



HELSINKI FOUNDATION  
FOR HUMAN RIGHTS

# **RULED BY LAW**



**THREATS TO THE PROTECTION  
OF HUMAN RIGHTS IN POLAND  
IN 2015-2019**

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OF HUMAN RIGHTS IN POLAND  
IN 2015-2019**

**Authors**

Małgorzata Szuleka, Marcin Wolny in cooperation with Maciej Kalisz

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ul. Zgoda 11

00-018 Warszawa

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# INTRODUCTION

The years 2015-2019 were a period in which the greatest rollback in human rights protection since 1989 has been recorded in Poland. The ruling majority, despite the lack of a sufficient number of votes to amend the Constitution, has introduced a number of changes to the state system, thereby putting at risk the protection of the rule of law and the principle of tripartite governance. By aligning legislation with political objectives, the rule of law, which is at the heart of democratic systems, has been replaced by rule using the law.

The Helsinki Foundation for Human Rights has been monitoring respect of human rights in Poland since 1989. Despite numerous difficulties and complex problems, up to 2015 we observed a gradual increase in the protection of individual rights and freedoms and an improvement in the functioning of the system for the protection of human rights. This slow improvement has ceased with the attacks on the foundations of a democratic state. The challenges addressed so far by human rights organisations (including access to the judicial system, the right to a fair trial and the rights of minorities and vulnerable groups) have been compounded by the need to protect the rule of law and the principles of the democratic rule of law.

The fundamental changes in the state have not left the system for the protection of human rights unaffected. Its independence and functioning have been undermined, among others, by changes in the functioning of the Constitutional Tribunal, the Supreme Court, the common courts and the office of public prosecutor. In addition, the situation was aggravated by attempts to limit the independence of the Commissioner for Human Rights and the subordination of public media to the ruling majority.

This report documents the most important aspects in the breakdown of the system for the protection of human rights. The report is not exhaustive and does not constitute any kind of chronicle on the rule of the Law and Justice party. The report focuses primarily on institutions and issues of key importance to human rights, in which we have seen the greatest rollback over the last four years – primarily the judiciary, the activities of independent institutions (the Commissioner for Human Rights, the media and social organisations), the protection of key freedoms and human rights, and Poland's relations with the European Union. An urgent improvement of the situation in these areas is crucial for maintaining the entire democratic system in Poland.

# SUMMARY OF EVENTS IN THE YEARS 2015–2019

## THE PARLIAMENTARY ELECTIONS IN OCTOBER, 2015

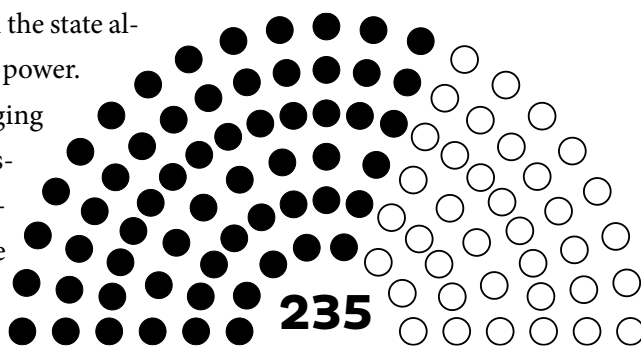
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In October, 2015, the parliamentary elections were won by the Law and Justice party with 37.5% of votes, which in turn translated into 235 seats in the Sejm (support of 39.9% in the elections to the Senate translated into 66 seats in the Senate). This was the first time in the history of elections after 1989, when a single party won the majority of votes in parliament and could rule independently. Despite the fact that the majority achieved did not allow for a change in the constitution,








the ruling majority initiated the process of amending key legal acts concerning the most important institutions in the state almost immediately after taking power.

Thus, de facto, without changing the constitution, the state system was changed and the protection of the rule of law and the separation of powers was undermined.



## INFORMATION ON THE MOST IMPORTANT SYSTEMIC CHANGES










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Institution	Description	Status	
<b>Commissioner for Human Rights</b>	<ul style="list-style-type: none"> <li>▪ A decrease in the budget for the office of Commissioner for Human Rights.</li> <li>▪ Amendments to the act on immunity, including the Commissioner for Human Rights.</li> <li>▪ Attacks in public debates</li> </ul>	<ul style="list-style-type: none"> <li>▪ Independent.</li> <li>▪ The term of office for the current Commissioner for Human Rights ends in 2020.</li> </ul>	
<b>Supreme Court</b>	<ul style="list-style-type: none"> <li>▪ Attempts to reduce the retirement age of Supreme Court judges.</li> <li>▪ The creation of two new Supreme Court Chambers.</li> <li>▪ Attacks on the First President of the Supreme Court and other Supreme Court judges.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Independent of political will.</li> <li>▪ Doubts about the legality of the decisions taken by the judges sitting in the new Supreme Court Chambers.</li> </ul>	
<b>Common courts</b>	<ul style="list-style-type: none"> <li>▪ Changes in the procedure for appointing and dismissing presidents of courts.</li> <li>▪ Amendments to the rules on disciplinary proceedings against judges.</li> <li>▪ Media attacks on individual judges.</li> <li>▪ Introduction of a system for the random allocation of cases.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Independent of political will, despite emerging examples of a chilling effect.</li> </ul>	
<b>Constitutional Tribunal</b>	<ul style="list-style-type: none"> <li>▪ Six acts of legislation or amendments changing the mode of operation of the Constitutional Tribunal and the procedure for electing a new Constitutional Tribunal President.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Partially dependent on political will.</li> <li>▪ Doubts as to the legality of decisions issued by judges chosen without a valid legal basis.</li> </ul>	
<b>Public Prosecutor's Office</b>	<ul style="list-style-type: none"> <li>▪ Merger of the functions of the Prosecutor General with the Minister of Justice giving the Prosecutor General broad powers to influence the course of investigations.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Significantly dependent on political will.</li> </ul>	
<b>National Council of the Judiciary of Poland</b>	<ul style="list-style-type: none"> <li>▪ Amendment of the act on the National Council of the Judiciary of Poland and change in the manner of appointing member-judges of the National Council of the Judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Dependent on political will.</li> <li>▪ Doubts about the legitimacy of the NCJ's activities in its current form.</li> </ul>	
<b>Public media</b>	<ul style="list-style-type: none"> <li>▪ Changes in the procedure for appointing and dismissing members of management and supervisory boards of public radio and television.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Dependent on political will.</li> </ul>	



