, in European countries and in the US, the swastika is associated almost exclusively with Adolf Hitler and Nazism, but in Asia it is widely used as a symbol for happiness and prosperity. In this case, it is difficult to see a painted swastika as a symbol promoting fascism (cited in pg 2013).

The decision caused a storm in Poland, given the country's bloody history of the Holocaust and anti-Jewish pogroms. For example, the daily *Gazeta Wyborcza* accused the prosecutor of 'giving a green light to neo-Nazis' (Medek and Klimowicz 2013). The international media were also outraged (e.g. Tzur 2013). Following the outcry, the Białystok Chief Prosecutor and the Prosecutor General's Office condemned the decision not to investigate the case. Disciplinary proceedings against the district prosecutor were initiated.²⁴⁰

²⁴⁰ The proceedings were held in secret. The prosecutor was eventually acquitted (Markusz 2014).

Following the framing of Białystok as a hate crime hotbed by the media, the government announced that it will launch a special programme aimed at preventing racist and xenophobic attacks there (PAP 2013). At the same time, the representatives of the government and prosecution services made a series of symbolic statements suggesting their commitment to fight racism. The Prosecutor General Andrzej Seremet stated, commenting on the swastika case, that '[a]ntisemitism won't fly on my watch' (Czuchnowski and Jałoszewski 2014). The Minister of the Interior Bartłomiej Sienkiewicz announced in May 2013: 'I can say one thing regarding skinhead communities: We're coming after you.' (Grabek 2013) Half a year later, he announced that 'the most important goal for 2014 is combatting racist and xenophobic hate crimes' (MSW 2014).

10.5 CONCLUSION

The aim of this chapter was to provide some possible explanations to the question why Poland, despite no amendments in the law, took steps to counter anti-LGB hate crime through changes in policing, prosecuting and monitoring. In analysing the factors influencing the presence of sexual orientation in the policy, the chapter aimed to understand the role of NGOs and IGOs in developing national measures aimed at protecting LGB people from targeted violence.

The chapter provides empirical evidence suggesting that there is a range of factors that influence how hate crime is policed, prosecuted and monitored in Poland. First, Poland was criticized for the small numbers of detected cases of racist and xenophobic crimes and inadequate handling of incidents reported to the police. International human rights bodies recommended that Poland improve the capacity of the police and prosecutors to deal with hate crime and improve the monitoring. ODIHR was available to support Polish authorities in these efforts, and the police training programme was rolled out in Poland as the first country in Europe. The above happened in the wake of a mega sporting event – the EURO2012 football championship, the second factor. The need to tackle racism at the stadiums brought another incentive to improve practices related to hate crime. Third, changes in the practices may be seen as a result of initiative of individual public officials, who took it upon themselves to improve how hate crime is policed and monitored. The analysis identifies three personal-level factors which may result in policy makers stepping up efforts to counter hate crime without a clear command from above. They include shaming, inspiring/teaching and personal activism. Finally, the improvements are understood as a result of a moral panic connected with the rise of racism and antisemitism, and institutional reflectivity coming from investigations into mishandled cases.

As the focus of changes in policy was on improving the response to racism and xenophobia, rather than countering homophobia, the changes went unnoticed by the opponents of the progression of LGBT rights. Changes were technical and not politicized. The political and economic costs of the inclusion of sexual orientation was insignificant; the reporting requirements were fulfilled, without inciting the critics of the progression of LGBT rights.

11

CONCLUSIONS

THE POLITICAL debate on hate crimes based on sexual orientation in Poland started over a decade ago, but, to this day, has not resulted in the recognition of a bias based on sexual orientation as an aggravating circumstance in committing a crime. In the meantime, however, subtle signs of recognition of homophobia as a bias motivation can be observed in the handling of hate crime cases by police and prosecution services, as well as in the data collection systems. Recognizing sexual orientation hate crime in police practice but refusing to legislate is unique in Europe, yet has not, so far, been an object of academic interest. For this reason, this dissertation sought to understand why the passage of legislation providing higher penalties for sexual orientation hate crimes in Poland proved more difficult than for other forms of bias crimes.

Here, in the final chapter, I summarize the key findings, provide conclusions as to the main points that have emerged, and discuss implications for research and policy. For clarity, the findings are divided into two groups. The first group comprises factors that foster recognition of anti-LGB hate crime by state agents. The second group consists of factors that impede the recognition of this phenomenon as a problem requiring a specific legislative and policy responses. The third and the fourth sections consider the scholarly contribution of the thesis and implications for future research. The final section presents implications of the results on policy and practice and provides recommendations for activists and policy makers working on hate crime issues. From the point of view of participants in this research, this section is the most important, as it has the answers to some of the questions that they have asked me during the fieldwork. Here, I present my suggestions on what changes are needed in advocacy strategies. I also reflect on the changing political context and the need to safeguard achievements in an increasingly hostile political environment.

