

EU 2020: DEMANDING ON DEMOCRACY

*Country & Trend Reports on Democratic
Records by Civil Liberties Organisations
Across the European Union*

POLAND



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Poland // Polish Helsinki Foundation for Human Rights (HFHR)



HELSINKI FOUNDATION
FOR HUMAN RIGHTS

Key concerns

- Dismantling of judicial independence continues, including new rules on disciplinary liability, with increasing impact on the ability of the justice system to deliver justice and hold authorities accountable – despite rulings of the EU Court of Justice
- Government continues its plan to take control over media
- Decision making is disturbingly opaque and the constitutional review of laws is seriously flawed
- Civil society is under continued attacks, with prosecutions and SLAPPs brought against activists, smear campaigns, reduced funding and crackdown on protests
- COVID-19 exacerbates problematic issues affecting justice, freedom of assembly and access to information

Justice system

Judicial independence

Appointment and selection of judges, prosecutors and court presidents

In 2020, one of the key issues concerning the appointment of judges was related to the position of judges appointed by the National Council of Judiciary in its current composition. The NCJ is composed of among others 15 judges who were elected by the Parliament in the procedure that raised numerous legal concerns (see the following point). The NCJ is a constitutional authority responsible for appointing and promoting judges. Given the legal concerns regarding the status of the NCJ in its current composition, there are also legal doubts regarding the validity of its decisions, including decisions on appointing judges of the Supreme Court and common courts. As the participation of these judges may influence the validity of the proceedings pending before the courts composed of these judges, the Supreme Court decided to rule on this case.

On 23 January 2020, the Supreme Court adopted a resolution concerning the impact that judges appointed by the new National Council of the Judiciary have on the legality of court proceedings. The Supreme Court referred to two provisions of criminal and the

civil procedure which provide for the grounds for challenging court decisions.

The Supreme Court interpreted these provisions in relation to both judges appointed to the Supreme Court and the common courts. In the relation to the judges of the Supreme Court appointed by the new NCJ, the Supreme Court stated that their participation in adjudicating results in invalidity of the proceedings before the Supreme Court.

In reference to judges of a common court appointed by the NCJ, the Supreme Court decided that their participation in the process of issuing the judgement gave grounds to challenge such a decision. However, this should be assessed on a case-by-case basis and the court should also take into consideration the process in which the judge was appointed by the NCJ and whether any irregularities in the appointment process led to a violation of this judge's independence and impartiality in particular case.

In the light of the resolution, judges appointed by the NCJ retain their status. The Supreme Court also ruled that the decision issued so far by the judges appointed by the new NCJ should remain in force.

The Supreme Court resolution was highly contested by the governing majority. Both the Speaker of Sejm and the Prime Minister challenged the resolution in the proceedings before the Constitutional Tribunal. In two verdicts of 20 and 21 April 2020, the Constitutional Tribunal ruled that by adopting the resolution

the Supreme Court violated certain provisions of the Constitution.

Irremovability of judges

In 2020, the media reported on several cases of transfers of prosecutors. According to the Act on prosecution, the National Prosecutor has a right to transfer a prosecutor from one unit to another for 12 months without the prosecutor's consent. However, in recent years this competence was used as a tool of disciplining prosecutors. For example, in December 2020, the media reported on a case of prosecutor Wojciech Pełeszok who was transferred from the Circuit Prosecutor Office to a District Office. Earlier that year, prosecutor Pełeszok participated in a court proceeding concerning application of pre-trial detention against a person participating in a protest against the Constitutional Tribunal decision on abortion law. In this proceeding, against the instructions of his supervisors, prosecutor Pełeszok did not support the motion for application of a pre-trial detention. Furthermore, in 2020, the media reported on a case of a prosecutor Mariusz Krasoń. In 2019, Mariusz Krasoń was transferred from the prosecutor office in Kraków to a prosecutor office in Wrocław. This decision was criticized for its lack of rational justification and was perceived as a form of disciplining the prosecutor for his engagement in the discussion on rule of law. In January 2020, when the term of delegating prosecutor Krasoń to Wrocław expired, he was yet again transferred to another office in Cracow.

In 2020, the Voivodeship Administrative Court in Warsaw ruled that the Ministry of

Justice should reveal the reports from the random allocation of cases system works.

In 2017, the System of Random Allocation of Cases was introduced to the Polish courts. The system, operated at the central level, assigns the new cases to the judges in common courts. For three years, the civil society organizations, including e-Państwo Foundation, applied for access to public information concerning the system algorithm and reports from its operation. In 2018, the Voivodeship Administrative Court dismissed the organizations complaint and decided that the system algorithm is not a piece of public information (the case is still pending before the National Administrative Court). Still, in 2020, the court decided that the Ministry should reveal the reports from the system daily operations.

National Council for the Judiciary

In 2020, the Speaker of Sejm published the lists of judges endorsing candidates to the National Council of Judiciary. The Law on the National Council of the Judiciary was amended in 2017 and changed the way in which 15 judges-members of the NCJ (out of 25) are appointed. Until that time the judges-members of the Council were elected by their peers.

The lists remained confidential for almost two years as the Speaker of the Sejm refused to publish them claiming that the lists are not public information. Finally, in February 2020

in a result of court proceedings, the Speaker of Sejm presented the lists.

The publication of the lists confirmed the on-going concerns regarding their legality as in one case the candidate, Judge Maciej Nawacki, did not collect a required number of endorsement. Four out of 28 of judges on his list withdrew their support before it was submitted to the Parliament. Despite that, the list was accepted by the Speaker of the Sejm and the Sejm appointed the entire group of 15 judges-members of the Council en bloc. The irregularity in submitting the required documents for one candidate influences the entire process of appointing the members of the NCJ and undermines the legal grounds for its further operation.