## THE SHRINKING SPACE FOR HUMAN RIGHTS

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Constitution	Detailed description of the violations in 2015–2019
 <p><b>Article 32</b> – Everyone is equal before the law [...] no one shall be discriminated against.</p>	→ <b>LGBTQI rights, p. 78</b>
 <p><b>Article 33</b> – Men and women in the Republic of Poland have equal rights in family, political, social and economic life.</p>	→ <b>Women's rights, p. 74</b>
 <p><b>Article 40</b> – No one shall be subjected to torture or cruel, inhuman or degrading treatment.</p>	→ <b>Police violence, p. 87</b>
 <p><b>Article 45</b> – Everyone has the right to a fair and public hearing without undue delay by a competent, autonomous, impartial and independent court.</p>	→ <b>A crisis in the rule of law – attacks on the judiciary, p. 13</b>
 <p><b>Article 47</b> – Everyone has the right to the protection of privacy.</p>	→ <b>Security and the right to privacy, p. 88</b>
 <p><b>Article 54</b> – Everyone is guaranteed the freedom to express their views and to receive and disseminate information.</p>	→ <b>Freedom of expression, p. 69</b>
 <p><b>Article 56</b> – Foreign nationals may exercise the right of asylum in the Republic of Poland on the basis of the principles set out in the act.</p>	→ <b>The rights of foreign nationals, p. 80</b>
 <p><b>Article 57</b> – Freedom of peaceful assembly and participation for all is guaranteed.</p>	→ <b>Freedom of assembly, p. 63</b>
 <p><b>Article 58</b> – Freedom of association for all is guaranteed.</p>	→ <b>Non-governmental organisations, p. 55</b>

## CALENDAR OF CHANGES

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### Judiciary

### Human rights

### Dispute with the European Union

2015

**XI and XII 2015** – two amendments to the act on the Constitutional Tribunal.  
**XII** – The President accepts the oath of office from three people chosen as judges.

**XII** – changes in the public media.

2016

**III** – judgement of the Constitutional Tribunal on the amendment of the act on the Constitutional Tribunal, the government refuses to publish the judgement.  
**III** – amendment of the act on the public prosecutor's office.

**I** – mass dismissals in the public media, disciplinary dismissals.  
**III** – amendment of the police act and new regulations concerning operational control and obtaining information from correspondence.

**I** – European Commission launches rule of law audit procedure

**VII** – the second act on the Constitutional Tribunal.

**VII and VIII** – NGOs and the media report about refugees on the eastern border of Poland who are refused entry into Poland by Border Guards and refused the option to apply for international protection.

**VII** – first recommendation of the European Commission on the rule of law.

**IX** – the first draft of the law tightening access to legal abortions. The National Women's Strike.

**XII** – three new laws on the Constitutional Tribunal, the President of the Republic of Poland appoints a new President of the Constitutional Tribunal.

**XII** – amendments to the act on assemblies

**XII** – second recommendation of the European Commission on the rule of law.

2017

**II** – the Sejm receives the first draft amendment to the act on the National Council of the Judiciary and the act on common courts.

**V** – first court rulings on counterdemonstrations under the amended law on assemblies.

**VII** – third recommendation of the European Commission on the rule of law.  
The Commission launches the European Union law infringement procedure in connection with the act on common courts.

**VII** – veto by the President of the acts on the National Council of the Judiciary and the Supreme Court.  
**VIII** – the amendment to the act on the system of common courts enters into force.

**Judiciary****Human rights****Dispute with the European Union****2017**

**IX** – first decisions of the Minister of Justice on the dismissal of presidents of courts.

**XII** – the Sejm adopts the law on the Supreme Court and the National Council of the Judiciary.

**IX** – the Sejm adopts the act on the National Freedom Institute.

**XII** – The European Commission launches the procedure under article 7 of the European Union Treaty.

Initiation of an infringement procedure against European Union law on the retirement age of common court judges.

**2018**

**III** – the Sejm appoints new members to the National Council of the Judiciary of Poland. The Chancellery of the Sejm refuses to provide the lists of support for candidates.

**IV** – the provisions concerning the new retirement age for judges of the Supreme Court and the provisions on disciplinary proceedings against judges enter into force.