11.1 FACTORS FOSTERING RECOGNITION OF ANTI-LGB HATE CRIME AS A POLICY ISSUE

This thesis identified a range of social and political factors which have been conducive to the improvement in the official response to anti-LGB hate crime in Poland. They include: using the international human rights machinery to amplify NGO claims (the boomerang pattern of advocacy); linking the issue of anti-LGB hate crime with efforts to tackle racist and xenophobic

violence (coat-tailing); European socialization opportunities provided by ODIHR and other organizations; and commitment of people 'on the inside'.

The first factor relates to the mobilization and professionalization of the LGBT movement in Poland and its increased ability to conduct international advocacy. This research demonstrates that anti-LGB hate crime advocates in Poland do not limit themselves to the traditional advocacy tools of the hate crime movements in other countries (e.g. evidencing victimization and lobbying politicians). Rather, Polish anti-LGB hate crime activists participate in local and transnational advocacy networks and make use of the opportunities provided by international human rights monitoring and review system to increase their leverage. Over the years, this boomerang pattern of advocacy resulted in a critical mass of recommendations for Poland to step up efforts to tackle hate crime. Combined with support provided by ODIHR on the ground, international recommendations are the primary reason for improvements in the policing, prosecuting and monitoring of hate crime. This is a new finding, as scholarship is only now starting to observe the process of globalization of hate crime policies and the role of transnational institutions in developing national hate crime measures.

Another factor contributing to the change is linking the issue of homophobia with efforts to eradicate racism and xenophobia. The initial push for stepping up efforts to counter intolerance came in the beginning of 2000s, when Poland was criticized internally and externally for mishandling cases of racism and antisemitism. In 2007, UEFA announced that the EURO2012 football tournament would take place in Poland and Ukraine. Faced with the prospect of an international disgrace for its inability to deal with racism, Poland teamed up with ODIHR and civil society organizations to train police to deal with hate crime. Through ODIHR, the international hate crime concept started to permeate the police and prosecution services in Poland, as one of the first countries in the region. In 2011, inspired by ODIHR, the Ministry of Interior implemented a working definition of hate crime, inclusive of sexual orientation, for training and data collection purposes. In 2015, a 'hate crime check box' was added to police crime recording forms. These improvements, seen as a response to racism and xenophobia, were in line with the government's political direction and went unnoticed by the opponents of the progression of LGBT rights. Changes were treated as technical, necessary because of reporting requirements. Whether to include sexual orientation in police training and recording mechanisms was never a part of any political discussions. The political and economic costs of the inclusion of sexual orientation in anti-hate policies were, therefore, insignificant. The costs were additionally lowered as methods of dealing with hate crimes came from a legitimate, trusted partner – ODIHR. While there was no real commitment from the Ministry of Justice to institute enhanced penalties for anti-LGB hate crimes, some public officials, either sympathetic to LGBT rights or socialized by European agencies, exhibited commitment to countering hate crime in their own capacities. Such 'activists within the government' have been instrumental in, for example, implementing innovative data collection methods. From the point of view of theory, my data challenge the implicit assumption in social movement studies that public officials are only objects of lobbying and that NGOs are

those who propose changes by showing that the initiative of people on the inside was instrumental in recognizing anti-LGB hate crime in policy in Poland.

11.2 FACTORS INHIBITING RECOGNITION OF ANTI-LGB HATE CRIME AS A POLICY ISSUE

Having presented the factors contributing to improved responses to hate crime, I will now summarize research results explaining factors which have impeded the recognition of sexual orientation hate crime as a legitimate policy concern. The factors include: high levels of social and political homophobia; politicization of debates about anti-LGB hate speech; lack of powerful political allies; lack of identification and prioritization of the key issues within the LGBT movement; inadequate framing of anti-LGB hate crime as a policy problem; lack of hard international obligations to legislate against anti-LGB hate crime; weak external conditioning; issues related to the criminal law doctrine, rationale and origins of current hate crime laws.

Political homophobia in Poland is linked with the decline of acceptance of antisemitism and the emergence of identity politics of LGBT groups in the 2000s. As religious and national norms in Poland are entwined, LGBT rights are framed as a threat to the survival of the nation, a symbol of Western imperialism and lack of morals. Conservative views on homosexuality are expressed by mainstream politicians. Over the past decade, LGB advocates did not have a strong ally in the parliament. The PO-PSL coalition government steered away from ideological topics, such as abortion or registered partnerships. Hate crime was less contentious than same-sex unions, but the politicization of the issue prevented the government from legislating against homophobia. This is because the political costs of doing so were deemed too high, unlike in countries such as Croatia, where anti-LGB hate crime laws were 'buried' in a broader criminal law reform.