The further analysis of the lists indicates that out of 360 judges who took part in the whole procedure (ca. 3,5% of judges) 49 of them were seconded to the Ministry of Justice, 56 were appointed by the Minister of Justice for the position of courts' presidents or vice-presidents and 60 were promoted for the higher position in the courts by the very NCJ.¹

Disciplinary liability of judges

On 23 January 2020, the Parliament adopted the muzzle law that provided among others a stricter disciplinary liability for judges. The law introduced new provisions on disciplinary offences such as e. g. questioning the status of a judge appointed by the National Council of

1 For more information, see: <https://ruleoflaw.pl/wp-content/uploads/2020/02/krs-zestawienie.pdf>

Judiciary. This provision was a response to the landmark judgements of the Court of Justice of the European Union (CJEU) of 19 November 2019 and the Supreme Court of 5 December 2019. In its ruling, the CJEU outlined the assessment criteria of the independence of the NCJ. In its judgment of 5 December 2019, the Supreme Court confirmed the NCJ, due to its composition and the way it operates, does not provide sufficient guarantees of independence from executive and the legislature. Having relied on these judgments, some ordinary courts judges started to question judicial appointments made by the President. In the opinion of the governing majority, such decisions might “lead to a legal anarchy”, hence the judges “attacking the legal order of Poland” should be held liable in disciplinary proceedings.

In 2020, the disciplinary commissioner of common courts judges continued their work initiating disciplinary proceedings against judges engaged in the defense of rule of law in Poland. In 2020, the commissioner launched proceedings in cases concerning among others judicial decisions, their public statements in defence of rule of law or their membership in judges cooperation groups.

At the same time, there are significant legal concerns regarding the Disciplinary Chamber of the Supreme Court. The Chamber was established in 2018 and is composed of judges nominated entirely by the National Council of the Judiciary (in its current composition). In its resolution of 23 January 2020, three chambers of the Supreme Court found that its disciplinary counterpart did not meet the criteria

for an independent court. Furthermore, on 8 April 2020, the Court of Justice of European Union ordered Poland to suspend the applications of the legal provisions regulating the competences of Disciplinary Chamber in disciplinary cases against judges.

Despite these decisions, members of the Disciplinary Chamber continue to adjudicate. Although the Chamber has not ruled in a disciplinary case against judge since April 2020, still the nature of the decisions made by the Chamber has a pseudo disciplinary character. In this case, the most controversial aspect of Chamber’s work concerns decisions on waiving immunities of judges known of defending rule of law. For example, in November 2020 the Disciplinary Chamber decided to waive the immunity of judge Igor Tuleya. The prosecution intends to bring charges against judge Igor Tuleya in reference to a judicial decision he made in 2017. The Disciplinary Chamber made a similar decision in October 2020 when it decided on waiving the immunity of Judge Beata Morawiec, a president of Judges Association THEMIS.

According to the Act on common courts, the Disciplinary Chamber while deciding on suspending the judge in their duties should also rule on lowering their salaries.

In February 2020, the Disciplinary Chamber decided to suspend judge Paweł Juszczyszyn – a judge from Regional Court in Olsztyn who, in one of the proceedings pending before his court, ordered the Chancellery of Sejm to reveal the lists of supporters for the candidates to NCJ. While suspending Judge Juszczyszyn,

the Chamber also decided to lower his salary for 40%. In November 2020, while deciding on lifting the immunity of Judge Igor Tuleya the Chamber also decided to suspend him in his duties and lower his salary for 25%. Finally, the Chamber made a similar decision in the case of Judge Beata Morawiec and lowered her salary for 50%, yet in the appeal proceeding in this case is still pending.

Independence and autonomy of the prosecution service

In 2020, the media reported on several cases in which the decisions made by the prosecutors were overturned by their supervisors. In the light of the Act on Prosecutor General and prosecution office the supervising prosecutor has a wide control over the decisions being made by the prosecutors.

In April 2020, prosecutor Ewa Wrzosek launched an investigation in case of organizing the correspondence voting for the President of Poland that was organized within the strict pandemic regime. The decision of Ewa Wrzosek was overturned by her supervisors and the proceeding was discontinued. Furthermore, Ewa Wrzosek heard disciplinary charges related to her decision. The disciplinary proceedings were also on-going in the cases of prosecutors who speak up publicly in defence of rule law e.g. the case of the

prosecutor Krzysztof Parchimowicz who faces disciplinary charges in relation to his public statements.

In the light of the Muzzle law that came into force in 2020, the prosecutors are obliged to declare their membership in all kinds of associations and organizations – this information is then published in the Public Information Bulletin.

Fairness and efficiency of the justice system

Length of proceedings

The Ministry of Justice did not publish the data on the average length of judicial proceedings in Poland in 2020.

According to the report of the Supreme Audit Office (PL - Najwyższa Izba Kontroli),² between 2015 – 2019 the average overall length of judicial proceedings increased from 4,7 months to 5,8 months. The increase in the length of proceedings was also observed in the case of judicial proceedings concerning entrepreneurs (from 2,3 months in 2015 to 3,8 months in 2019).

Moreover, in 2020, HFHR conducted a study aimed at assessing the implementation of

2 Supreme Audit Office, Realizacja projektów informatycznych mających na celu usprawnienie wymiaru sprawiedliwości, available in PL: <https://www.nik.gov.pl/kontrola/P/19/038/> (24.02.2021).

ECHR's judgment in the case *Rutkowski and Others v. Poland*,³ in which ECHR recognized the excessive length of judicial proceedings as a systemic problem of Poland. The HFHR study⁴ revealed that 95,8% of 500 surveyed lawyers identified excessive length of proceedings as a burning problem. Furthermore, only 11,6% of the respondents recognized the specific complaint in that matter (PL - skarga na prawo strony do rozpoznania jej sprawy bez nieuzasadnionej zwłoki) as an effective remedy for the parties of judicial proceedings.