**VII** – 22 judges of the Supreme Court over 65 old retire.

**IX** – the first disciplinary proceedings are launched in cases of judges active in public debate.

**I** – adoption of an amendment to the act on the Institute of National Remembrance.

**III** – second attempt at tightening up the law on access to abortion. Black Friday.

**IX** – The Mayor of Lublin bans an Equality March, the courts overturn his decision.

**VII** – The European Commission launches the European Union law infringement procedure in connection with the act on the Supreme Court, including the retirement of judges.

**VIII** – questions referred by the Supreme Court for a preliminary ruling.

**2019**

**III** – The Constitutional Tribunal issues a judgement on the new provisions of the act on the National Council of the Judiciary.

**I** – Warsaw Mayor Rafał Trzaskowski signs the LGBT Declaration, in response to the Declaration attacks on LGBT people in the public space are increasing.

**V** – amendment of the Penal Code.

**VII** – increasing attacks on LGBTQI people.

**III** – hearing before the Court of Justice of the European Union on the establishment of a new National Council of the Judiciary.

**VI** – Judgement of the Court of Justice of the European Union on the retirement age of judges of the Supreme Court.

**VI** – Opinion of the Advocate General of the Court of Justice of the European Union on the establishment of a new National Council of the Judiciary.

# A CRISIS IN THE RULE OF LAW – ATTACKS ON THE JUDICIARY

## **CHANGES IN THE CONSTITUTIONAL TRIBUNAL**

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The Constitutional Tribunal plays an important role in a democratic system based on the rule of law. On the one hand, it adjudicates on the abstract compliance of laws with the Constitution, and on the other hand, it examines individual constitutional complaints (anyone whose right has been violated has the right to lodge a complaint with the Constitutional Tribunal regarding the compliance of the provision on the basis of which the decision was issued with the freedoms and rights set forth in the Constitution). In accordance with the Constitution, the decisions of the Tribunal are binding and final. The dispute over the shape and functioning of the Constitutional Tribunal initiated the most serious democratic crisis in Poland after 1989.

### **The New Act on the Constitutional Tribunal**

The dispute over the Constitutional Tribunal began with the changes introduced by the previous parliamentary majority at the end of the previous, 7<sup>th</sup> term Sejm. At that time, a transitional provision was adopted in the new act on the Constitutional Tribunal, under which the previous ruling majority could fill 5 out of the 15 seats in the Tribunal (the term of three judges in the Constitutional Tribunal expired during the term of the previous Sejm, and the term of two consecutive judges during the term of the next Sejm).

During the last session before the elections, with the votes of the previous ruling majority, the Sejm adopted 5 resolutions on the election of judges for the Tribunal. The

five newly elected judges were not sworn in by the President of the Republic of Poland, Andrzej Duda, who had been in office since August, 2015.

## **Parliamentary elections and amendments to the act on the Constitutional Tribunal**

After the parliamentary elections of 25<sup>th</sup> October, 2015, won by the Law and Justice party, the first amendment to the law on the Constitutional Tribunal was adopted during the first session of the Sejm. The amendment repealed the transitional provision of the law on the Constitutional Tribunal and gave grounds, according to the new ruling majority, for the repeat election of five judges. The new regulations on the Constitutional Tribunal were appealed against by, among others, the Commissioner for Human Rights, the National Council of the Judiciary and a group of MPs. In this case, the Constitutional Tribunal issued an interim measure and called on the Sejm to refrain from taking steps aimed at electing new judges to the Constitutional Tribunal. Despite this, two days later, the Sejm adopted five new resolutions appointing judges to the Constitutional Tribunal and the President took oaths from four of them in the late hours of the night.

*“This Tribunal is to be a redoubt, a blocking position, for this system. Defending all that has been wrong and disgraceful in the last 26 years. And we want to change this and this is why we need to change this Tribunal. We must make it an institution which will truly defend the rights of citizens and the constitution, but not in such a way that this constitution is binding on some and not on others.”<sup>1</sup>*

**Jarosław Kaczyński, President of the Law and Justice party**

In its judgement of 3rd December, 2015, the Constitutional Tribunal annulled in part the transitional provision concerning the election of 5 judges to the Constitutional Tribunal. The Tribunal found the transitional provision of the law, which allowed for the election of all 5 judges at the same time, to be partially unconstitutional. The Tribunal held that this provision, in so far as it allowed three judges to be elected to replace judges whose term of office expired in November, 2015, was compatible with

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1 *Kaczyński: We want a good tribunal. This is not the tribunal in its current composition, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/marsz-pis-w-warszawie-przemowienie-jaroslaw-a-kaczynskiego,602612.html> (accessed 21/09/2019).*

the Constitution. However, in the part in which it allowed judges to be elected to replace judges whose term of office expired in December, 2015, it was, in the Tribunal's opinion, unconstitutional.<sup>2</sup> This means that the 7<sup>th</sup> term Sejm had the right to elect three out of 5 judges and the 8<sup>th</sup> term Sejm had the right to elect two out of 5 judges.

### **Second amendment of the act on the Constitutional Tribunal**

On 28<sup>th</sup> December, 2015, the second amendment to the act on the Constitutional Tribunal came into force. Just like the previous amendment, the Sejm adopted this amendment at an express pace and without taking into account expert opinions. The act introduced a number of changes that could effectively paralyse the work of the Tribunal, including, among others, an increase in the number of judges in the full composition of the bench (to 13 judges), the introduction of the obligation to consider cases in the order in which they are received, and decisions to be taken by a two-thirds majority and at a hearing scheduled no earlier than three months after the parties were notified. The new rules were to apply to cases already pending before the Tribunal.