Considering advocacy strategies, the thesis found that part of the failure to effectuate change was due to the lack of identification and prioritization of the key issues within the LGBT movement. All LGBT claims are framed as a human rights/equality issue. Hate crime laws are presented as part of the LGBT rights package. Empirical evidence presented in this dissertation suggests that this framing does not resonate with conservative groups, who see hate crime laws as a step on the way to full LGBT equality and a tool to curb Christian critique of same-sex unions. The 'slippery slope argument' is further enabled by the prioritization of hate speech vis-à-vis hate crime in advocacy and the vagueness of the term 'hate speech.' The problem was further magnified by the invisibility of other minority groups, particularly people with disability and older people, in the civil society coalition behind the initiatives to amend the hate crime laws.

Among the reasons why Poland has not legislated against sexual orientation hate crime was also the fact that there is still no international obligation to do so. This differentiates hate crime laws from anti-discrimination laws, where recognition of sexual orientation as a protected ground is obligatory for EU member states. While the EU now encourages states to adopt anti-LGBT hate

crime laws, Poland, already an EU member, has had little incentive to legislate, compared with accession countries, for which the EU has a 'carrot'.

Finally, the legislative initiatives proposing the addition of sexual orientation to the catalogue of protected grounds in hate crime laws were contested by politicians and legal scholars as contradictory to the rationale of the existing provisions and the criminal law doctrine. As laws proscribing racism and xenophobia in Poland are grounded in the 'Never Again!' movement after WW2, the 'ideal victim' is a member of an ethnic or religious minority group that was inhumanely abused in the past. Precautions for the protection of minorities from crime are linked with the precautions regarding democracy, peace and public order. LGB people fail to meet the standard of the ideal victim, as criminal conduct based on homophobia is seen as targeting the individual only, without broader consequences. Adding new grounds to the old laws is seen as giving them a new meaning and diluting them. Combined with perceived vagueness of some of the new categories, initiatives to change the laws are seen as contradictory to the principle of legal certainty. Importantly, these arguments are technical; if the government was committed to protecting LGB people from violence, it would have found a way out of the legislative conundrum. Yet, as the commitment was lacking, the government deprioritized the issue and buried the draft amendments in a parliamentary committee for years.

11.3 RESEARCH CONTRIBUTION

As one can see from the previous sections, the answer to the question as to why Poland does not have sexual orientation hate crime laws, but has recognized homophobia in some policing and prosecuting practices, is multifaceted. The story is not one of a simple refusal to engage with homophobic violence; rather, it is a story of a recognition of the problem in some areas, but resistance in others. The identification of internal and external factors for such a situation provides both an empirical and conceptual contribution to the body of research.

While hate crime scholarship is growing, most works continue to concentrate on common law countries, particularly in North America. Traditionally, research in this area has fallen into five categories: the understanding and defining of hate crime (e.g. Al-Hakim 2015; Chakraborti and Garland 2012; Levin 2009; Perry 2001); the consequences of hate crime (e.g. Chakraborti et al. 2014b; Herek et al. 1999; Iganski 2009; Perry and Dyck 2014); the victims of hate crime (e.g. Bakalis 2017; Chakraborti and Garland 2012; Mason 2014b; Perry 2009; Schweppe 2012); the hate crime offenders (e.g. Blazak 2009; Iganski 2008; Levin and McDevitt 1993; McDevitt, Levin, and Bennett 2002; Walters 2014) and the responding to hate crime (e.g. Bleich 2007; Chakraborti and Garland 2014; Jenness and Grattet 2001; Lawrence 2009). Emerging are new categories of the internationalization of hate crime (e.g. Hall et al. 2015; Haynes, Schweppe, and Taylor 2017; Iganski and Levin 2015; Perry 2014; Perry et al. 2015; Perry 2016a; Schweppe and Walters 2016) and doctrinal issues of hate crime laws (e.g. Bakalis 2017; Brudholm 2016; Goodall 2013; Mason 2014b). My research contributes mostly to the first and the last two categories. Insights into the

work of transnational human rights organizations, such as ODIHR, and the focus on new jurisdictions, outside of the West, contributes to filling in the gaps in our understanding of hate crime as a global phenomenon. The comparative analysis of how European states respond to anti-LGB violence through legislative and policy measures makes this thesis the broadest cross-country analysis of anti-LGB hate crime law, policy and reporting so far. My analysis shows how the process of Europeanization of CEE countries conditions national responses to anti-LGB hate crime. It also uncovers the vital role of transnational human rights organizations in promoting the use of the hate crime model as a preferred way of dealing with racism, xenophobia, homophobia and related intolerance, as well as obstacles to internationalization.