The respondents also identified main reasons for the excessive length of the proceedings, including inter alia: excessive intervals between hearings (75% of respondents), long waiting time for the first hearing of the case (73,9%), delays in performing expert opinion or obtaining next opinions (70%), inactivity of the court in making procedural decisions (63,2%), bad organization of court's work (59,1%), inefficient number of judges (52,7%), the excessive formalism of the proceedings (50%).

On the other hand, the statistical report of the Supreme Administrative Court⁵ revealed a decrease in the average length of proceedings before administrative courts. In more than

80% of cases, the provincial administrative courts (PL – wojewódzkie sądy administracyjne) were able to deliver a judgment in less than 6 months. However, this data does not concern the jurisprudence of the Supreme Administrative Court, where the average length of the proceedings increased.

In recent years the ECHR issued several rulings concerning lengthy proceedings in civil, criminal, and administrative cases, including the case of *Rutkowski and others v. Poland* (application no. 72287/10), *Kaminska and others v. Poland* (4006/17), *Beller v. Poland* (51837/99). According to the Council of Europe's Committee of Ministers, those cases are still pending implementation.

Execution of judgments

On 23 January the Supreme Court issued a resolution concerning the status of judges appointed to their position by the new National Council of Judiciary. The resolution was implementing CJEU ruling of 19 November 2019.

Before the Supreme Court ruling, the government of Poland made an attempt to deter the Supreme Court from issuing a ruling in that

3 ECHR judgment in the case *Rutkowski and Others v. Poland*, application no. 72287/10, 13927/11 and 46187/11.

4 Helsinki Foundation for Human Rights, *W poszukiwaniu rozsądnego czasu... postępowań sądowych. Badanie nt. przewlekłości postępowań w Polsce*, available in PL: <https://www.hfhr.pl/wp-content/uploads/2020/07/Raport-przewlek%C5%82o%C5%9B%C4%87-1.pdf> (24.02.2021).

5 Supreme Administrative Court, *Informacja statystyczna o działalności sądów administracyjnych za 2019 r.*, available: <http://www.nsa.gov.pl/download.php?plik=2392> (24.02.2021).

case. In order to do it, the Speaker of Sejm created a fictitious competence dispute regarding the powers of the President of Poland and the Supreme Court, arguing that it suspends all activities of the Supreme Court in that case. The Supreme Court ignored that issue underlying that its actions do not interfere with the competencies of the President of Poland. After the resolution, the state authorities undertook actions aimed at depreciating the SC resolution and questioning its legal force. For this purpose, the Prime Minister applied to the Constitutional Tribunal to examine the constitutionality of the Supreme Court's resolution. The Constitutional Tribunal, in a very rapid way, just after a month since the Prime Minister's motion, found the Supreme Court ruling in the case BSA I-4110-1/20 to be unconstitutional. The CT judgment not only eliminated the SC ruling from the legal system, but also deprived individuals of protection resulting from it.

On 22 October 2020 the Constitutional Tribunal delivered a judgment declaring one of the three legal grounds for abortion unconstitutional. By eliminating the possibility to conduct abortion because of foetal abnormalities, due to which the overwhelming majority of legal abortions had been carried out in Poland, the Constitutional Tribunal's decision has led to an almost complete ban on the procedure. The judgement ignited the biggest street protests in Poland since 1989 (according to some, the biggest in the country's history). Despite the constitutional duty to immediately publish

the judgment in the promulgation journal, the Prime Minister delayed the promulgation for nearly three months, which was perceived as an attempt to postpone inflaming the already tense situation.

Rules on withdrawal and recusal of judges and their application in practice

The Constitutional Tribunal in its ruling of 4 March 2020 found the specific provision of Code of Criminal Proceedings and Code of Civil Proceedings unconstitutional to the extent to which they allowed to exclude judges from adjudicating due to the manner in which they are appointed. As a result, individuals do not have the possibility to request the exclusion of a judge due to the method of their appointment or challenge it in an appellate procedure. This violates their right to the tribunal established by law in the meaning of ECHR judgment in the case *Astradsson v. Iceland*.

Respect for fair trial standards in particular in the context of pre-trial detention

On 4th June 2020, the Parliament adopted an amendment to the Code of Criminal Proceedings, enabling the courts to conduct remote hearings in the case of pre-trial detention. As a result of this amendment, the cases concerning pre-trial detention do not have to be recognized in a physical presence of a suspect. This, according to the HFHR, might be a violation of art. 5 of ECHR, which requires the suspect to be physically present during

the hearing concerning pre-trial detention⁶. Moreover, the amendment to the CCP worsened the standard of right to defence, as it did not guarantee that the suspects will have the possibility to consult their lawyers every time they need it. According to the new provisions of CCP, the defendant's lawyer might be present both in the courthouse or in the place where the defendant is held. In the first case, the court is able to grant the defendant a break in the hearing and enable a phone call between the lawyer and his client, unless the interruption of the hearing violates the proper conduct of proceedings and create a risk of not deliver the judgment in the required time.

Corruption

In 2016 the government merged the positions of the Minister of Justice and the Prosecutor General. The new body has gained the competence to amend every decision of prosecutors conducting criminal proceedings or to give binding orders to the prosecutors. All supervising prosecutors received similar powers enabling them to interfere in all criminal proceedings.

In addition, the 2001 Freedom of Information Act guarantees every person access to the documents stored in the case files of preparatory proceedings that have been completed. It

enables the citizens to control the activities of the prosecution.

At the beginning of 2021, the group of ruling majority MPs brought to Parliament an amendment to the Code of Criminal Procedure (CCP). The amendment modifies the rules on third persons' access to case files of completed criminal proceedings, in which the prosecution brought an indictment to the court or decided to discontinue the proceedings. Pursuant to the new meaning of CCP, access to such cases will be dependent on the arbitrary decision of the prosecutor, without even the possibility to challenge it by an administrative court.

According to the HFHR, this violates ECHR provisions guaranteeing freedom of speech⁷ and will have a negative impact on media representatives, NGOs, and other watchdogs.