In its judgement of 9<sup>th</sup> March, 2016,<sup>3</sup> the Constitutional Tribunal ruled that the amending act, as a whole, was inconsistent with the Constitution of the Republic of Poland. The Tribunal recognised, first of all, the unconstitutionality of the very way in which the law was passed – so hasty that it made it impossible to reflect on the compatibility of the amendments introduced with the Constitution.

The Prime Minister refused to publish the judgement of the Constitutional Tribunal and to recognise its binding force. On 11<sup>th</sup> March, 2016, the Venice Commission published an opinion<sup>4</sup> in which it shared the critical view of the provisions contained in the amendment in their entirety, as they paralysed the work of the Constitutional Tribunal and posed a threat to the rule of law. The Commission also called on the Council of Ministers to publish the Tribunal's judgement.

Due to the failure to publish the judgement of 9<sup>th</sup> March, 2016, the Helsinki Foundation for Human Rights filed a notification of suspicion that a crime had been

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2 Judgement of the Constitutional Tribunal of 3rd December, 2015, K 34/15, Journal of Laws from 2015.

3 Judgement of the Constitutional Tribunal of 9<sup>th</sup> March, 2016, K 47/15.

4 Venice Commission, Opinion on the Act on the Constitutional Tribunal Adopted by the Venice Commission at its 108<sup>th</sup> Plenary Session (Venice, 14-15 October, 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e) (accessed 21/09/2019).

committed. After the public prosecutor's office refused to initiate proceedings, the HFHR filed a complaint in which it indicated that the refusal to publish the ruling of the Constitutional Tribunal has led to systemic, political and economic damage, as well as harming the reputation of Poland. The court upheld the complaint against that decision and ordered the initiation of proceedings. After four months, the proceedings were finally discontinued by the public prosecutor.<sup>5</sup>

### **Third amendment of the act on the Constitutional Tribunal**

In July, 2016, the Sejm adopted another amendment to the act on the Constitutional Tribunal, which significantly affected its work.

The new provisions contained regulations concerning, among others, the obligation of the President of the Constitutional Tribunal to assign cases to persons elected as judges of the Tribunal by the 8<sup>th</sup> term Sejm, or to examine cases, as a rule, in the order of their receipt, unless the President of the Republic of Poland requests otherwise. The provisions also contained regulations concerning, for example, the date after which a hearing can be scheduled (after a minimum of 60 days) and changes in the manner of announcing judgements by the Constitutional Tribunal (they would be published at the request of the President of the Tribunal). The amendment also introduced provisions allowing judges to oppose the content of the proposed decision, which could de facto serve to block decisions.

Like the two previous amendments, this one was also appealed against to the Constitutional Tribunal. The Tribunal found that the new provisions are partially unconstitutional. The provisions concerning, among others, the obligation of the President of the Constitutional Tribunal to allow the three persons elected to the appointed judicial positions to adjudicate, the introduction of a procedure for the submission of a motion by the President of the Tribunal to the Prime Minister for the publication of judgements and the necessity of postponing a hearing due to the absence of a properly notified Prosecutor General, have been deemed unconstitutional.<sup>6</sup>

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5 Helsinki Foundation for Human Rights, *Non-publication of CT judgements: documents from the investigation*, available at: <https://www.hfhr.pl/niepublikowanie-wyrokow-tk-dokumenty-z-sledztwa/> (accessed 21/09/2019).

6 Judgement of the Constitutional Tribunal of 11<sup>th</sup> August, 2016, K 39/16.

## Recent amendments to the act on the Constitutional Tribunal

While the amendments adopted since 2015 mainly concerned the regulation of the Tribunal's working procedures, the amendments adopted in the package of the three laws at the end of 2016 mainly concerned reserving the possibility of filling the post of President of the Constitutional Tribunal for the ruling party's majority. The new laws, apart from the powers of the incumbent Vice-President of the Tribunal, introduced the institution of a "judge acting as President of the Constitutional Tribunal", appointed by the President. This judge, in turn, was obliged to convene a General Assembly to elect a candidate for a new president.

In December, 2016, after the expiry of the term of the previous President of the Tribunal in the person of Professor Andrzej Rzepliński, the President of the Republic of Poland appointed Julia Przyłębska, a judge elected by the current ruling majority, to the position of acting President of the Constitutional Tribunal. One of her first decisions was to allow persons elected to judicial positions without a valid legal basis to participate in the General Assembly and to convene the General Assembly in order to elect candidates for the President of the Constitutional Tribunal. However, according to the available information, the procedure for appointing candidates to the position of President of the Constitutional Tribunal was carried out incorrectly. In the light of the new provisions, the General Assembly should first vote on candidates for the office of President of the Constitutional Tribunal and only then adopt a resolution on the matter. However, a majority of judges would have to pass a resolution in this case. The General Assembly was attended by 14 judges (7 "old" judges and 7 judges elected by the 8<sup>th</sup> term Sejm). However, the assembly did not adopt the resolution, mainly because judge Przyłębska decided that voting for candidates is tantamount to voting on the resolution for the president. Only her signature appears under the minutes from the session of the General Assembly. On 21<sup>st</sup> December, 2016, the President of the Republic of Poland appointed Judge Julia Przyłębska as President of the Constitutional Tribunal.<sup>7</sup>

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7 Helsinki Foundation for Human Rights, *Session on the selection of candidates for the Presidency of the Constitutional Tribunal illegal?*, available at: <https://www.hfhr.pl/po-siedzenie-w-sprawie-wylonienia-kandydatow-na-prezesa-tk-nielegalne/> (accessed 21/09/2019).