From the point of view of Europeanization and social movement outcome theories, by showing the importance of framing strategies and adequate issue linkage, the thesis makes a case for separating the issues of hate crime laws and other LGBT rights areas (e.g. same-sex unions and equal treatment) in both advocacy and research. Only by considering hate crime in its own rights, not as part of the LGBT rights package or as an extension of discrimination, will we be able to dissect factors which are conducive to improved responses to hate crime. One of such factors is the importance of actors active in the area of hate crime who do not operate in, for example, the area of laws governing same-sex unions. Empirical evidence presented in this dissertation shows that the OSCE human rights bodies (joined recently by the FRA) have been instrumental in promoting the use of the hate crime model in some European countries. They are *quasi*-activists, committed to countering hatred, but with more leverage than minority groups. The effects of their interventions are dependent, however, on the relationship of the country with the EU. In accession countries, laws are passed as a sign of *bona fide* towards fundamental rights, but are rarely used in practice. In current member states, the change seems more incremental, as the state behaviour starts to change. By providing this evidence, the thesis reconciles opposing views on the efficacy of the work of transnational institutions in the current literature (Garland and Funnell 2016; Goodall 2013).

Finally, this thesis contributes to theory by showing the importance of 'activists within the government', i.e. officials who, for various reasons, behave like activists, originating and proposing ideas and pushing for their implementation. The social movements and agenda setting theories tend to emphasize the role of NGOs as those who exert pressure on the government. In critiquing this aspect of social movement outcome theories I provide empirical evidence for claims made by Swiebel (2009:31), who observes that civil servants are not just 'mere objects for lobbying activities'. My data show that, in Poland, developments in policing and data collection were not a result of direct lobbying by LGBT activists, but rather by civil servants. The most important reasons for this is that they do not want to be shamed when reporting to international human rights bodies, because they have been socialized by ODIHR and other organizations, or they are personally sympathetic to LGBT causes.

One limitation of this research is that it focuses on responses to anti-LGB (sexual orientation) rather than anti-LGBT (sexual orientation and gender identity) hate crimes. Disability hate crime is also considered only in passing. While the thesis has shown that the issues of transgender and disability hate crime are not understood by politicians and legal scholars, the legal and policy approach to these types of violence in Poland (and Europe) should be considered in a separate paper. The analytical model built here may be used for such analysis. Considering the quantitative part of the thesis, one limitation is in the number of factors included in the analysis. A study including additional indicators, such as political stability in the state, presence of political allies, other LGBT rights laws, accounting for regional contagion and a 'learning curve' of sorts would be helpful to see which factors best predicts the passage of sexual orientation hate crime laws, implementation of policies, and their enforcement.

11.4 FUTURE RESEARCH

This research, the first theoretical work focused on sexual orientation hate crime laws and policies in Poland, has the potential to impact future scholarship on countering racism, xenophobia, homophobia, hate crime, hate speech and other forms of intolerance in this country. In fact, published outputs from this project (Godzisz 2015; Godzisz and Pudzianowska 2016) have already informed some studies. For example, in her recent Master's thesis, Wójcik (2016:41) uses them to support her argument that the failure to recognize anti-LGB hate speech laws in Poland was a result of a combination of 'supremacy of political leadership's interests compounded with vernacular cultural anxieties.' My research, however, has even more to offer: apart from informing future scholarship on Poland, this work, as the largest theoretically-informed comparative study on the proliferation of hate crime laws in Europe to date, has the potential to influence how future studies approach the diffusion and internationalization of hate crime laws.

As it is usually the case with research in a new field, this dissertation opens more questions than it answers. For example, this research suggests that the human rights framing was not optimal for anti-LGB hate crime advocacy in Poland. As a consequence, future research could consider what other framing, e.g. focused on community safety (McGhee 2003), urban security (European Forum for Urban Security 2017) or public health (Escobar 2014; Iganski and Sweiry 2016) could offer better results.

On the international level, this research shows that Poland has accepted recommendations given in the Human Rights Council by UN countries as part of the Universal Periodic Review which referred to hate crime, but rejected recommendations on same-sex unions. This suggests that countries may be more inclined to accept recommendations referring to 'negative' rights than those on 'positive' LGBT rights. Future, large-scale research, looking at sexual-orientation-related recommendations from three cycles of the UPR could verify this hypothesis.

Another area which is touched upon in this research, but needs more attention is hate crime at the international level. Specifically, it is recommended that further research be undertaken to assess how ODIHR and OSCE missions work together with NGOs on the ground to promote the hate crime model and how effective these interventions are. This should be particularly interesting for scholars of bottom-up Europeanization, who should also consider hate crime in its own right, separately from other LGB claims. Scholars working on social movements could also analyse the role of ODIHR/OSCE missions in the transnational anti-hate crime advocacy networks.