Media environment and freedom of expression and of information

Transparency of media ownership and government interference

On 7 December 2020, PKN Orlen, Polish state-controlled oil company, announced its intention to extend its activity in the media

6 ECHR judgment of 29 March 2010 in the case *Medvedev and Others v. France*, application no. 3394/03, § 118.

7 See ECHR Grand Chamber judgment in the case *Magyar Helsinki Bizottság*, application no. 18030/11.

sector through acquiring of one of the biggest publishing groups in Poland, Polska Press.⁸ Polska Press, during its 26-year activity, has created one of the largest media and publishing groups in Poland. The most crucial part of its portfolio are local press titles, including 20 daily newspapers (at least one per each of the 15, out of total 16, administrative regions' capital cities. in Poland), and almost 150 local weekly magazines.⁹ The group also runs numerous popular on-line services, the biggest of which is a local news platform [Naszemiasto.pl](https://naszemiasto.pl), as well as dedicated websites of its press titles. According to a November 2020 survey, Polska Press' Internet outlets have an amount of almost 17.5 million monthly real users.¹⁰

The upcoming acquisition of Polska Press and its media outlets by the major state-owned company raise several questions from the point of view of the possible impact on media freedom and pluralism in Poland. First, the Helsinki Foundation for Human Rights fears that the takeover will result in the politicisation of local press titles, putting an end to independent media at the regional level in Poland. A resemblance can be seen between the acquisition of Polska Press and the situation in Hungary, where independent media

outlets were purchased by the state, or business entities affiliated with the government, so as to gain political influence over them. Moreover, with control over local media outlets and politicised coverage, it would be much easier for the governing majority to attack local opposition politicians. With less than 3 years until the next local elections, in which city mayors and members of local legislative assemblies are chosen, harnessing local media to conduct smear campaigns against local politicians might be a calculated move on the part of the governing majority.

Other issues related to checks and balances

Process for preparing and enacting laws

In 2020 HFHR observed that the lack of public consultations on proposed legislation is a recurrent issue. The problem was particularly visible (but not only) during the COVID-19 pandemic, where the majority of government legislation concerning epidemic restriction

8 PKN Orlen, PKN Orlen to take over Polska Press (press release), 7 December 2020, available at: <https://www.orklen.pl/EN/PressOffice/Pages/PKN-ORLEN-to-take-over-Polska-Press.aspx>

9 M. Burlikowski, "The Economist": Orlen mógłby przejąć Polska Press, [MMPonline.pl](https://mmponline.pl), 10 October 2020. <https://mmponline.pl/artykuly/242072,the-economist-orklen-moglby-przejac-polska-press>

10 Gemius Polska, Results of the Mediapanel survey for November 2020, 4 December 2020. <http://www.gemius.pl/wszystkie-artykuly-aktualnosci/wyniki-badania-mediapanel-za-listopad-2020.html>

was not consulted with stakeholders, NGOs, or other actors.

Moreover, the restrictions were usually announced by the Prime Minister or Minister of Health a day or two before its entrance into force. In a large number of cases, the announcement of the restrictions was not connected with the publication of the draft of the regulation. As a result, it happened that promulgated restrictions did not fully correspond with the ones that were announced during press conferences. The late disclosure of the new law drafts resulted in a situation where individuals were surprised with the meaning of the new restrictions. It also led to several mistakes forcing the government to quickly amend its regulations.

Furthermore, the pandemic forced the government to adopt a number of statutes aimed at counteracting the pandemic and its economic consequences. The majority of them amended the Act of 2 March 2020 on preventing, counteracting and combating COVID-19 pandemic.¹¹ The adopted legislative technique resulted in a situation where large numbers of provisions were related to art. 15 of that act. As a result, this specific statute includes dozens of provisions named after art. 15 and subsequent letters of the alphabet, e.g. art. 15zzzzl. This made the whole regulation and its consequences difficult to understand.

In addition, the acts on counteracting the COVID-19 epidemic were sometimes used as a method to introduce measures not even indirectly related to the counteracting of the pandemic.

As in previous years, the government continued its practice of by-passing public consultations by submitting governmental draft Acts by its MPs. In such a situation, the parliament was not obliged to conduct public consultations.

Generally, the parliament adopted the statutes in a rush. The whole legislative process concerning the Act on Presidential Elections during COVID-19 took only 2 hours and 43 minutes, depriving MP and stakeholders the possibility to comment or amend the proposed draft.

Lack of public consultation and rush in adopting the new law led to several mistakes. Some of them had a great impact on the situation of individuals. For example, the measures adopted in one of the statutes allowed entrepreneurs to temporarily reduce the working time of their employees. However, the reduction resulted in an unforeseen, automatic decrease of social benefits connected with sick leaves and maternity leaves. It took Parliament six months to correct these mistakes.

11 Act of March 2, 2020 on special solutions related to the preventing, counteracting and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws, item 1842, as amended).

Constitutional review of laws

The ongoing constitutional crisis questioned the ability of the Constitutional Tribunal (CT) to conduct an independent review of constitutionality of law. Specific problems in that field concern the composition of the Tribunal (and in particular the fact that its 3 members were elected to already taken seats) and the legality of the appointment of the President of the Tribunal. Moreover, J. Wyrembak, a member of CT elected on already taken seat, has publicly criticized the President of the Tribunal for interfering with the composition of the court or delaying its judgment due to political reasons.

Furthermore, the Constitutional Tribunal has been used to rubber-stamp the most controversial elements of the so-called reform of the judiciary and as a convenient ally to the ruling majority whenever there was a need to put the certain discussion on hold and reduce political tensions in the ruling majority or social protests. This happened inter alia in the case of the Istanbul Convention, where the Prime Minister decided to suspend public discussion on the termination of this convention by asking the CT to review the convention's constitutionality.

