Poland vs. Elzbieta Podlesna, Anna Prus, and Joanna Gzyra-Iskandar

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE
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Staff at the American Bar Association Center for Human Rights helped to draft this report. The American Bar Association (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA Center for Human Rights mobilizes lawyers to help threatened advocates, protect vulnerable communities, and hold governments accountable under law. It has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. It is an implementing partner in the Clooney Foundation for Justice’s TrialWatch initiative.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE’S TRIALWATCH INITIATIVE

The Clooney Foundation for Justice (CFJ) advocates for justice through accountability for human rights abuses around the world. TrialWatch is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTIQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries’ performance and use it to support advocacy for systemic change.

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From January to March 2021, the American Bar Association (ABA) Center for Human Rights monitored the trial of human rights defenders Elżbieta Podlesna, Anna Prus, and Joanna Gzyra-Iskandar as part of the Clooney Foundation for Justice’s Trial Watch initiative. The three accused were charged with "offend[ing] the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies" under Article 196 of Poland’s Criminal Code: specifically, they were accused of placing posters and stickers depicting the Virgin Mary with a rainbow halo, a symbol of LGBTIQ+ acceptance, in public spaces in the town of Plock. Although the accused were acquitted by the District Court of Plock, their prosecution constituted a severe violation of their rights to freedom of expression and to freedom from discrimination. These rights are enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), which Poland acceded to in 1977 and 1993, respectively. With prosecution representatives comparing the rainbow flag to the swastika, condemning the "homolobby,"1 and deeming homosexuality an abomination, it was clear that Article 196 was but a vehicle to pummel the LGBTIQ+ community.

The case reflects a broader pattern in which the Polish authorities – particularly under the Law and Justice Party’s (PiS) leadership – have used Article 196 to target advocates for LGBTIQ+ equality within a political climate increasingly hostile to the LGBTIQ+ community. The accused’s acquittal demonstrates how vital it is that the international community combat PiS efforts to undermine judicial independence, protecting the ability of courts such as the District Court of Plock to issue decisions based on human rights standards, not the PiS agenda. This report is being released in advance of the prosecution’s appeal of the acquittal, the hearing for which is scheduled for November 10.

On the night of April 26, 2019, Podlesna, Prus, and Gzyra-Iskandar traveled by car to the town of Plock. They spent approximately two hours pasting posters and stickers

1 District Court of Plock, Trial Transcript, January 13, 2021.
depicting the Virgin Mary with a rainbow halo on “portable toilets, waste bins, transformers, street signs, [and] walls of buildings” in the vicinity of the Church of St. Dominik. According to the accused, they did so in response to a church installation put up a week prior that featured placards describing homosexuality as a sin and deviation. Subsequently, a criminal investigation was triggered by a complaint made by Tadeusz Łebkowski, a priest at the Church of St. Dominik. On May 6, 2019, Podlesna’s home was searched and she was detained for several hours.

Over a year later, on June 29, 2020, the District Prosecutor in Plock filed an indictment against the three women, charging them under Article 196 with offending religious feelings. Their trial began on January 13, 2021 before the District Court of Plock. Łebkowski and Kaja Godek, a well-known anti-abortion, “pro-family” activist who previously ran for European Parliament, participated in the proceedings in the role of “auxiliary prosecutors,” supporting the State’s case. Notably, cases brought against LGBTIQ+ activists for “offending religious feelings” have been on the rise in parallel with the ascendance of the socially conservative PiS party, which has made anti-LGBTIQ+ rhetoric central to its political platform.

The proceedings against Podlesna, Prus, and Gzyra-Iskandar violated the right to freedom of expression enshrined in the ICCPR and ECHR. The right encompasses speech imparted via all media, including art, and speech that offends and disturbs. While the right to freedom of expression is not absolute, any restrictions on protected speech must (i) be prescribed by law (be precise, clear, and accessible), (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.

The prosecution of the three accused did not meet any of these requirements. First, Article 196 is not precise, clear, or accessible. In criminalizing acts that “offend the religious feelings of other persons” through public insult, by nature a subjective concept, Article 196 is so broad as to afford the authorities unfettered discretion in its application, making it ripe for abuse. This is demonstrated both by the case against the accused and numerous other prosecutions brought against LGBTIQ+ activists or individuals who deviate from the PiS agenda.

Second, there was no legitimate objective to justify prosecuting the accused. While the State indicated that it brought the case to protect morals arising from the Catholic faith, both the United Nations Human Rights Committee, charged with monitoring implementation of the ICCPR, and the European Court of Human Rights, charged with monitoring implementation of the ECHR, have held that States may not invoke morals to restrict freedom of expression where the restriction “embodie[s] a predisposed bias on the part of a heterosexual majority against a homosexual minority.” As described in

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2 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
more depth below, the prosecution was clearly based on the accused’s activism on behalf of the LGBTIQ+ community. Third, the case against the accused failed to meet necessity and proportionality requirements. With respect to this requirement, international and regional bodies have made clear that criminal prosecutions for speech offenses should be reserved for exceptionally grave acts, such as incitement to genocide and terrorism. The accused’s posting of stickers and posters featuring a rainbow halo clearly did not rise to this level of gravity.

Finally, the trial violated the non-discrimination guarantees established by Articles 2 and 26 of the ICCPR and Article 10 of the ECHR. Discrimination is prohibited both in law and in practice. The UN Human Rights Committee and European Court have established that the ICCPR and ECHR protect against discrimination based on real or perceived sexual orientation and gender identity. In the present case, it was clear that the accused were prosecuted for their advocacy on LGBTIQ+ rights. The indictment highlighted that the criminal charges were based not on the fact that a religious image had been altered but that it had been combined with a “symbol of the LGBT community.”

Likewise, throughout the trial the auxiliary prosecutors and other prosecution witnesses consistently made homophobic remarks: among other things, comparing the rainbow flag to swastikas, deeming homosexuality a sin and abomination, and characterizing the placement of the rainbow symbol on the Virgin Mary as profane. Indeed, the court found in its acquitting verdict that contrary to the State’s assertions, the rainbow symbol neither “express[ed] any negative thoughts” nor “carr[ied] shameful, degrading content.”