As mentioned above, this research was limited to factors conditioning the recognition of sexual orientation hate crime only. However, the analytical model used here, consisting of internal and external, social, cultural, historical and political factors may be applied to research looking at other hate crime grounds, particularly gender identity and disability. Such research is needed both in countries that are yet to change the laws (e.g. Poland or Ireland) and countries where legal frameworks are established (e.g. Croatia and Georgia), but rarely used.

Finally, the thesis observes that there is a rise of Islamophobia in Poland, and that the current government deprioritized hate crime as a policy problem. Future research could consider how the discourse of Muslims becoming a new threat to Poles is built upon, joins or replaces the discourse ostracizing Jews and sexual minorities. Future research could also consider comparing how the 'turn to the right', arguably taking place in some European countries, impacts countering hate crime.

11.5 IMPLICATIONS FOR POLICY AND PRACTICE

This thesis is grounded in the commitment to producing research which is theoretically informed and methodologically sound, yet publicly engaged and accessible for policy makers and activists. Having presented the scientific contribution and propositions for further research above, I would now like to reflect on how the findings of this research may impact future policy and practice.

Action research often follows the realization that there is an acute social problem which needs to be solved. In my case, I observed the attempts to advocate for anti-LGB hate crime laws in Poland and wanted to understand why and when governments take the issue of hate crime seriously to inform future advocacy work.

The findings suggest that, among the social-movement-related reasons impeding the effectiveness of the movement were: poor resonance of the human rights/equality framing; de-prioritization of hate crime advocacy vis-à-vis advocacy for rights of same-sex couples; broad and vague understanding of hate speech and focus on hate speech in advocacy; lack of an action plan and dedicated structures to advocate for anti-LGB hate crime laws; incongruence of the proposed legal changes with criminal law principles; insufficient evidence of the need to enhance penalties for hate crime. Conversely, factors which were conducive for the change in the policy

area include: securing international recommendations, linking the issue of anti-LGB violence with racist and xenophobic hate crime (coat-tailing) and cooperation with ODIHR and FRA.

The above results suggest several courses of action for the LGBT rights movement in Poland (of which I am now a member, having been involved in hate crime advocacy since 2015). The number one priority for the movement should be to define basic concepts (hate crime and hate speech), craft new strategies, establish dedicated structures and prioritize claims. To cite Swiebel (2009:31), 'we must first put our own house in order; that is, define what it is that we want – and in which order'. My advice would be to follow the OSCE definition, separating hate speech from hate crime, and prioritize hate crime over hate speech in advocacy and information politics to avoid the 'freedom of speech' discussions and the slippery slope argument.

Next, the LGBT movement needs to prioritize hate crime advocacy vis-à-vis other collective claims, particularly recognition of same-sex unions. Ideally, advocacy in both areas should be separated. Instead, hate crime advocacy efforts should be linked with advocacy for better responses to racist and xenophobic crimes, perceived as 'legitimate' and rarely contested. Ideally, anti-LGB hate crime issues would be incorporated ('hidden') within a broader strategy to respond to hatred.

As there is little prospect for the change of law under the PiS government, the LGBT movement should use this time to mobilize and 'get ready' when political opportunities appear. Advocates should devise an action plan inclusive of not only goals, but also information politics. With support of legal scholars, advocates should prepare a new draft amendment accounting for the doctrinal critique of previous legislative initiatives. One option would be to create a new set of laws, separate from the existing, historicized ones, providing for enhanced penalties for a range of possible hate crime types and motivations. It should ideally be submitted by the Ministry of Justice and, if possible, form part of a larger reform of the criminal law. The draft amendment's authorship should not be associated with LGBT groups and heralded as the penalization of homophobia; instead, it should be promoted as government business or, alternatively, as collaborative work of a horizontal, broad-based coalition. To provide evidence for the draft amendment, there is a need to collect strategic cases where there is an identifiable victim (so not hate speech cases, but, for example, physical assaults). For that, there is a need to increase efforts to encourage victims to report and share their testimonies, and to raise awareness of hate crime among the public, to build sympathy for the initiatives to change the law.

Finally, the last implication from this research concerns ensuring that whatever has been achieved over the past years in countering hate crime is not undermined by current and future governments. The prospects are worrying. Government officials in Poland have made it clear that countering hate speech and hate crime is no longer a priority. The official stance is now that the hate crimes are only a small, insignificant percentage of all the crimes reported and thus there is no need to prioritize it (pr/ 2016). The Human Rights Protection Team at the Ministry of Interior was dismantled (Koźmiński 2016). As Perry writes, 'with a change in political leadership all of these efforts can be undermined and careful work that has sometimes taken years can be dismantled

almost overnight' (Perry 2016b). Activists, researchers and transnational organizations should think of ways of safeguarding the progress that was made, considering shrinking resources and an increasingly hostile political environment. There is a clear role for IGOs here to support activists who find themselves in increasingly challenging situations, are subjected to smear campaigns and cut away from funding (Warso and Godzisz 2016).