Moreover, the Constitutional Tribunal was used to limit the effects of the Supreme Court (SC) Chambers resolution of 23 January 2020. Before the SC judgment, the CT issued a judgment identifying an alleged competence dispute between the Speaker of the Sejm, President of Poland, and the Supreme Court. It aimed at preventing the Supreme Court from

issuing the resolution. After the SC resolution in just a month, the Constitutional Tribunal found the Supreme Court's ruling to be unconstitutional despite a lack of competence to assess the constitutionality of judgments.

Finally, the Prime Minister asked the Constitutional Court to assess the constitutionality of art. 417 of the Civil Code, allowing individuals to seek compensation for damages that occurred by the adoption of a law, e.g. governmental regulations introducing COVID restrictions. The future CT judgment founding this provision to be violating the Constitution will prevent common courts from assessing the constitutionality of regulations adopted by the government and ordering compensation to all persons who were victimized by COVID-19 restrictions.

Independent authorities

In September 2020, the five-year term of office of Commissioner for Human Rights ended. However, according to the provision of the Act on Commissioner for Human Rights, the acting Commissioner fulfils its duties until the election of the new Commissioner.

In August 2020, the coalition of more than 1200 non-governmental organizations proposed Ms. Zuzanna Rudzińska-Bluszcz, an attorney and employee of the Commissioner for Human Rights Office, as a candidate for the position of the new Human Rights Commissioner. Despite that, the lower house of the Parliament denied supporting her candidacy three times. At the same time, the Law

and Justice proposed Mr. Piotr Wawrzyk, a ruling majority MP and deputy minister of foreign affairs as a candidate for that position. On 21 January 2020, Mr. Wawrzyk was elected to the position of new Commissioner for Human Rights, but his election was not accepted by Senate, the higher house of the Polish Parliament.

Before that, the representatives of the ruling majority questioned the constitutionality of the Act on Commissioner for Human Rights in the context of provisions enabling current CfHR to hold office until the election of new Commissioner. According to their motion the current regime violates the rule of law principle, the principle of public trust to the state, as well as the provisions of the Constitution that limits the term of office of CfHR to only 5 years.

At the end of 2020, the Sejm decided to decrease the proposed budget of the Commissioner for Human Rights Office by 15%. According to the Commissioner, it means that office day-to-day expenses were set at the level observed in 2013 and 2014. Therefore, the CfHR Office might face problems to cover all salaries of already employed employees.

Enabling framework for civil society

Lawsuits and prosecutions against civil society actors

As a part of the protest against anti-LGBT resolutions adopted by local governments, Bart Staszewski, an LGBT activist, runs a photographic project within which he travels to places where such resolutions were adopted and hangs a sign “LGBT-free zone” along roads leading into them. He then takes photographs of LGBT people who live in those places, before taking down the sign. In response to this project, Bart Staszewski faced numerous legal actions. For example, in 2020 two MPs from the ruling coalition have submitted a request to prosecutors for him to be investigated.¹² Furthermore, the conservative think tank Ordo Iuris submitted a request to the police to start an investigation on the basis of the provisions of the Code of Petty Crimes against Bart Staszewski, however, the police refused to launch the investigation.¹³

In 2020, one of the LGBT civil society organisations, Campaign Against Homophobia (Polish *Kampania przeciwko homofobii*), won

12 Notes from Poland, Activist signposts Polish towns as “LGBT-free zones” in protest against anti-LGBT resolutions, available at: <https://notesfrompoland.com/2020/01/25/activist-signposts-polish-towns-as-lgbt-free-zone-in-protest-against-anti-lgbt-resolutions/>

13 Ordo Iuris, Kolejna krzywdząca akcja Bartosza Staszewskiego. Ordo Iuris w obronie prorodzinnych samorządów, available at: <https://ordoiuris.pl/rodzina-i-malzenstwo/kolejna-krzywdzaca-akcja-bartosza-staszewskiego-or-do-iuris-w-obronie>

a civil lawsuit against the public media. In the civil proceedings, the organisation sought remedies for the violation of its good reputation by one of the materials prepared by the public television. The material (entitled “Invasion”) presented homophobic statements and included allegations regarding the transparency of financing and organising LGBT pride marches in Poland. In June 2020, a court in Warsaw ordered public television to remove the material from its YouTube channel.¹⁴

Smear campaigns and other measures affecting the public perception of civil society organisations

In 2020, the anti-LGBTI campaign escalated. During the presidential campaign, the representatives of the governing majority, including incumbent President Andrzej Duda, made numerous anti-LGBT statements describing LGBT persons as “a foreign ideology” and seeking “the ban on the LGBT ideology”.¹⁵ The attacks on the LGBT community constituted a peak of an over 2-year campaign, in which both public media and state authorities (including the representatives of the

local governmental institutions adopting the so-called anti-LGBT ideology resolution) participated.

In August 2020, the Minister of Justice together with the Minister of Environment presented a draft law on transparency of NGO financing. According to the draft legislation, each NGO that receives more than 30% of its annual budget from foreign funding will have to register in an official registry of foreign funded NGOs. Additionally, such an NGO should inform about the foreign funding in all of its prepared and published materials (including the printed materials but also on organization’s website etc., regardless of their form). In the light of the proposal, if an NGO fails to register, then it could be subject to financial penalties ranging from 3 up to 50 thousand PLN (7.5 up to 12.5 thousand EUR). If an NGO receives less than 30% of its funding from foreign sources, then it would be obliged only to inform about it in its materials. The draft law was strongly criticized by the civil society organizations who claim that adoption of this law would significantly limit the scope of work of the CSOs. Furthermore, the deputy prime minister who is responsible for supervising the Public Benefit Committee announced that the government does not plan to implement such a