Given that the prosecution stemmed from the accused’s LGBTIQ+ activism, it violated their right to freedom from discrimination. Although the accused were acquitted, they were subjected to lengthy and costly criminal proceedings. The verdict was issued almost two years after the alleged offense and the prosecution is appealing the acquittal, meaning that the saga will continue indefinitely. More broadly, the case of Podlesna, Prus, and Gzyra-Iskandar is just one of many pending against LGBTIQ+ activists under Article 196. Going forward, courts should intervene at an earlier stage and dismiss such cases, drawing on the Plock District Court’s ruling and international and regional standards. The prosecution’s appeal in the present case, which is scheduled to be heard on November 10, should likewise be rejected.

While the legislature should repeal Article 196, which – as described above – does not conform with international and regional standards, the current political climate makes such an outcome unlikely in the short-term. As such, it is more important than ever that the international community combat the PiS party’s efforts to roll back judicial independence. With the executive and legislature committed to the PiS agenda, the

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3 District Prosecutor of Plock, Indictment, June 29, 2020.
4 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
judiciary, as demonstrated by the case against Podlesna, Prus, and Gzyra-Iskandar, is the last bastion for protecting rights such as the right to freedom of expression and right to freedom from discrimination. This is true not only for members of the LGBTIQ+ community but also for other minority groups as well as for anyone who speaks out against PiS policies and rhetoric.
A. POLITICAL AND LEGAL CONTEXT

Poland transitioned from communist rule to democracy in 1989. However, ever since the Law and Justice Party (PiS) – a populist, socially conservative party with close links to the Catholic church⁵ – came into power in late 2015, it has enacted measures that “increase political influence over state institutions and threaten to reverse Poland’s democratic progress.”⁶

Judicial Independence

In its 2021 Freedom in the World report, Freedom House gave Poland the lowest possible score – 1 out of 4 – with respect to the independence of its judiciary. ⁷ The PiS government has sharply curbed judicial independence by making structural changes and passing laws “designed to mitigate the ability of the courts to act as a check against legislative and executive power.”⁸ In brief, these include:

- Adopting various acts in 2015 and 2016 that “seriously undermined the Constitutional Tribunal’s independence and legitimacy.”
- In 2016, combining the office of the Minister of Justice, which is part of the executive branch, and the office of the Prosecutor General of Poland into one entity,⁹ a change criticized as increasing the “vulnerability to political influence” of the overall justice system.¹⁰

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⁷ Id.
- Giving the Minister of Justice more expansive power over the discipline of judges (2017) as well as expanded appointment power (2019).\(^\text{11}\)
- In 2017, placing the National Council of the Judiciary, a body that appoints judges, including Supreme Court judges, under the control of the PiS-controlled legislature as opposed to judicial assemblies.\(^\text{12}\)
- In 2018, lowering the retirement age of sitting judges on the Supreme Court from 70 to 65, “forcing the removal of 27 of Poland’s 73 high court judges alone.” (The law was withdrawn following domestic and international pressure.)\(^\text{13}\)
- In 2018, restructuring the Supreme Court by creating a Disciplinary Chamber staffed with “newly appointed judges selected by the new National Council of the Judiciary,”\(^\text{14}\) spurring many disciplinary inquiries and proceedings against Polish judges – particularly judges who had criticized PiS changes or who had referred questions to the European Union Court of Justice.\(^\text{15}\)
- In December 2019, passing a so-called “muzzle” law,\(^\text{16}\) which broadened disciplinary offenses so that judges can now be disciplined for “acts or omissions which may prevent or significantly impede the functioning of an organ of the judiciary”; for “actions questioning the existence of the official relationship of a judge, the effectiveness of the appointment of a judge, or the constitutional mandate of an organ of the Republic of Poland”; and for public activities “that are incompatible with the principles of judicial independence and the impartiality of judges.”\(^\text{17}\) The law also allows the Disciplinary Chamber of the Supreme Court

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(which is not independent) to lift judicial immunity so that judges can be criminally prosecuted.\(^{18}\)

The PiS’s overhaul of Poland’s judicial system has been widely criticized as undermining the rule of law and judicial independence.\(^{19}\) Notably, the European Commission took the “unprecedented step” in 2016 of activating its rule of law framework, under which the Commission opened a dialogue with Poland on rule of law issues,\(^{20}\) and in 2017 activated its Article 7 disciplinary mechanism in response to continuing concerns,\(^{21}\) which “can ultimately lead to the suspension of a country’s voting rights in the Council of the EU.”\(^{22}\) The gravity of PiS’s overhaul of the judicial system is further evidenced by the fact that three separate proceedings in this regard have been initiated against Poland before the Court of Justice of the European Union,\(^{23}\) and there are at least six pending cases before the European Court of Human Rights.\(^{24}\) On May 7, 2021, the European Court issued its first judgment addressing such issues, finding a violation of the right to a fair hearing and a “tribunal established by law” due to the unlawful appointment of judges to the Constitutional Tribunal.\(^{25}\)

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\(^{18}\) Id.


\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) POLITICO, “MEPs urge EU to push Poland closer to sanctions over rule of law”, June 29, 2021. Available at https://www.politico.eu/article/meps-adopt-call-to-finally-act-on-article-7-against-poland/.


**LGBTIQ+ Rights and Discrimination**

In a 2020 assessment, the International Lesbian, Gay, Bisexual Trans and Intersex Association rated Poland 43rd out of 49 European countries (and last in the European Union) based on how its laws and policies impact LGBTIQ+ persons. As described by the U.S. State Department, “violence or threats of violence targeting lesbian, gay, bisexual, transgender, or intersex persons” is likewise a “significant human rights issue” in Poland. These realities were reflected in the EU LGBTI survey II, published in May 2020, in which 68% of respondents in Poland said that LGBTIQ+ prejudice and intolerance had risen in the last five years, and only 4% believed their national government was effectively combating prejudice and intolerance towards LGBTIQ+ persons.

**The PiS Party: Anti-LGBTIQ+ Rights Agenda**

The Law and Justice Party, led by President Andrzej Duda, has made anti-LGBTIQ+ rhetoric a political campaign issue and a major part of the party platform. Throughout President Duda’s re-election campaign in 2020, he repeatedly made homophobic statements, such as deeming “LGBT ideology” “even more destructive” than communism. He also proposed amending the Polish Constitution to ban same-sex couples from adopting children. Multiple leading figures in the Law and Justice Party have likewise made public anti-LGBTIQ+ statements:

- In 2019, before European Parliament Elections, PiS party leader Jaroslaw Kaczynski called LGBTIQ+ rights “a real threat to our identity.” Later, he called “LGBT ideology” a threat “to the very foundations of our civilization.”
- In June 2020, Member of the European Parliament (and former PiS interior minister) Joachim Brudzinski tweeted that “Poland without LGBT is most beautiful.”