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APPENDICES

APPENDIX A

EXCERPTS FROM HATE CRIME AND HATE SPEECH LAWS IN POLAND²⁴¹

Article 119§1 of the Criminal Code: 'Whoever uses violence or makes unlawful threat towards a group of people or a particular person because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.'

Article 126a of the Criminal Code: 'Anyone who publicly incites others to the commission of an act referred to in Article 118, 118a, 119 § 1, Article 120-125 [Articles 117-125 proscribe crimes against peace, crimes against humanity and war crimes], or publicly commends the commission of an act referred to in those provisions, shall be subject to the penalty of deprivation of liberty for the term of between 3 months to 5 years.'

Article 256§1 of the Criminal Code: 'Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.'

Article 257§1 of the Criminal Code: 'Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years.'

Article 55 of the Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation: 'Anyone who publicly and contrary to the facts denies crimes referred to in Article 1, point 1 shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public.'

(Article 1. The act shall govern:

1. the registration, collection, access, management and use of the documents of the organs of state security created and collected between 22 July 1944 and 31 December 1989, and the documents of the organs of security of the Third Reich and the Union of Soviet Socialist Republics concerning:

a) crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989:

- Nazi crimes,

- communist crimes,

- other crimes constituting crimes against peace, crimes against humanity or war crimes (...).

²⁴¹ All translations of the legal provisions are unofficial.

APPENDIX B

FREEDOM OF INFORMATION REQUEST EXAMPLE

Piotr Godzisz
School of Slavonic & East European Studies
University College London

Warszawa, 24 czerwca 2015

Rzecznik Praw Obywatelskich
al. Solidarności 77
00-090 Warszawa

Na podstawie art. 2 ust. 1 Ustawy o dostępie do informacji publicznej z dnia 6 września 2001 roku zwracam się z uprzejmą prośbą do udostępnienie mi treści korespondencji (wychodzącej i przychodzącej) prowadzonej przez Biuro Rzecznika Praw Obywatelskich dotyczącej zmian w Kodeksie karnym w zakresie przepisów penalizujących mowę nienawiści i przestępstwa motywowane uprzedzeniami (art. 119, 256 i 257 Kodeksu karnego). Prośba dotyczy korespondencji z następującymi podmiotami:

- Ministerstwo Sprawiedliwości;
- Ministerstwo Spraw Wewnętrznych;
- Ministerstwo Administracji i Cyfryzacji;
- Pełnomocnik Rządu do Spraw Równego Traktowania;
- Organizacje pozarządowe (w szczególności Kampania Przeciwko Homofobii), w tym koalicje je zrzeszające.

Jednocześnie, proszę o udostępnienie mi treści interwencji skierowanych do Policji, Prokuratury Generalnej i sądów, jak też odpowiedzi na te interwencje, w zakresie przypadków mowy nienawiści i przestępstw motywowanych uprzedzeniami, w tym uprzedzeniami związanymi z orientacją seksualną i tożsamością płciową.

Prośba dotyczy okresu od 1 stycznia 2005 do dnia dzisiejszego.

Informację proszę przekazać w formie elektronicznej na adresy e-mail piotr.godzisz.13@ucl.ac.uk oraz pgodzisz@gmail.com. Gdyby to nie było możliwe, proszę o przesłanie informacji na adres korespondencyjny: ul. Kępną 2B/112, 03-730 Warszawa.

W razie pytań związanych z powyższą prośbą, proszę o kontakt e-mailowy lub telefoniczny pod numerem ... lub

Z poważaniem
Piotr Godzisz

APPENDIX C

MEMOS – EXAMPLES

C.1. DOCUMENT-SPECIFIC MEMO:

***Concluding observations on the combined fifth and sixth periodic reports of Poland
CAT/C/POL/CO/5-6 (CAT 2013), 2015-07-08***

Summary

- Relevant; recommends adding sexual orientation, disability and age.
- Lack of conceptual clarity regarding different manifestations of violence.

Questions

Why does CAT recommend adding sexual orientation, if UN may not have the strongest mandate in it?

Quotes

25. The Committee notes the adoption of the Equal Treatment Act in 2010 and the provisions of the Penal Code prohibiting hate crimes (arts. 119, 256 and 257), but considers that neither the Act nor the Penal Code provide adequate and specific protection against discrimination based on sexual orientation, disability or age. It is concerned at the prevalence of racial violence and other acts of racial abuse targeting persons of Arab, Asian and African origin, and manifestations of anti-Semitism. It is also concerned at the significant rise in manifestations of hate speech and intolerance directed at lesbian, gay, bisexual and transgender people and the persistent discrimination against members of the Roma community (arts. 2, 11 and 16).