14 Kampania Przeciw Homofobii, Sąd nakazał TVP usunięcie „Inwazji” z Youtube’a. To sukces KPH, które uruchamia zbiórkę na kolejne sprawy przeciw Telewizji, available at: <https://kph.org.pl/sad-nakazal-tvp-usuniecie-inwazji-z-youtubea-to-sukces-kph-ktore-uruchamia-zbiorke-na-kolejne-sprawy-przeciw-telewizji/>

15 The Guardian, Polish president issues campaign pledge to fight ‘LGBT ideology’, available at: <https://www.theguardian.com/world/2020/jun/12/polish-president-issues-campaign-pledge-to-fight-lgbt-ideology>

law. Since the day the draft law was presented, there have been no further legislative works in this regard.¹⁶

Access to funding

In 2020, the media also reported on the works of the National Institute of Freedom – the Centre of Civil Society Development. The Institute was established in 2017 as a governmental agency responsible for distributing some part of the public financing for civil society organizations. According to the media reports, the vast majority of the organization that receives financing from the National Institute of Freedom are the catholic, conservative or even in some cases nationalistic organizations. The media reports also documented examples of cases that remain loyal to the governing majority or have some personal ties with the representatives of the government administration. Furthermore, the media report revealed information on granting substantial financing to organizations that were registered only a week before announcing the call for proposals.¹⁷

On the other hand, in 2020, the Active Citizens Fund – National program, funded by the EEA and Norway Grants, was launched. The 30 million EUR budget program is dedicated to supporting civil society organizations working “towards greater civic participation in public life, protection of human rights and equality, environmental protection, preventing climate change, and empowering vulnerable groups”. The program provides financing, including grants, to improve awareness of civic, equality, and discrimination issues. The financing offered within the program is dedicated to both thematic projects as well as projects aiming at strengthening the condition of the civil society sector in Poland.¹⁸

Access and participation to decision-making processes

Since 2015, the civil society’s access to public consultations and participation in decision-making process has been gradually limited. According to the latest information analysing the legislative process, in years 2015–2019 the average time of social consultations was 12 days, and the government directed to

16 Poland, Ministry of Justice, Nowe prawo wzmacni przejrzystość finansowania organizacji pozarządowych, available at: <https://www.gov.pl/web/srodowisko/nowe-prawo-wzmocni--przejrzystosc-finansowania-organizacji-pozarzadowych>

17 Baczyński M., Miliony dla swoich. Tak PiS wspiera swoje organizacje, cz. 1., available at: <https://wiadomosci.onet.pl/tylko-w-onecie/pis-i-organizacje-pozarzadowe-partia-rzadzaca-przelewa-miliony-zl-dla-swoich/51d421f>

18 Active Citizens Fund, Official launch of Active Citizens Fund – National programme, available at: <https://aktywniobywatele.org.pl/en/official-launch-of-active-citizens-fund-national-programme/>

social consultations less than 2/3 of the prepared draft legislation.¹⁹ In recent years, the requirement of public consultations was also bypassed by presenting the draft legislation by the members of the Parliament and not by the government. This practice continued in 2020 when certain key pieces of draft legislation, particularly relevant from the perspective of civic engagement, such as e. g. the changes to the Electoral Code, were presented by the members of the parliament without proper consultations and adopted at an accelerated pace.

In March 2020, the Parliament amended the provisions of the Act on the Social Dialogue Council.²⁰ The Council is a platform of cooperation between the representatives of the employers, employees, and the government. The Council prepares among others opinion on draft legislation concerning e. g. labor market and state's financial strategies. In the light of the changes, the Prime Minister gained the competence to dismiss any member of the Council in a case of "loss of trust in a relation to an information concerning member's work performance". This provision was strongly criticized as an attempt to widen the

governmental control over the works of the Council. This provision was eventually abolished in December 2020.

Furthermore, according to the Act on public benefit and voluntary activities, each Ministry should prepare a program of cooperation with civil society organizations. In recent years, the practice of adopting such programs has, however, deteriorated. According to the information presented by the Polish Federation of Civil Society Organizations, in 2020, eight ministries (out of 16 Ministries in 2020) did not publish such a program.²¹

Civil society mobilisation and resilience

Despite the shrinking of space for civil society engagement in the decision-making process, civil society remains mobilised and seeks new forms of advocacy work. One of the examples of civil society's innovative work was the campaign for support for the candidate for the position of Ombudsman. In 2020, the term of office of the Ombudsman, professor Adam Bodnar, expired. According to the

19 Poland, Fundacja Batorego, XIII raport Obywatelskiego Forum Legislacji przy Fundacji Batorego, available at: https://www.batory.org.pl/informacje_prasowe/xiii-raport-obywatelskiego-forum-legislacji-przy-fundacji-batorego/

20 Poland, Act on the Social Dialogue Council (Ustawa z dnia z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego) 24 July 2015

21 Ogólnopolska Federacja Organizacji Pozarządowych, Problemy z programami współpracy, available at: <https://repozytorium.ofop.eu/problemy-z-programami-wspolpracy/>

Constitution, the candidates for the position of the Ombudsman are presented by the group of MPs. In July and August, civil society organisations mobilised to present to the MPs their own candidate. Zuzanna Rudzińska-Bluszcz, a former director of strategic litigation in the Ombudsman's office, was supported by over 1200 civil society organisations. Her candidacy was presented by two political groups, yet she was not appointed for the position by the governing majority.²²

Other systemic issues affecting rule of law and human rights protection

Widespread human rights violations or persistent protection failures

On 22 October 2020, the Constitutional Tribunal delivered a judgment concerning the access of abortion in case of severe or fatal impairment of the foetus. The CT found the specific provision of the Act on planning family to be unconstitutional. It resulted in a

situation in which vast majority (96%) of abortions have become illegal in Poland.²³

Moreover, the CT did not decide to postpone judgment entry into force. It directly violated the rights of women who were already pregnant and had legal grounds to terminate their pregnancy. As a result of CT judgment, they were forced to give birth to children with severe or fatal impairment, which violates human rights standards.