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33 Id.
Before becoming Minister of Education and Science, PiS member Przemysław Czarneck said that LGBTIQ+ individuals were “not equal to normal people.”

In August 2020, then Education Minister Dariusz Piontkowski “defended the education superintendent of Lodz Province for saying the ‘LGBT virus…of ideology’ was ‘much more dangerous’ than COVID-19.”

**Discrimination by the State: “LGBT-free zones,” Family Charters, and Prosecutions**

Since early 2019, many local authorities – seemingly emboldened by the PiS’s anti-LGBTIQ+ rhetoric, including a statement by Deputy Minister of State Assets Janusz Kowalski that all of Poland should be an “LGBT-free zone” – have passed resolutions opposing “LGBT ideology” and declaring themselves “LGBT-free zones.” By early 2021, almost 100 regions, counties and municipalities had passed such resolutions and/or signed “family rights charters” that proclaimed marriage to only be between a man and a woman, purporting to advocate for the “protection of children against moral corruption.”

Hate crimes have increased in the wake of these declarations. For example, in August 2020, two separate attacks occurred; in Poznan, a man was brutally beaten by attackers who used homophobic language, while in Warsaw, an LGBTIQ+ activist was assaulted while holding hands with his partner. Advocates have also stated that the increasing anti-LGBTIQ+ rhetoric has contributed to “poor mental health among young, LGBT+ poles.”

The Polish Ombudsman for Human Rights has initiated nine complaints challenging various local resolutions, with mixed results. In response to a complaint filed by the Ombudsman, an administrative court in Gliwice annulled a “LGBT ideology free zone” resolution passed by the Istebna municipality, finding it to be discriminatory on the basis of sexual orientation and gender identity and in violation of the Polish Constitution and

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34 Id.
35 Id.
the European Convention on Human Rights.\textsuperscript{42} The court noted that “establishing a zone free from LGBT ideology is also a direct hit to freedom of expression.”\textsuperscript{43} A similar local resolution was invalidated by an administrative court in Radom.\textsuperscript{44} On the other hand, analogous complaints from the Ombudsman have been rejected by courts in Krakow, Kielce and Poznan;\textsuperscript{45} the Krakow court, for example, ruled that “the declarations neither limited nor interfered with the constitutional rights and freedoms of any group of citizens and did not discriminate against any person.”\textsuperscript{46}

Activists peacefully protesting against anti-LGBTIQ+ propaganda and government policy have faced arrests and targeted prosecutions. On August 3, 2020 the police arrested and detained three activists for placing rainbow flags on public monuments in Warsaw and charged them with desecrating monuments and offending religious feelings under Article 196 of the Criminal Code.\textsuperscript{47} One of these activists, Margot Szutowicz, had been arrested and then released a few days prior for defacing a van that had anti-LGBTIQ+ slogans on it.\textsuperscript{48} When hundreds gathered on August 7 to protest an order to detain Szutowicz, nearly 50 people in the crowd were arrested.\textsuperscript{49} As of the writing of this report, the case against Szutowicz for defacing the van was pending, while the case against Szutowicz and two other activists for placing the rainbow flag on Warsaw monuments had been discontinued.

**Criminalization of Speech Offenses**

Prosecutions of LGBTIQ+ activists have been facilitated by the raft of expansive provisions criminalizing speech offenses in Poland’s Criminal Code. One such provision is Article 196, which states: “[w]hoever offends the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies, is liable to pay a fine, have his or her liberty limited, or be deprived of his or her liberty for a period of up to two years.” Other speech acts that are criminalized include criminal defamation (Article 212); criminal insult (Article 216); publicly insulting the President of Poland (Article 135); insulting a public official (Article 226); publicly


\textsuperscript{43} Id.


\textsuperscript{49} Id.
insulting the nation or republic of Poland (Article 133); publicly insulting, destroying or removing a symbol of the state (Article 137); and publicly insulting a "constitutional authority of the Republic" (Article 226(3)).

Before the rise of the PiS party in 2015, criminal prosecutions under so-called “insult laws” and other speech-related provisions were rare, mostly ending in acquittal when they did occur. However, since PiS’s ascendance, such prosecutions – primarily brought against those who have spoken out against the government or the powerful Catholic Church, with which the PiS is closely aligned – have increased: the number of charges brought under Article 196, for example, increased from 10 in 2016 to 29 in 2020, while convictions for criminal defamation committed through the media (Article 212(2)) have doubled – from 60 convictions in 2012 to 137 convictions in 2017 and 118 convictions in 2018.

In particular, Article 196 has been leveraged against LGBTIQ+ activists. As documented by Freedom House, “the law appears to be applied mostly at the instigation of conservative Catholics.” As of the writing of this report, several cases under Article 196 were pending:

- The case against professor and civil rights activist Magdalena Pecul, who is facing charges for putting a rainbow flag on a monument of Jesus as a gesture of solidarity with arrested LGBTIQ+ activists.
- The case against priest and LGBTIQ+ activist Szymon Niemiec, who is facing charges for conducting a mass during Pride events in Warsaw in 2019.

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The case against participants in the 2019 Equality March in Gdańsk, who are facing charges for conducting what resembled a religious procession with rainbow images and a drawing of a vagina as a goddess. For now, it appears that the majority of those charged with speech offenses have been able to obtain fair hearings, with most cases ending in dismissal. While such “judgments are full of references to rulings by the European Court of Human Rights and international standards on freedom of expression,” there is serious concern that “if PiS continues to dismantle the judiciary, it will no longer be the case that these people will be treated fairly by the courts.” Further, “[i]n many cases, the aim is not necessarily to win the case, but to put defendants through a very long and expensive legal process that has financial as well as health impacts.”

International Response to Anti-LGBTIQ+ Laws and Policies in Poland

Anti-LGBTIQ+ laws and policies have been roundly condemned by international organizations and institutions. In a resolution adopted on December 18, 2019, for example, the European Parliament denounced the so-called “LGBT-free zones” and urged Polish authorities to revoke such declarations. A similar resolution was adopted by the European Parliament in September 2020.