The Committee recommends that the State party incorporate offences in its Penal Code to ensure that hate crimes and acts of discrimination and violence that target persons on the basis of their sexual orientation, disability or age are punished accordingly. It also urges the State party to take all necessary measures to combat discrimination and violence against persons of Arab, Asian and African origin, lesbian, gay, bisexual and transgender people and persons belonging to the Roma community and to take effective measures to prevent all manifestations of anti-Semitism. Moreover, the State party should continue to be vigilant in ensuring that the relevant existing legal and administrative measures are strictly observed and that training curricula and administrative directives constantly remind staff that such acts will not be tolerated and will be sanctioned accordingly. The Committee refers the State party to its general comment no. 2 (2007) on the implementation of article 2 by States parties,

section V: "Protection for individuals and groups made vulnerable by discrimination or marginalization".

Compared to CAT 4:

- Gender identity has been added compared to CAT 4 in concerned, but not in recommendation
- new grounds – disability and age have been added compared to CAT 4
- more stress on actual hate crime – violence is added; however still stress on hate speech
- No more interest in data collection

Analysis

- CAT is concerned about 'significant rise in manifestations of hate speech and intolerance directed at lesbian, gay, bisexual and transgender people'
- gender identity has been added compared to CAT 4 [this shows that the focus re LGBT is on HS; this recommendation is clearly influenced by HFPC]
- However, in recommendations, it recommends adding sexual orientation [without gender identity], disability and age
- Where do dis and age come from? [again, this recommendation is clearly influenced by HFPC]
- Furthermore, one can wonder what the Committee understands by hate crime, when it says 'hate crimes and acts of discrimination and violence'. There is criminal discrimination [access to goods, unequal treatment; there have never been attempts in Poland to criminalize it?], there is violence [hate crime according to ODIHR?] and there is hate crime [should be hate speech?]
- It seems that if it says hate crimes are in 119, 256 and 257, then hate speech is also hate crime
- Lack of conceptual clarity and lack of alignment with other IGOs may work in detriment
- CAT is inconsistent in what types of conduct and protected categories they are interested in – in questions they asked about sex and political affiliation and ToC threats and attacks.

C.2. NON-DOCUMENT SPECIFIC MEMO

Disability hate crime, 2015-04-30

In Poland, we have certain laws which could be considered disability hate crime laws (Art 198, 207 and possibly one more), but they are not commonly recognized as hate crime laws because of the focus on extremism, hate speech, violence etc.

Focus on hate speech /brutal hate crime results in policy-makers and NGOs ignoring the disability hate crime provisions which are already in the Criminal Code.

This is also because the pressure is mostly from LGBT groups and their supporters; disability is included, but the specifics of disability hate crime may not be completely understood;

According to draft amendments - disability hate crime is also stranger crime; focus on hate speech - examples of hate speech targeting disability - focus on brutal crimes - there seems to be lack of understanding of 'mate crimes' and no propositions to cover other parts of the Criminal Code that cover disability at the moment.

Only extreme/brutal disability hate crime is proposed to be added.

This comes from the focus on hate speech /brutal/extremism/stranger crime.

APPENDIX D

LIST OF INTERVIEWS

Personal interviews

1. Interview-01-International-civil-servant1-2015-06-17
2. Interview-02-anti-hate-speech-activist1-2015-08-11
3. Interview-03-LGBT-rights-activist1-2015-08-11
4. Interview-04-anti-hate-speech-activist2-2015-08-18
5. Interview-05-LGBT-rights-activist2-2015-08-19
6. Interview-06-trans-rights-activist1-2015-08-19
7. Interview-07-prosecutor-general's-office-2015-08-20
8. Interview-08-MoI-group-2015-08-20
9. Interview-09-anti-racism-activist1-2015-08-26
10. Interview-10-police-human-rights-officer1-2015-08-25
11. Interview-11-MoEducation-2015-08-25
12. Interview-12-police-human-rights-officer2-2015-08-26
13. Interview-13-Commissioner-for-human-rights-office-2015-09-16
14. Interview-14-anti-racism-activist2-2015-09-25
15. Interview-15-trans-rights-activist2-2015-10-08
16. Interview-16-MoJ-2015-10-08
17. Interview-17-police-hate-crime-coordinator-2015-11-17
18. Interview-18-ECRI-2015-11-20
19. Interview-19-HRCtee-2015-11-21
20. Interview-20-anti-racism-activist3-2016-03-30
21. Interview-21-International-civil-servant2-2016-05-30
22. Interview-22-International-civil-servant3-2016-10-26