## Limitation of the work of the Constitutional Tribunal<sup>8</sup>

The changes relating to the Constitutional Tribunal have translated into a reduction in its effectiveness. In 2017, the Constitutional Tribunal received the smallest number of cases in the history of this institution since the entry into force of the Constitution of 1997 – just 285 (for comparison, in the years 2009-2013 it received from 440 to 487 cases per year, and in 2015 it increased to 623 cases).<sup>9</sup> Moreover, the number of each type of case initiated before the Constitutional Tribunal has significantly decreased. While in 2015, just before the outbreak of the constitutional crisis, the number of legal questions addressed to the Constitutional Tribunal reached 135, two years later it was 21.

The second aspect of the decrease in the efficiency of proceedings before the Constitutional Tribunal concerns the duration of proceedings in cases of legal questions and constitutional complaints, i.e. the categories of cases that are most important for citizens. In 2015, the average time taken to examine a constitutional complaint was 36 months. However, this was influenced by the fact that in the year under review the Constitutional Tribunal examined many cases brought in 2011 and even in 2010. According to data compiled by HFHR, in 2017 this indicator was at the level of 27 months. In 2016, however, it still amounted to 22 months.<sup>10</sup>

## Examples of CT rulings issued in accordance with the expectations of the ruling majority

Despite a significant decrease in the total number of cases heard by the Constitutional Tribunal, in the years 2017-2019 the Tribunal ruled in a number of cases which are of significant importance from the point of view of the political system or fundamental

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8 See M. Wolny, "Operating as it should"? – report on the activities of the Constitutional Tribunal in 2017, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/publication/pracuje-tak-jak-powinien-raport-o-dzialaniach-trybunalu-konstytucyjnego-w-2017-roku/> (accessed 21/09/2019).

9 Constitutional Tribunal, *Information on problems arising from the activity and jurisprudence of the Constitutional Tribunal*, available at: <http://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003> (accessed: 15/9/2019).

10 See M. Wolny, "Operating as it should"? – report on the activities of the Constitutional Tribunal in 2017, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/publication/pracuje-tak-jak-powinien-raport-o-dzialaniach-trybunalu-konstytucyjnego-w-2017-roku/> (accessed 21/09/2019).

freedoms and civil rights. An analysis of the decisions made allows us to put forward the thesis that the rulings in matters of public interest often corresponded to the expectations of the currently ruling political majority.

■ **Amendment to the law on assemblies**,<sup>11</sup> which was sent to the Constitutional Tribunal by the President of the Republic of Poland according to the procedure for preventive control in 2016. The allegations raised by the President of the Republic of Poland concerned solutions differentiating forms of public assemblies and granting one of them (cyclical assemblies) greater protection, as well as the impossibility of appealing against a substitute ordinance of a voivode to ban an assembly. In the first case, the Constitutional Tribunal considered the issues in question to be compatible with the constitution. While in the second case, it discontinued the proceedings thereby avoiding a final settlement of the matter.

■ **Act on the National Council of the Judiciary (I)**<sup>12</sup> – the Constitutional Tribunal, at the request of the Prosecutor General from April, 2017, assessed in this case the issues related to the procedure for the selection of judges to the National Council of the Judiciary and the issue of individual terms of office of member judges of the National Council of the Judiciary. In both cases, it considered the solutions adopted in the law on the National Council of the Judiciary to be unconstitutional. The controversy in this case was primarily aroused by the manner in which the ruling was issued. Two people chosen for previously occupied places took part in issuing the ruling. The Tribunal itself delivered its ruling only 2 months after the Prosecutor General submitted the application, during an intensive public debate on the proposed amendments to the act on the National Council for the Judiciary, which subordinated this institution to the ruling parliamentary majority. In its ruling, it thus gave an additional argument justifying the need for changes to the National Council of the Judiciary.<sup>13</sup>

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11 Judgement of the Constitutional Tribunal of 16<sup>th</sup> March, 2017, Kp 1/17.

12 Judgement of the Constitutional Tribunal of 20<sup>th</sup> June, 2017, K 5/17.

13 *Piotrowicz: The ruling of the Constitutional Tribunal is important to dispel doubts regarding the constitutionality of the draft act on the National Council of the Judiciary*, wPolityce.pl, available at: <https://wpolityce.pl/polityka/345006-piotrowicz-orzeczenie-tk-ma-znaczenie-dla-rozwiania-watpliwosci-ws-konstytucyjnosci-projektu-ustawy-o-krs> (accessed 21/09/2019).

■ **The obligation to publish all the judgements of the Constitutional Tribunal and the assignment of cases to persons elected to positions already occupied by judges**<sup>14</sup> – at the request of the Commissioner for Human Rights, the Constitutional Tribunal assessed three laws passed by the 8<sup>th</sup> term Sejm regulating the system, the organisation of work before the Constitutional Tribunal and the status of judges of the Constitutional Tribunal. The Commissioner's doubts concerned, among others, the issue of assigning cases by the President of the Constitutional Tribunal to persons selected for positions already occupied, and legalising the lack of publication of selected Constitutional Tribunal judgements in the relevant promulgator journal. The reservations of the Commissioner for Human Rights were also raised by regulations allowing for arbitrary dismissal of existing employees of the Tribunal's Office, according to which they had to leave their jobs by the end of 2017, unless they received a proposal to move to the new structures replacing the existing Office. Both cases were found to be compatible with the Constitution. The most controversial issue, however, was the procedure for issuing the ruling on this specific law itself. Its constitutionality was assessed by the people directly affected by the disputed regulations – Mariusz Muszyński (rapporteur on the matter) and Henryk Cioch. Despite the Commissioner's request, they were not excluded from handling the case in question.