On December 3, 2020, the Council of Europe Commissioner for Human Rights released a memorandum in which she expressed specific concern about the “numerous accounts of harassment and intimidation of LGBTI activists in Poland by law enforcement agencies and the public prosecution service” and called on Poland to “fully protect persons defending the rights of LGBTI people from hostility and aggression and to enable them to carry out their activities freely.” In 2021, largely in response to the backlash against LGBTIQ+ rights in Poland and Hungary, the European Parliament adopted a resolution declaring the EU an “LGBTIQ Freedom Zone.”

Anti-LGBTIQ+ laws and policies have also resulted in financial penalties. On July 28, 2020, the EU Commissioner for Equality announced the rejection of applications for

58 Information from the Campaign Against Homophobia, March 10, 2021.
60 Id.
funding from six towns that had adopted “LGBT-free” resolutions. In September 2020, the Norwegian Minister of Foreign Affairs also announced that Polish municipalities with such declarations (as well as institutions under their control) would not receive funds from the European Economic Area Financial Mechanism.

UN bodies have correspondingly expressed support for LGBTIQ+ activists. In 2018, the UN Special Rapporteur on Cultural Rights recognized “the use of a flag which combines the rainbow flag and the Polish eagle symbol as an exercise of cultural rights to express one’s identity and inclusion” and stated that she was “sorry that this has come under criticism and that people using such a flag have reportedly faced questioning by law enforcement officers.” The Rapporteur likewise raised concern “about the lack of specific legal protection for LGBT persons under Polish law,” as well about the “[a]cts of hate and hate speech against LGBT people and their cultural events,” noting that sometimes “the hate speech emanates from those in official positions.”

B. CASE HISTORY

Elżbieta Podlesna, Anna Prus, and Joanna Gzyra-Iskandar are Polish human rights defenders. Podlesna helped organize nationwide abortion rights protests in 2016 and was also part of a 2017 Independence Day counter-protest in Warsaw, during which far-right protesters attacked her and other female activists for displaying a banner that read “Stop Fascism.”

On the night of April 26, 2019, Podlesna, Prus, and Gzyra-Iskandar traveled by car to the town of Plock. They spent approximately two hours pasting posters and stickers depicting the Virgin Mary with a rainbow halo on “portable toilets, waste bins, transformers, street signs, [and] walls of buildings” in public spaces near the Church of St. Dominik. They also put up A4 sheets of paper with the names of cardinals and bishops accused of covering up pedophilia committed by Catholic priests. As Podlesna explained at trial, their actions were in response to an installation put up

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68 Id.
71 District Court of Plock, Judgment, Case No. II K 296/20, March 2, 2021.
72 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
73 Id.
inside the Church of St Dominik one week earlier. The display featured placards with the names of purported crimes and sins, including “LGBT,” “Gender,” and “Homodeviations,” placed around a crucified Christ.

On May 6, 2019, shortly after Podlesna returned from an advocacy trip to Belgium and the Netherlands, where she “raised concerns about the rule of law in Poland,” police raided her apartment and detained her for several hours. Her laptop, mobile phone and memory cards were seized. The criminal investigation was triggered by a complaint made about the posters and stickers by Tadeusz Łebkowski, a priest at the Church of St. Dominik.

Over a year later, on June 29, 2020, the District Prosecutor in Plock filed an indictment against Podlesna, Prus, and Gzyra-Iskandar. They were charged under Article 196 of the Criminal Code with:

- publicly insulting the object of religious worship by placing on portable toilets, waste bins, transformers, street signs, walls of buildings in the public space printouts stickers with an altered image of Our Lady of Czestochowa [the Virgin Mary], with a visible halo in the colors of the rainbow, which is a symbol of the LGBT community and thus offend[ing] the religious feelings of others.

Łebkowski, the aforementioned priest at the Church of St. Dominik, and Kaja Godek, a well-known anti-abortion, “pro-family” activist who previously ran for European Parliament, participated in the proceedings in the role of “auxiliary prosecutors”: under the Polish Criminal Procedure Code, an “injured person who has brought a private accusation shall be granted the rights of a subsidiary prosecutor.”

The first hearing of the trial took place on January 13, 2021. After the prosecutor read out the indictment and informed Podlesna of her rights under the Criminal Procedure Code, the judge asked if she admitted to the alleged act and if she wanted to provide any explanation. Podlesna testified that the trio had put up the stickers and posters after the “homophobic” display at the Church of St. Dominik because they wanted to show LGBTIQ+ individuals that someone was defending them and that “they have the

74 Id.
75 Id.
77 Id.
78 District Prosecutor of Plock, Indictment, June 29, 2020.
79 Poland Code of Criminal Procedure, 1997, Article 60.
80 District Court of Plock, Trial Transcript, January 13, 2021.
same place in our society and the right to a safe life as the politicians, people aspiring to politics and priests that incite hatred against them.”

She noted that they specifically chose to put up printouts of the Virgin Mary because she is “a universal symbol of a mother’s love for her child” that would be understood as a “symbol of care, concern and unconditional love,” a natural pair for the rainbow representing “beauty, diversity and consent to diversity.” She emphasized that the trio also posted lists of Catholic cardinals and bishops who had covered up institutional pedophilia in order to juxtapose “a love that accepts and protects the weak” alongside what she described as the “hypocrisy and crime” of church patriarchs. Podlesna then answered questions from the public prosecutor, stating that the placement of the posters and stickers was spontaneous – that the accused put them up as they walked from where Podlesna had parked the car to the church. She also answered questions posed by the attorney of the priest of the Church of St. Dominik (serving as auxiliary prosecutor), stating that the women did not believe the image of the Virgin Mary with a rainbow would offend anyone’s feelings “because the image is not offensive, the rainbow is not offensive and the place and location of these stickers were also not offensive in any way.” Podlesna last answered questions asked by Kaja Godek, the second auxiliary prosecutor.

Next, Prus was given the opportunity to speak. She described the negative impact of societal discrimination on the mental health of LGBTIQ+ youth and children in Poland, including high rates of suicidal thoughts. She noted that “dehumanizing” statements made by Catholic Church representatives were contributing to the stigmatization of LGBTIQ+ individuals. According to Prus, the Campaign Against Homophobia (a Polish human rights organization) responded by launching “Rainbow Fridays,” a day on which schoolchildren, teachers and parents could discuss homophobia. The other part of the Association’s response was to create the image of the Virgin Mary with a rainbow halo to “show child[ren] and teenager[s] they have the right to feel someone takes care of [them].”