Emails

1. Email-anti-discrimination-activist-2016-10-11
2. Email-LGBT-rights-activist3-2016-10-12
3. Email-LGBT-rights-activist4-2016-10-14
4. Email-LGBT-rights-activist1-2017-01-16
5. Email-LGBT-rights-activist4-2017-05-08
6. Email-ODIHR2-2015-11-20
7. Email-MoI-2016-11-08
8. Email-KGP-2017-06-14
9. Email-KSSIP-2017-06-20
10. Email-hate-crime-charity-UK-2014-02-17

Other

1. Personal-comms-former-MoI1-2017-06-06
2. Personal-comms-former-MoI1-2017-09-28.

APPENDIX E

THE FIRST LETTER TO THE MOJ ABOUT ANTI-LGB HATE CRIME LAWS



KAMPANIA PRZECIW HOMOFOBII CAMPAIGN AGAINST HOMOPHOBIA

adres: Kampania Przeciw Homofobii, ul. Wołoska 58/62 m. 5, 03-507 Warszawa
telefon: +48 22 423 64 38 fax: +48 22 844 55 47 e-mail: info@kampania.org.pl strona: www.kampania.org.pl
NIP: 521-32-04-077 REGON: 015182882
Konto bankowe: Bank Inicjatyw Społeczno-Ekonomicznych S.A.
43 1370 10 370000170140748001
organizacja pożytku publicznego

Warszawa, dnia 25 lipca 2005 r.

2005-07-28

Mr. Kalwas

Pan

Andrzej Kalwas

Minister Sprawiedliwości

Szanowny Panie Ministrze

W imieniu stowarzyszenia Kampania Przeciw Homofobii, ogólnopolskiej organizacji działającej na rzecz przeciwdziałania dyskryminacji mniejszości homo, bi i transseksualnych w naszym kraju, zwracam się do Pana Ministra z zapytaniem, czy istnieje możliwość rozważenia przez kierowany przez Pana resort opracowania rządowej propozycji nowelizacji ustawy Kodeksu karny, która w skuteczniejszy sposób chroniłaby polskich gejów i lesbijki.

W ostatnich miesiącach, do naszego stowarzyszenia zgłaszanych jest coraz więcej przestępstw, których ofiary to właśnie obywatele odmiennej niż większość społeczeństwa orientacji seksualnej. Większość przestępstw stanowią pobicia, podżeganie do nienawiści wobec tej grupy społecznej oraz groźby. Sprawcami kieruje głównie niechęć do mniejszości homoseksualnej.

W przekonaniu członków reprezentowanego przeze mnie stowarzyszenia, pojawiła się społecznie uzasadniona konieczność wprowadzenia w polskim systemie prawnym, a szczególnie prawie karnym, skuteczniejszych instrumentów, które w bardziej efektywny sposób zapobiegłyby nienawiści skierowanej wobec polskiej mniejszości homoseksualnej, liczącej około 5% społeczeństwa, czyli około 2 milionów osób. Wprowadzenie zapisów na wzór tych już istniejących - chroniących mniejszości narodowe, etniczne, wyznaniowe (art. 256 i 257 kk) z pewnością poprawiłoby sytuację dyskryminowanych przedstawicieli tej grupy społecznej.

Wprowadzenie zapisów wyraźnie zakazujących propagowania nienawiści wobec osób o homoseksualnej orientacji nie tylko wzmocniłoby poczucie bezpieczeństwa znacznej liczby obywateli, ale również miałoby społeczny aspekt edukacyjny, pod którego wpływem

Kampania Przeciw Homofobii jest ogólnopolską organizacją działającą na rzecz równouprawnienia mniejszości seksualnych.

znaleźliby się także pracownicy wymiaru sprawiedliwości, którzy, jak pokazują doświadczenia stowarzyszenia Kampania Przeciw Homofobii, bardzo często nie uwzględniają przesłanki orientacji seksualnej jako czynnika, który wpływa na motywację przestępców. Przykładem może być tu postępowanie prokuratorów, którzy nie wszczęli z urzędu jeszcze żadnego postępowania przeciwko osobom narwołującym do nienawiści wobec gejów i lesbijek, a także odmawiali wszczęcia takich postępowań, po tym, jak zainteresowane osoby lub organizacje zgłaszały takie przypadki.

Mając na uwadze powyższe zwracam się z prośbą o uściśnienie się do przedstawionych powyżej argumentów i uprzejmie rozważenie opracowania stosownej propozycji rządowej.

P R E Z E S

Robert Biedrak

Do wiadomości:

- Wiceprezes Rady Ministrów, Izabela JARUGA NOWACKA
- Pełnomocznika Rządu ds. Równego Statusu Kobiet i Mężczyzn, Magdalena ŚRODA
- Rzecznik Praw Obywatelskich, Andrzej ZOLL
- Media