■ **The Act on the National Council of the Judiciary (II)**<sup>15</sup> – two groups of provisions were the subject of control in the case: 1) the appointment of judges to the National Council of the Judiciary by the Sejm and 2) the appeal procedure against resolutions of the National Council of the Judiciary on refusal to present the president with a candidacy for a judge in a common court, the Supreme Court and the Supreme Administrative Court. The Tribunal found that the new procedure for the election of member judges of the National Council of the Judiciary is in line with the Constitution. As regards the second group of the contested provisions, the Constitutional Tribunal held that the examination of appeals against the resolutions of the National Council of the Judiciary does not fall within the competence of the Supreme Administrative Court, as the latter is to control public administration, whereas the National Council of the Judiciary is a hybrid body. Judge Justyn Piskorski, chosen for a place already

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14 Judgement of the Constitutional Tribunal of 24<sup>th</sup> October, 2017, K 1/17.

15 Judgement of the Constitutional Tribunal of 25<sup>th</sup> March, 2019, K 12/18.

occupied, was a member of the adjudicating panel in this case – his exclusion was unsuccessfully demanded by the Commissioner.

■ **The possibility of lodging a cassation in the event of the application of a pardon**<sup>16</sup> – a case resulting from the Prosecutor General’s motion to examine compliance with, *inter alia*, an article of the Code of Criminal Procedure to the extent in which it allows for the possibility of lodging a cassation to the disadvantage of the accused in the event of discontinuance of proceedings due to the application of a pardon by the President of the Republic of Poland. The Tribunal found the aforementioned provisions to be inconsistent with the Constitution. According to the Constitutional Tribunal, these provisions violate the principle of separation of powers and constitute an unauthorised interference in the President’s prerogatives, as well as being unconstitutional to verify the President’s application of his prerogative, which is the right of pardon. This ruling was connected with the case of M. Kamiński, in whose case, after the President applied the right of pardon in November, 2015, the regional court, which was to hear the appeal, discontinued proceedings. However, cassations to the Supreme Court have been filed against this ruling. On 31<sup>st</sup> May, 2017, the Supreme Court recognised that the right of pardon, as the right of the President of the Republic of Poland, may be exercised only in respect of persons whose guilt has been established by a valid court judgement (convicted persons) and that the application of the right of pardon before the date of a judgement’s validity does not produce procedural effects.<sup>17</sup>

■ **Refusal to provide services based on freedom of conscience and religion by a service provider**<sup>18</sup> – in this judgement, the Constitutional Tribunal found unconstitutional the provision of article 138 of the Code of Administrative Offences, which provided for the penalty of a fine for wilful refusal to provide services without a justified reason. The Constitutional Tribunal considered this provision unconstitutional in the part covering the words: “or intentionally, without a justified reason, refuses to provide the service to which it is obliged”. The judgement was based on a case of a refusal, based on personal belief, to provide the service of printing a poster ordered

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16 Judgement of the Constitutional Tribunal of 26<sup>th</sup> June, 2019, K 8/17.

17 Resolution of the panel of seven judges of the Supreme Court of 31<sup>st</sup> May, 2017, I KZP 4/17.

18 Judgement of the Constitutional Tribunal of 26<sup>th</sup> June, 2019, K 16/17.

by an LGBT organisation. The court found the printer guilty of an offence in its final judgement, but did not impose a penalty on it. The Tribunal delivered its ruling in this case in a panel of five members chaired by Judge Andrzej Zielonacki, the Rapporteur was the Vice-President of the Constitutional Tribunal, Mariusz Muszyński (elected to an occupied seat). Two separate opinions were submitted to the judgement – they were submitted by Judges Leon Kieres and Wojciech Sych.

## **CHANGES TO THE SUPREME COURT**

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Following the changes to the Constitutional Tribunal, the ruling majority introduced extensive changes to the structure and functioning of the Supreme Court.

### **First amendment of the act on the Supreme Court**

In July, 2017, at one of the last sessions of the Sejm before the summer break, a new private member's bill on the Supreme Court was unexpectedly included in the agenda. The bill was an addition to two bills previously submitted to the Sejm concerning the system of common courts and the National Council of the Judiciary. The changes in the Supreme Court would lead to a significant extension of political influence over the judiciary.

The bill included, among other things, the retirement of all the Supreme Court judges (except for those indicated by the Minister of Justice), the expiry of the term of office of the First President of the Supreme Court and amendments to the Supreme Court's Rules of Procedure.

The bill on the Supreme Court, despite numerous criticisms and reservations about the unconstitutionality of its provisions, was dealt with at a very fast pace. The Sejm approved the bill in just over a week.

The bill on the Supreme Court, along with the parallel amendments to the acts on the Common Court System and the National Council of the Judiciary, triggered mass social protests. The opponents of the bills demonstrated throughout the entire time the bills were in parliament in more than 200 cities in Poland, joining forces in a so-called Chain of Light and appealing to the President to veto all three laws.

At the end of July, 2017, the President of the Republic of Poland announced that he would veto the laws on the Supreme Court and the National Council of the Judiciary.