Like Podlesna, Prus explained that she had put up the posters and stickers to “oppose” the “contempt, aggression and hatred” she saw expressed in the earlier church installation. She also stated that the trio had pasted the printouts alongside lists of cardinals and bishops who had covered up institutional pedophilia.
Catholic leaders who had protected pedophilic priests “to indicate who [wa]s really the sinner here, a criminal according to secular standards, and who deserves care, custody and unconditional support.” In response to a question by auxiliary prosecutor Godek, Prus stated that she did not think the trio had harmed anyone through their actions, and that they had actually received support from Christian LGBTIQ+ groups around the world.

Gzyra-Iskandar was the last to testify. She affirmed the explanations provided by Podlesna and Prus and added that while the “direct cause” of their “protest” was the church installation, it took place in the context of “a wide-ranging campaign against LGBTIQ+ people in Poland by both the state and the government.” She noted that nearly 70% of LGBTIQ+ teenagers surveyed in a Campaign Against Homophobia report had experienced violence, reiterating that she acted “in good faith to express … solidarity with the people persecuted in Poland” and had no intention to offend anyone’s feelings.

In the second half of the hearing, four witnesses testified: a parishioner of the Church of St. Dominik; Łebkowski (acting as a private prosecutor); Godek (also acting as a private prosecutor); and a second parishioner of the church. The two parishioners described seeing the stickers on the morning of April 27, 2019 as they walked to mass and feeling “shocked,” “surprised,” and “sad.” Łebkowski primarily testified as to his views on LGBTIQ+ issues: he compared the rainbow flag to the swastika, deemed the altered image of the Virgin Mary a “scourge,” and called homosexuality a disorder. Godek, the second private prosecutor, stated with respect to the printouts: “what in this matter is derogatory to us Catholics is the juxtaposition of sexual perversions with the image of God and the Mother.” She also used her testimony to discuss her views on what she called the “homolobby,” “LGBT ideology” and conversion therapy. According to Godek, the Catholic Church considers “homosexuality […] a sin crying out to heaven.”

At the trial’s second hearing on February 17, 2021, the presentation of evidence continued with one last witness. Moniki Niedzwiedzkiej, the founder of the Amnesty International branch in Plock, testified that she had advised the defendants not to put up the posters and stickers because “she would be identified with this action and all the hatred from the reluctant LGBT people will flow to her and she is the one who, living in Plock, will suffer the negative consequences of the provocative actions of the
Next, the prosecution showed surveillance footage from the evening of April 26, which depicted the accused putting up the stickers and posters. After a short break, all parties were given the opportunity to make closing statements: in order, the public prosecutor, the attorneys for the private prosecutors, Łebkowski, the three defense attorneys, and then the three women themselves.

On March 2, 2021, the court acquitted all of the accused. In its verdict, the court laid out the facts that were established at trial, evaluated the evidence given by the accused and various witnesses (explaining why the court found some evidence credible and other evidence not), and provided an explanation of the reasons for the acquittal. Interpreting the purpose of Article 196 as being the “elimination of all forms of intolerance and discrimination on the basis of religion or belief,” the court found that an offense under Article 196 had to be “an intentional act,” and that a defendant could thus be held liable “only if he wanted to hurt the religious feelings of other people by insulting the object of worship, and also when he agreed to it by foreseeing the violation of such feelings.” In the case at hand, the court concluded that the prosecution had “in no way demonstrated that the actions of the accused intentionally aimed at offending the religious feelings of Catholics, or that the intent was to insult the image of Our Lady of Czestochowa [the Virgin Mary] or of Jesus.” According to the court, “from the explanations of the accused and the circumstances of the case one can draw the only logical conclusion that the accused cannot be considered as having such an intention.”

The court further noted that behavior could only qualify as offending religious feelings under Article 196 if it was “perceived as insulting and degrading … according to the ‘average sense of sensitivity.’” It correspondingly found that “the divided public opinion and numerous voices of practicing Catholics [who] stated they did not feel offended by the behavior of the accused” indicated that the defendants’ actions did not amount to insulting behavior. The court reiterated: it is “not an insult … to create or disseminate even a controversial image in order to stimulate or contribute to a public debate on a specific, sensitive or important topic.”

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101 Trial Monitor’s Notes, February 17, 2021; District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
102 Id.
103 Id.
104 Trial Monitor’s Notes, March 2, 2021.
105 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
106 Id. at pg. 13.
107 Id. at pg. 12.
108 Id. at pg. 16.
109 Id. at pg. 13.
110 Id. at pg. 14.
111 Id.
On the contrary, the court characterized the three accused’s explanations for choosing an image of the Virgin Mary with a rainbow halo as “logical,” adding that the symbol “triggered a public debate on the place of LGBT people in society, equal treatment with heterosexual people, in line with the defendants’ goal.” Citing jurisprudence from the European Court of Human Rights, the court pointed out that the defendants’ placement of the altered Virgin Mary image in a public space “did not constitute a sign of hate speech, did not incite violence, [and] did not intimidate other people,” thus “remaining within the limits of the legally protected freedom of expression.”

Last, the court noted that the aggrieved parties did not object to the image because a religious symbol had been altered but because it featured the rainbow flag, representing the LGBTIQ+ community. The court highlighted the fact that the use of the rainbow symbol, “which was to draw attention to the necessity of equality of people on the basis of orientation, gender affiliation,” neither “express[es] any negative thoughts” nor “carr[ies] shameful, degrading content.”

The prosecution has appealed the accused’s acquittal. The appeal is scheduled to be heard on November 10 in Plock.
METHODOLOGY

A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice’s TrialWatch initiative, the American Bar Association Center for Human Rights deployed monitors to the trial of Elzbieta Podlesna, Anna Prus, and Joanna Gzyra-Iskandar before the District Court of Plock in Poland. The trial was in Polish and the monitors were able to follow the proceedings. The monitors did not experience any impediments in entering the courtroom and were present for the latter two trial hearings: the Center obtained the transcript of the first trial hearing. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants’ fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial’s fairness and arrive at a grade, TrialWatch Expert Lisa Davis reviewed notes taken during the proceedings, and court documents. Davis concluded that while the court acquitted the human rights defenders in this case, the trial was characterized by violations of international and regional standards that resulted in significant harm to the defendants. The charges were wholly brought based on improper motives: to discriminate on the basis of sexual orientation and gender identity, and in retaliation for human rights advocacy. The arrest and prosecution violated the defendants’ rights to freedom of expression and freedom from discrimination under the International Covenant on Civil and Political Rights and the European Convention on Human Rights.
A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (the “ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the European Convention on Human Rights (the “ECHR”); jurisprudence from the European Court of Human Rights; and commentary from UN Special Procedures. Poland acceded to the ICCPR in 1977 and ratified the ECHR in 1993.