In addition, Poland still did not take general measures to implement ECHR judgments in the cases *Tysiąc v. Poland* and *R.R. v. Poland* concerning access to legal abortion and prenatal genetic testing. Moreover, the ECHR already communicated to the Polish authorities the case of *B.B. v. Poland* concerning lack of access to abortion in case of severe foetus impairment.²⁴ The applicant in that case raised a complaint on violation of her rights protected under Art. 3 of the European Convention on Human Rights, forbidding torture, inhuman or degrading treatment.

22 [Rp.pl](https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich), Sejm wybrał Piotra Wawrzyka na Rzecznika Praw Obywatelskich, available at: [https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich.html](https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich)

23 [Rp.pl](https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku), 1116 legalnych aborcji w Polsce, available: [https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku.html](https://www.rp.pl/Spoleczenstwo/200819353-Raport-1116-legalnych-aborcji-w-2019-roku)

24 Case no. 671717/17

Follow-up to recommendations of international and regional monitoring bodies

In 2020 the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment and Punishment (CPT) delivered a report from its ad-hoc visit to Poland concerning the treatment of persons in police custody. According to the findings of the CPT report, persons taken into police custody in Poland are particularly exposed to the risk of being ill-treated, in particular at the time of apprehension. Therefore, the CPT urged Polish authorities to step up their efforts in this area and rigorously combat ill-treatment by the police.

Moreover, for more than 20 years the CPT and UN Committee Against Tortures have been urging Polish authorities to reduce occupancy rates in all penitentiary establishments, and offer a minimum of 4 m² of living space per inmate in multiple occupancy cells. Despite numerous appeals on that topic, Poland is still not willing to improve this legal standard of space ratio per inmate. As a result, Poland is raking among the worst in this area among all Council of Europe countries.

Implementation of decisions by supranational courts

On 19 November 2019, the CJEU delivered its judgment concerning the status of the Disciplinary Chamber of Supreme Court and the status of the National Council of Judiciary. The judgment provided Polish courts with

the possibility to assess the status of judges appointed by the new NCJ in the context of their independence. Poland not only have not implemented the judgment of CJEU but also took actions aimed at creating chilling effect among judges and discouraging them from using EU law to guarantee the independence of the court recognizing particular case. The so-called muzzle law adopted at the end of 2019 tightened the rules of disciplinary liability of judges and recognized any actions aimed at questioning the status of other judges as a disciplinary offense. Moreover, the Disciplinary Chamber of the Supreme Court was found as the only body competent to recognize cases concerning such offenses.

On the CJEU issued a ruling suspending the actions of the Disciplinary Chamber of the Supreme Court. CJEU decided to suspend the application of the provisions of the Supreme Court Act establishing the Disciplinary Chamber as well as to refrain from referring the cases pending before the Chamber for consideration by the panel not meeting the requirements of independence, laid down, inter alia, in the CJEU judgment of 19 November 2019.

Despite the CJEU ruling, the Disciplinary Chamber of Supreme Court gave on 9 June 2020 consent to prosecute Justice Tuleya, for his decision to admit journalists to an announcement of a ruling which was important to the public. On 12 October 2020, the Disciplinary Chamber lifted the immune of other Judge –Beata Morawiec, a President of the Judicial Association Themis, which is deeply involved in the protection of the independence of the

judiciary. However, this judgment has still not become final.

Last but not least, according to the European Implementation Network, Poland have not implemented 32 leading ECHR judgments. The average implementation pending exceeds 6 years. Finally, in recent 10 years, more than 40% of Polish cases that ended with ECHR ruling have not been successfully implemented. This includes cases concerning access to abortion, the right to have their case recognized in a reasonable time, inadequate detention conditions, lack of adequate and effective investigation, excessive length of detention of remand, delays in the enforcement proceedings.²⁵

Impact of COVID-19

Impact on the justice system

A study prepared by the HFHR has identified several problems related to the impact of COVID pandemic on the functioning of the justice system.²⁶

First, there have been numerous cancelled court hearings and sessions, which will result in an extension of duration of the proceedings in the future. In some courts, during the

quarantine, all of the scheduled hearings were cancelled, whereas in the other the number of hearings was smaller by half (compared to 2019).

Second, the applicable rules of filing the pleadings were an issue, as a result of different solutions adopted by particular courts in this regard (e.g. filing them in person, sending them by post or electronically). To make the matters worse, some courts have not informed the parties clearly on how to do so, which exacerbated the confusion.

Third, the possibility for third persons to participate in court proceedings as audience has been limited (as the study revealed, almost all of 369 Polish courts adopted some regulations in this regard; in 24 courts, the participation of audience has been completely excluded).

Fourth, when it comes to administrative courts, a disturbing trend of directing cases to sessions held *in camera* (without the participation of parties) has been observed. The courts argued that they lacked technical possibilities to conduct a hearing via means of distance communication.

Fifth, difficulties in the access to case files during the pandemic are visible. They take diverse forms, such the duty to order case files far in advance, the limited working hours of court

25 <https://www.einnetwork.org/poland-echr>

26 HFHR, Prawa człowieka w dobie pandemii, January 2021, <https://www.hfhr.pl/wp-content/uploads/2021/01/Prawa-czlowieka-w-dobie-pandemii.pdf>

reading rooms, as well as the limited time for familiarising with the case files (in some cases, reportedly, severely curtailed to 15 minutes).