*I am exercising my right of veto because they require [the laws on the Supreme Court and the National Court Register – ed.] changes to ensure their compliance with the Constitution in order to maintain the independence of the judiciary, but without absolute superiority and impunity, and to create the conditions for judges to feel independent of all kinds of pressure.*

**President Andrzej Duda**<sup>19</sup>

At the same time, the President announced that he would present his own draft amendments to the law on the Supreme Court and the National Council of the Judiciary.

### **Second amendment to the act on the Supreme Court**

In September, 2017, the President submitted to the Sejm the two previously announced draft amendments to the laws on the Supreme Court and the National Council of the Judiciary. Despite previous announcements, the bills were not subject to extensive public consultation.

The bill on the Supreme Court was only superficially different from the one vetoed by the President in July, 2017.<sup>20</sup> The solutions adopted in it introduced very extensive interference of the executive in the operation of the Supreme Court. First of all, they lowered the retirement age of Supreme Court judges to 65 years of age, while until then judges retired at the age of 70. Those judges who wanted to stay in office longer could ask the President to stay in office for another 3 years. At the same time, the act did not establish for the President any premises indicating the conditions under which he could decide on the fate of a judge, obliging him only to consult the National Council of the Judiciary. As a result, on the basis of these provisions, the President was given the right to arbitrarily assess whether 40% of all judges sitting in the Supreme Court at that time (this is how many were affected by the new regulations, including the First President of the Supreme Court) should continue to perform their functions.

The act on the Supreme Court also changed the structure of the Supreme Court, creating two new chambers: the Disciplinary Chamber (with far-reaching independence from the First President of the Supreme Court) and the Extraordinary Control and Public Affairs Chamber. These chambers also have jury members – persons appointed by the Senate.

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19 Two presidential vetoes, TVN24, available at: <https://www.tvn24.pl/raporty/dwa-weta-prezydenta,1201> (accessed 21/09/2019).

20 Cf. *Communication 26/2017: Presidential act on the Supreme Court - Creeping unconstitutionality. List of changes*, Civic Development Forum, available at: <https://for.org.pl/pl/a/5672,komunikat-for-26/2017-prezydencka-ustawa-o-sadzie-najwyzszym-kroczacaniekonstytucyjnosci> (accessed 21/09/2019).

The Presidential act on the Supreme Court also introduced the institution of an extraordinary complaint to challenge all court decisions issued after 1997. At the same time, it did not provide the complainants with sufficient human resources to manage the impact of the requests for this instrument (see → **Commissioner for Human Rights, p. 45**).

The last key element of the Supreme Court act was the changes in the disciplinary proceedings against common court judges (see → **Disciplinary proceedings against judges, p. 29**).

*The introduction of the new Supreme Court law is a further step in the evolution of the judiciary, which is increasingly subordinate to the ruling majority. The protection of the rule of law will largely depend on the attitude of judges and their determination to defend the fundamental principles of a democratic rule of law.*

**Position of the Helsinki Foundation for Human Rights<sup>21</sup>**

## **Retirement of Supreme Court judges**

Within three months of the effective date of the amendment to the act on the Supreme Court, judges over 65 years of age could apply to the President for permission to continue to hold office. Out of the 27 judges who were affected by the changes, only 9 submitted to the President a request for permission to remain in office. In five cases, the President gave his consent. The situation was different for the 7 judges who informed the President that they intended to continue to perform their duties as judges – they also received letters from the President with information about their retirement.

The First President of the Supreme Court, who did not apply to the President for permission to continue in office or inform her of her willingness to continue in office, behaved differently. At the same time, she continued to perform her functions.

*The Constitution guarantees me this very honourable position for six years, and I see no reason why I should make a request to the executive and that is not an option at all.*

**Prof. Małgorzata Gersdorf, First President of the Supreme Court<sup>22</sup>**

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21 Helsinki Foundation for Human Rights, *New act on the Supreme Court enters into force – position of HFHR*, available at: <https://www.hfhr.pl/nowa-ustawa-o-sn-wchodzi-w-zycie-stanowisko-hfpc/> (accessed 21/09/2019).

22 J. Bercal, Prof. Andrzej Zoll: *Małgorzata Gersdorf is still the 1<sup>st</sup> President of the Supreme Court*, Interia, available at: <https://fakty.interia.pl/autor/joanna-bercal/news-prof-andrzej-zoll-malgorzata-gersdorf-nadal-jest-i-prezesem-,nld,2602479> (accessed 21/09/2019).

As a result, some representatives of the ruling majority indicated that they held this position illegally and the President appointed Judge Dariusz Zawistowski to direct the work of the Supreme Court, who, however, stated that in his opinion, this function is held by Professor Małgorzata Gersdorf.<sup>23</sup>

In the meantime, in July, 2018, the European Commission launched a European Union law infringement procedure on the basis of the new provisions of the act on the Supreme Court.<sup>24</sup>

In October, 2018, the Court of Justice of the European Union issued an order for interim measures suspending the application of the provisions of the act on the Supreme Court on retirement.<sup>25</sup> Consequently, all retired Supreme Court judges (and Supreme Administrative Court judges to whom the provisions of the Supreme Court Act apply *mutatis mutandis*) returned to work after the First Supreme Court President was summoned to appear before the Supreme Court to take up her duties.<sup>26</sup> In June, 2019, the Court of Justice of the European Union found that the provisions introducing the new regulations concerning the retirement of judges were contrary to European Union law.<sup>27</sup>

## **Appointment of new judges to the Supreme Court**

Following changes in the two new chambers of the Supreme Court – the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber – the judges elected by the new National Council of the Judiciary in 2018 took their places. The process of appointing the new judges to the Supreme Court raised a number of concerns.