B. OTHER FAIRNESS CONCERNS

While the monitoring did not reveal any violations of the accused’s due process or fair trial rights, the proceedings constituted severe violations of their right to freedom of expression and right to be free from discrimination.

Right to Freedom of Expression

*International and Regional Standards and Article 196 of the Polish Criminal Code*

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression. The United Nations Human Rights Committee places a high value on “uninhibited expression,” particularly with respect to “circumstances of public debate concerning public figures in the political domain and public institutions.”\(^{116}\) According to the UN Human Rights Committee, restrictions on the right to freedom of expression must (i) be prescribed by law (the principle of legality), (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.\(^{117}\) As stated in the ICCPR, the only legitimate objectives are the protection of public morals, public health, national security, public order, and/or the rights and reputation of individuals.\(^ {118}\)

In order to comply with the principle of legality, legislation must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly … [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”\(^ {119}\) The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (UN Special Rapporteur on

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\(^{117}\) Id. at para. 22.

\(^{118}\) ICCPR, Article 19(3).

Freedom of Expression) has likewise noted: “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”\(^{120}\)

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”\(^{121}\) The necessity requirement overlaps with the proportionality requirement, under which restrictions must be the “least intrusive instrument amongst those which might achieve their protective function.”\(^{122}\) In line with necessity and proportionality standards, the UN Special Rapporteur on Freedom of Expression has concluded that criminal penalties for speech are warranted in only the most serious and exceptional cases, such as child pornography, incitement to terrorism, incitement to genocide, and advocacy of national, racial, or religious hatred.\(^{123}\) According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to expression that does not fall into these categories given the “significant chilling effect” on legitimate speech that such penalties create.\(^{124}\)

Article 10 of the ECHR also guarantees freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In assessing the legality of an interference with free expression, the European Court of Human Rights applies a test similar to the ICCPR: (i) whether the interference is prescribed by law; (ii) whether it pursues a legitimate aim within the meaning of Article

\(^{121}\) Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.
\(^{122}\) Id. at para. 34.
\(^{124}\) Id.
10(2), as enumerated above; and (iii) whether it is necessary in a democratic society. The Court has repeatedly affirmed that the right to freedom of expression encompasses ideas or information “that offend, shock or disturb.”

In the present case, the accused were prosecuted under Article 196 of the Polish Criminal Code. As mentioned above, Article 196 provides as follows: “[w]hoever offends the religious feelings of other persons by publicly insulting an object of religious worship, or a place designated for public religious ceremonies, is liable to pay a fine, have his or her liberty limited, or be deprived of his or her liberty for a period of up to two years.”

The first prong of the three-part test laid out by the UN Human Rights Committee (and similarly by the European Court) requires restrictions to be prescribed by law – “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.” “[O]ffends[ing] the religious feelings of other persons” is by nature a subjective concept. The law provides no further guidance. It is unclear what degree of perceived offensiveness would merit criminal charges; if the offended person could be any individual or would need to somehow be connected to the offending speech; and how it would be determined that the act had offended religious feelings specifically as opposed to sensibilities more broadly. Article 196’s imprecision gives the authorities broad discretion in making charging decisions, rendering it ripe for abuse and making it difficult for an individual to conform his or her conduct accordingly. Consequently, even if the government could demonstrate the law complied with the latter two requirements, it would contravene the threshold legality requirement.

But Article 196 also fails to meet the legitimacy requirement. It is clear that the provision’s restriction on speech is not in service of a legitimate objective: the protection of public order, national security, public morals, public health, or the rights and reputations of others. The UN Human Rights Committee has made clear that “[p]rohibitions of displays of lack of respect for a religion or other belief systems” are not compatible with the right to freedom of expression. The Special Rapporteur on Freedom of Expression has reached similar conclusions, stating: “anti blasphemy laws fail to meet the legitimacy condition of article 19 (3) of the Covenant, given that article 19 protects individuals and their right to freedom of expression and opinion; neither article 19 (3) nor article 18 of the Covenant protect ideas or beliefs from ridicule, abuse,

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128 Id. at para. 48.
criticism or other ‘attacks’ seen as offensive.” Likewise, the Special Rapporteur on Freedom of Religion or Belief has emphasized that restrictions on speech concerning religion must meet a high threshold, regardless of “subjective feelings of offensiveness.” According to the Special Rapporteur, “the employment of criminal sanctions against expressions which do not advocate for violence or discrimination but which are deemed ‘blasphemous’” is “incompatible” with the right to freedom of expression. Article 196 is precisely the type of provision denounced by these bodies: its goal is not to prevent the advocacy of hatred or violence but to protect the “religious feelings” of “other persons” from “public insults” deemed to have caused offense. It thus does not meet the legitimacy standards established by the ICCPR or ECHR.

Finally, Article 196 does not comply with the requirement of proportionality and necessity. The imprecision of the term “offend[ing] the religious feelings of other persons” potentially places a broad swath of protected speech within the law’s scope – as demonstrated by the present case and the many other cases in which LGBTIQ+ advocates have been prosecuted under Article 196 for routine activism. As such, the law is not the “least intrusive instrument available.” Further, under international standards, criminal penalties for speech should be reserved for only the most serious cases, such as public incitement to genocide, incitement to terrorism, advocacy of hatred and violence, and child pornography. Article 196 provides for a potential penalty of two years imprisonment for “[o]ffend[ing] religious feelings.” This category of speech does not rise to the level of severity required for a criminal penalty to be permissible.

In light of the above, Article 196 violates Article 19 of the ICCPR and Article 10 of the ECHR.

International and Regional Standards and the Prosecution of Elżbieta Podlesna, Anna Prus, and Joanna Gzyra-Iskandar

Article 196 not only violates the right to freedom of expression on its face, but also as applied in this particular case.