Freedom of assembly

From among all civil rights and liberties, the freedom of assemblies has been affected most significantly by the COVID-related restrictions introduced in 2020 by the Polish government. The freedom of assemblies was limited for the first time in the regulation of 13 March 2020, which introduced a limit of 50 participants applicable both to ordinary assemblies (i.e. such that are organized on the basis of notifying a certain local government entity) and spontaneous assemblies (occurring as a reaction to some unpredicted events in public sphere). The absolute ban on assemblies was introduced soon on 31 March 2020, only to be softened in the end of May 2020, when assemblies of 150 persons were allowed again. This number was gradually limited by the subsequent regulations, and reached the limit of 5 persons, which is applicable up to this day, on 24 October 2020. A correlation can be noticed with massive protests that started two days earlier after the Constitutional Tribunal

delivered its decision on a nearly absolute ban of abortion in Poland.²⁷

There are serious concerns that the adopted regulations are unconstitutional.²⁸ First, the government decided not to introduce any of the extraordinary measures allowing for derogation of certain civil liberties. Second, the Constitution requires that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute (act), and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Moreover, such limitations cannot violate the essence of freedoms and rights. Freedom of assembly has been restricted in a series of regulations (legal acts hierarchically lower than statutes) issued by the government, and probably beyond the scope of statutory authorization: the act that gives power for the government to issue such regulations contains a catalogue of possible orders or prohibitions that can be introduced, and a ban on assemblies is not among them.²⁹ Lastly, the introduced limitations on the number of participants violate the very essence of the right to assembly.

27 <https://www.theguardian.com/world/2020/oct/24/thousands-join-poland-protests-against-strict-abortion-laws>

28 See M. Małecki, “Poland’s coronavirus restrictions are unconstitutional and risk years of legal chaos”, Notes from Poland, 18 April 2020. <https://notesfrompoland.com/2020/04/18/polands-coronavirus-restrictions-are-unconstitutional-unlawful-and-risk-years-of-legal-chaos/>

29 See Poland, Act on preventing and combating infections and infectious diseases (Ustawa o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi), 5 December 2008, Articles 46-46b.

Regardless of the restrictions, and the criminal or administrative penalties likely to be imposed in case of their breach (the latter even up to approx. EUR 6.5 thousand), there were numerous massive demonstrations in Poland in 2020. The most prominent example are protests organised by Polish Women on Strike (arguably the largest in history) with relation to the Constitutional Tribunal's decision on abortion law of 22 October 2020

There is a growing number of decisions in which Polish courts review the legality of introduced limitations on the freedom of assembly. In the majority of cases, the assessment is unequivocally negative.³⁰ For instance, the Appellate Court in Warsaw, when hearing an appeal from a banned assembly's organizer, observed that such a ban „raises significant concerns from the point of view of the constitutional freedom of assembly”, in particular when it comes to possible limitations of civil rights and the principle of proportionality.³¹ Other courts emphasized, among others, the possible chilling effect that restriction of

freedom of assembly can cause, or were critical of the practice of imposing both criminal and administrative penalties for the same act.

Inequality and discrimination

As HFHR report indicates,³² there were three groups mostly affected by the pandemic: women, homeless people and foreigners. With regard to women, the laws adopted with relation to COVID-19 allowed for limiting the working time, therefore lowering the salaries, which serve as a basis for determining the amount of maternity allowance. As a result, the constitutional principles of equal treatment, social justice and the protection of maternity could have been violated. These changes in law were alleviated after the intervention from the Ombudsman.³³

Second, homeless persons are by definition particularly exposed to risks connected with the pandemic. HFHR indicated that, among others, financial resources allocated by the

30 See further M. Kalisz, M. Szuleka and M. Wolny, „2020. Pandemia, kryzys praworządności, wyzwania dla praw człowieka”, HFHR, 2020. <https://www.hfhr.pl/wp-content/uploads/2021/02/2020.Pandemia-kryzys-praworzadnosci-wyzwania-dla-praw-czlowieka-01-02.pdf>; Obywatele RP, „Uczestniczenie w zgromadzeniu w czasie pandemii nie jest wykroczeniem”, 21 November 2020. <https://obywatelerp.org/uczestniczenie-w-zgromadzeniu-w-czasie-epidemii-nie-jest-wykroczeniem/>

31 Appellate Court in Warsaw, Judgement of 15 May 2020, case no. VI ACz 339/20.

32 HFHR, Prawa człowieka w czasie pandemii, January 2021. <https://www.hfhr.pl/wp-content/uploads/2021/01/Prawa-czlowieka-w-dobie-pandemii.pdf>

33 <https://www.rpo.gov.pl/pl/content/tarcza-antykryzysowa-zasilek-macierzynskiego-rpo-do-MRPiPS>

government in 2020 did not satisfy the needs of facilities providing support for the homeless, nor did they guarantee access to healthcare and COVID testing.

Third, when it comes to foreigners, the study has also revealed that the pandemic limited the Border Guard's and Office for Foreigners' capacity for handling e.g. the incoming applications for international protection. According to the report, in 2020 only 1620 applications were accepted, which makes it the smallest number since 1999. Persons applying for such protection have also been deprived of needed medical and social support and no changes in law have been adopted so far. Moreover, so far no measures have been adopted in order to guarantee foreigners legally employed in Poland social security benefits in case they are made redundant.

Access to information

In March 2020 a change in law suspended the possibility for citizens to challenge the authorities' inaction with regard to requests for public information. Such amendment, in HFHR's opinion, should be assessed negatively as violating the right to access public information and completely unjustified. Although the law was applicable only for three months, during this period it deprived the citizens the expectation to obtain answer for their FOI request within the ordinary two-week time.

Anti-corruption framework

At the beginning of the COVID-19 pandemic, the Parliament adopted an amendment to the Act on counteracting the COVID-19 pandemic.³⁴ Its Article 10c states that whoever violates official duties or regulations while purchasing goods or services necessary to combat COVID-19 does not commit criminal offenses specified in Articles 231 and 296 of Criminal Code, provided that they act in the public interest and without committing these violations it would not be possible to acquire those goods or services. Art. 231 of CC punishes failure to fulfil obligations or exceeding powers by a public officer, while art. 296 of CC criminalizes inflicting substantial material damage to an entity.

34 Act of March 2, 2020 on special solutions related to the preventing, counteracting and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws, item 1842, as amended).