The right to freedom of expression under the ICCPR includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” The UN Human Rights Committee has emphasized that this right encompasses “political discourse” and “religious discourse,” and “embraces even

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131 Id.
132 ICCPR, Article 19(2).
expression that may be regarded as deeply offensive.”¹³³ As noted above, “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.”¹³⁴ The UN Special Rapporteur on Freedom of Expression has elaborated that limitations on the right to freedom of opinion and expression in international instruments “were designed in order to protect individuals against direct violations of their rights” and were “not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements” or “to protect belief systems from external or internal criticism.”¹³⁵

Like the ICCPR, the ECHR protects the freedom “to receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹³⁶ As noted above, the European Court has consistently held that the right is “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”¹³⁷

In the case at hand, the accused were prosecuted for posting images of the Virgin Mary with a rainbow halo on portable toilets, transformers, road signs, and walls in public areas in the city of Plock.¹³⁸ As the right to freedom of expression includes the imparting of information and ideas of all kinds through art or other media, the accused’s actions qualified as protected speech under the ICCPR and ECHR unless the limitation imposed by the authorities—i.e., their criminal prosecution—passed the three-part test delineated by the UN Human Rights Committee and the European Court: that the restriction was (i) prescribed by law, (ii) in pursuit of a legitimate objective, and (iii) necessary and proportional.

As discussed above, Article 196 is not prescribed by law due to its vagueness, failing the first prong of the test. With respect to the objective of the proceedings, a legitimate aim must be one enumerated under Article 19(3) of the ICCPR and Article 10(2) of the ECHR. The protection of individuals from “subjective feelings of offensiveness” stemming from perceived insult to religion does not constitute a legitimate objective under the ICCPR or ECHR. It is further worth noting that the “protection of morals,” a legitimate objective under the ICCPR and ECHR,¹³⁹ does not cover situations where said protection is rooted in prejudice against a protected group.

¹³³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 11.
¹³⁴ Id. at para. 48.
¹³⁶ ECHR, Article 10(1).
¹³⁷ See European Court of Human Rights, Sekmadienis LTD. V. Lithuania, App. No. 69317/14, January 30, 2018, para. 70.
¹³⁸ District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021.
¹³⁹ European Court of Human Rights, Sekmadienis LTD. V. Lithuania, App. No. 69317/14, January 30, 2018, para. 69. The court accepted the government’s submission that the aim pursued by its interference
The European Court, for example, has “consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority”; in *Bayev and others v. Russia*, where three individuals were convicted of the administrative offense of “public activities aimed at the promotion of homosexuality among minors”\(^\text{140}\) for holding banners outside a secondary school, children’s library, and municipal building in support of LGBTIQ+ equality, the European Court rejected the Russian government’s claim that “regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.”\(^\text{141}\) According to the Court, “these negative attitudes, references to traditions or general assumptions in a particular country” were not sufficient justification for restriction of speech,\(^\text{142}\)

In the present case, testimony and arguments at trial revealed that the prosecution was based not on the taking of offense that a sacred religious image had been altered, but on the fact that – as the court noted – it was altered with colors representing LGBTIQ+ equality, to which the prosecution, the auxiliary prosecutors, and prosecution witnesses imputed negative connotations.\(^\text{143}\) For example, Łebkowski, the priest at the Church of St. Dominik and auxiliary prosecutor, stated: “[B]ehind these colors on the streets you can see a disgusting, condemned content, referring to the marches and recognizing that the intercourse of two men is a disorder, a deviation, and the orientation should be treated.”\(^\text{144}\) Auxiliary prosecutor Kaja Godek likewise noted that she was horrified by “the juxtaposition of sexual perversions with the image of God and the Mother.”\(^\text{145}\) In this vein, the prosecution’s indictment emphasizes that the image of the Virgin Mary was altered to include a “*symbol of the LGBT community* and thus offended the religious feelings of others” [emphasis added]. Given the above, the accused were targeted because of their advocacy for LGBTIQ+ equality. This is an unacceptable justification for restricting freedom of expression under the ostensible objective of “protecting public morals.”

Notably, according to the UN Human Rights Committee, “where a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”\(^\text{146}\) As discussed above, the threat posed must be grave: international standards require that criminal penalties


\(^{141}\) Id. at para. 68.

\(^{142}\) Id.

\(^{143}\) District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021, pg. 13.

\(^{144}\) District Court of Plock, Trial Transcript, January 13, 2021, pg. 15.

\(^{145}\) Id.

\(^{146}\) Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.
be limited to the most serious speech offenses, such as incitement of religious hatred or violence.

In the present case, even assuming that the proceedings were legitimately initiated for the “protection of morals,” the prosecution failed to demonstrate “in specific and individualized fashion” that the accused’s actions posed a threat and that prosecuting them was necessary and proportionate. Namely, the prosecution did not allege that the stickers incited religious hatred or violence and there was no evidence put forth in this regard. Indeed, the court noted in its judgement: “there is no doubt that the actions of the defendants in the present case, consisting in placing in the public space the image of the Virgin Mary with the Child with the LGBT flag inscribed in the halo, did not constitute a sign of hate speech, did not incite violence, [and] did not intimidate other people.”147 The only evidence of “harm” presented at trial was the testimony of several individuals who said they felt shocked, saddened, or hurt upon seeing the stickers and posters.148 Consequently, the prosecution of the accused fell short of necessity and proportionality standards.

The framework established under the ECHR produces the same conclusion. According to the European Court, interference with freedom of expression must be “necessary in a democratic society” and “proportionate to the legitimate aim pursued,” meaning that the least restrictive measure must be employed.149 The European Court has held that “in the context of religious beliefs,” expressions that are “likely to incite religious intolerance, for example in the event of an improper or even abusive attack on an object of religious veneration,” or “expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance” are not protected under Article 10 and may be restricted through proportionate measures.150

However, State authorities must strike a proper balance between “on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the … right to freedom of expression.”151 In Sekmadienis LTD v. Lithuania, for example, a clothing company was fined for displaying advertisements that featured images of individuals wearing the advertised clothes with captions that read “Jesus, what trousers!” and “Dear Mary, what a dress!”152 The Court, stating that “it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority,” found a violation of Article 10 on the basis that the State authorities “gave absolute

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147 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021, pg. 16.
148 See District Court of Plock, Trial Transcript, January 13, 2021; Trial Monitor’s Notes, February 17, 2021.
150 European Court of Human Rights, E.S. v Austria, App. No 38450/12, October 10, 2018, para. 43.
152 Id. at paras. 7-8.
primacy to protecting the feelings of religious people, without adequately taking into account the applicant company’s right to freedom of expression.”

In the case at hand, the women’s use of religious symbolism was – in the words of the court – “intended to bring something important to the public debate, to raise the socially important problem of LGBT people’s rights,” and did in fact trigger “a public debate on the place of the LGBT people” in Polish society. The speech was thereby of high value and any corresponding restriction would have to be proportionate, striking a “fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the … right to freedom of expression.” In initiating criminal proceedings against Podlesna, Prus, and Gzyra-Iskanda, a severe restriction on freedom of expression, the prosecution improperly “gave absolute primacy” to protecting the feelings of the (few) Catholics who lodged complaints over the accused’s right to freedom of expression, in violation of Article 10.

Right to Freedom from Discrimination

The right to equality and freedom from discrimination based on sexual orientation is protected under Articles 2(1) and 26 of the ICCPR. Article 2(1) requires State Parties to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The UN Human Rights Committee has established that discrimination based on actual or perceived sexual orientation is prohibited under Articles 2 and 26.

The Committee has further stated that the term ‘discrimination’ in the Covenant should be understood “to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of or effect of nullifying or impairing the recognition, enjoyment or exercise by

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153 Id. at paras. 82-83.
154 District Court of Plock, Justification for a Judgment, Case No. II K 296/20, March 2, 2021, pgs. 14, 16.
all persons, on an equal footing, of all rights and freedoms.” According to the Committee, Article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities,” even beyond “those rights which are provided for in the Covenant.”

Article 14 of the ECHR similarly provides that the “enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

According to the European Court, differential treatment based on sexual orientation “require[s] particularly serious reasons by way of justification.” The margin of appreciation given to States in such cases “is narrow”: “the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant’s sexual orientation, this would amount to discrimination under the Convention.” In Bączkowski and Others v. Poland, the European Court considered a case where municipal authorities refused to grant a permit to a demonstration about discrimination against minorities. In finding a violation of Article 14, the Court took into account “that the decisions concerned were given by the municipal authorities acting on the Mayor’s behalf after he had made known to the public his opinions regarding the exercise of freedom of assembly and ‘propaganda about homosexuality.’”

In the present case, the totality of the facts indicates that the arrest and prosecution of the three accused constituted discrimination “in fact” – in the application of Article 196 of the Criminal Code – based on sexual orientation. The accused’s arrest and prosecution occurred in the context of increasingly hostile rhetoric against and discriminatory State policies toward the LGBTIQ+ community. As described earlier in the report, other LGBTIQ+ activists have also been charged under Article 196.

Meanwhile, the trial made clear that the prosecution was rooted in bias against the LGBTIQ+ community. In his testimony, for example, Łebkowski called the rainbow flag “a symbol of abominations, disorders and deviant acts” and compared it to the swastika. Deeming homosexuality a “disorder [and] a deviation,” he further stated

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157 Human Rights Committee, General Comment No. 18, 1989, para. 7.
158 Id. at para. 12.
162 Id. at para. 100.
163 Trial Monitor’s Notes, February 17, 2021.
164 See District Court of Plock, Trial Transcript, January 13, 2021, pg. 15.
that “the sin of gender and LGBT ideology threatens the younger generations.”

Godek also called “homosexuality a sin” and, in relation to the accused’s posting of the stickers and posters, made various claims about the “homolobby” and “LGBT ideology”: namely, “how the LGBT lobby in Plock has developed towards profanity.”

By bringing charges following Łebkowski’s filing of a complaint and participating in the trial, the public prosecutor endorsed such sentiments. As noted above, the indictment stated that the accused had offended religious feelings specifically because the image of the Virgin Mary had been altered to include a “symbol of the LGBT community.”

Given the above, there are significant grounds for concluding that the State applied the law in a discriminatory manner, failing to ensure that the defendants were able to exercise their right to freedom of expression on “an equal footing.” The accused’s right to freedom from discrimination under Articles 2 and 26 of the ICCPR and Article 14 of the ECHR was thereby violated.

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165 Trial Monitor’s Notes, February 17, 2021.
166 See District Court of Plock, Trial Transcript, January 13, 2021, pg. 16.
CONCLUSION AND GRADE

In the case against Podlesna, Prus, and Gzyra-Iskandar, the judge conducting the proceedings complied with fair trial guarantees and ultimately acquitted the three activists despite public pressure. In line with international and regional standards on freedom of speech and freedom from discrimination, on November 10 the appellate court in Plock should dismiss the prosecution’s appeal against the acquittal. Courts considering similar cases brought against LGBTIQ+ activists under Article 196 should dismiss them at the earliest stage possible to relieve defendants of financial, reputational, emotional and other costs incurred as the result of such proceedings.

The case against Podlesna, Prus, and Gzyra-Iskandar reflects a pattern in which Polish authorities have used Article 196 to target activists advocating for LGBTIQ+ equality in the context of a political climate increasingly hostile to the LGBTIQ+ community. With the executive and legislature committed to a socially conservative agenda that often prioritizes so-called traditional values over the right to freedom of expression and right to freedom from discrimination, the independence of the judiciary is more important than ever. As such, the international community must ensure that courts such as the District Court of Plock are protected by continuing to combat the PiS’s efforts to rollback judicial independence.

Recommendations from Professor Lisa Davis

To the Polish legislature: It is crucial that the legislature strengthen protections for the LGBTIQ+ community and maintain the independence and legitimacy of the judiciary. Article 196 and other laws functionally criminalizing expressions of solidarity with the LGBTIQ+ community should be repealed. Laws to protect the LGBTIQ+ community from violence, discrimination, and malicious prosecution should be passed. Efforts to undermine the independence and legitimacy of the judiciary should be immediately stopped by the repealing of laws that chip away at the judicial system and the passing of laws to strengthen democratic institutions.

To the Polish judiciary: In line with international and regional standards on freedom of speech and freedom from discrimination, the court should dismiss the prosecution’s appeal against the acquittal of Podlesna, Prus, and Gzyra-Iskandar. Courts considering similar cases brought against LGBTIQ+ activists under Article 196 should dismiss them at the earliest stage possible.

To the international community: The international community must continue to combat PiS efforts to rollback judicial independence, including through sanctions such as those envisioned by the European Union’s Article 7 disciplinary
mechanism. It is crucial that independent courts, like the court that presided over the acquittal of Podlesna, Prus, and Gzyra-Iskandar, are protected.
ANNEX

GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, \textit{inter alia}:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”\textsuperscript{167} and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

\textsuperscript{167} ICCPR, Article 26.