First of all, they were related to the procedure for the appointment and the shape of the new National Council of the Judiciary, as well as the lack of its independence

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23 A. Stankiewicz, *The President specifies the judge who distances himself from the president*, Onet.pl, available at: <https://wiadomosci.onet.pl/tylko-w-onecie/dariusz-zawistowski-malgorzata-gersdorf-pozostaje-pierwsza-prezes-sadu-najwyzszego/qzv2368> (accessed: 12/9/2019).

24 European Commission, *Rule of Law: Commission launches infringement proceedings to protect the independence of the Supreme Court in Poland*, available at: [https://europa.eu/rapid/press-release\\_IP-18-4341\\_pl.htm](https://europa.eu/rapid/press-release_IP-18-4341_pl.htm) (accessed: 12/9/2019).

25 Judgement of the Court (Grand Chamber) of 17<sup>th</sup> December, 2018, the European Commission v. Republic of Poland, Case C-619/18 R.

26 A. Brzostek, *Gersdorf calls on judges aged 65+ to appear before the court and take up judicial service*, Gazeta Prawna, available at: <https://prawo.gazetaprawna.pl/artykuly/1313609,gersdorf-wzywa-sedziow-sn-do-stawienia-sie-w-sadzie.html> (accessed 21/09/2019).

27 Judgement of the Court (Grand Chamber) of 24<sup>th</sup> June, 2019, European Commission v. Republic of Poland, Case C 619/18.



(this issue is dealt with in proceedings before the Court of Justice of the European Union – see → **Dispute with the European Union, p. 91**). Secondly, the very procedure for appointing new judges did not guarantee a thorough and accurate analysis of the candidates submitted. The minutes from the hearing of candidates for the Supreme Court show that these interviews rarely focused on substantive issues, including an analysis of whether candidates had the appropriate experience and competence to perform these functions.<sup>28</sup> Thirdly, the doubts concerning the legality of the appointment of new judges to the Supreme Court were also linked to the infringement of the procedure itself and, in particular, to the disregard of the decision of the Supreme Administrative Court of September, 2018. The Supreme Administrative Court, in considering appeals against negative decisions of the National Council of the Judiciary in two cases, issued a decision on interim measures to suspend the procedure for appointing judges until the appeals of other candidates for the function of a judge in the Supreme Court are considered.<sup>29</sup> Finally, the appointment of the new judges was based on the announcement of the President of the Republic of Poland on the recruitment of Supreme Court judges, which did not have the necessary countersignature of the Prime Minister.

### **Subsequent amendments to the act on the Supreme Court**

Since the adoption of the act on the Supreme Court in 2017, the act has been amended eight more times. The changes introduced concerned, among others, the retirement of judges and the institution of extraordinary complaint. In April, 2019, MPs from the ruling majority presented a bill whose most far-reaching changes interfered in the process of appointing a new First President of the Supreme Court. The proposed changes included, among other things, an extension of the powers of the Disciplinary Chamber (it would make decisions on waiving the immunity of judges), as well as changes in the process of appointing candidates for the First President of the Supreme Court – if the candidate was not appointed by the General Assembly of judges, the candidate could

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28 "As my grandmother used to say, I'd be good for it." *Details of interviews to the Supreme Court*, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/przesluchania-kandydatow-do-sadu-najwyzszego-szczegoly-z-protokolow,871542.html> (accessed: 12/9/2019).

29 T. Skory, *The President will appoint judges against the decisions of the courts*, rmf24.pl, available at: <https://www.rmf24.pl/raporty/raport-batalia-o-sady/fakty/news-prezydent-powola-sedziow-sn-wbrew-decyzjom-sadow,nld,2642366> (accessed: 12/9/2019).

be elected by the President.<sup>30</sup> Ultimately, these solutions were abandoned during the legislative process.

### **The situation in the Supreme Court**

The number of amendments to the act on the Supreme Court, the failure to fill vacancies for judges and organisational difficulties all affected the work of the Supreme Court in 2018 and 2019. In its annual report for 2018, the Supreme Court indicated that fewer cases were processed than in 2017 and the average duration of proceedings before the Court increased from 9 months in 2017 to 11 months in 2018.<sup>31</sup>

At the same time, despite doubts as to the legality of filling the posts in these chambers, the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber commenced their work.

The term of office of the First President of the Supreme Court, Prof. Małgorzata Gersdorf, expires on 30<sup>th</sup> April, 2020.

## **CHANGES IN THE COMMON COURTS**

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The changes in the justice system also affected the functioning of the common courts. These changes have not translated into an improvement in the work of the courts, but into a broadening of the political influence on the judiciary. One of the key changes in this respect was the amendment of the act on the system of common courts of 2017, which introduced changes in the process of appointing presidents of courts, modified the retirement age of judges and disciplinary proceedings conducted against them.

### **Removal of the presidents of courts**

Between August, 2017, and February, 2018, the Minister of Justice had the power to arbitrarily remove presidents and vice-presidents of common courts without providing any justification. Up until then, presidents of appeals and district courts were also indicated by the Minister of

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30 Sejm, Member's draft act amending the Supreme Court act and some other acts, print No. 3396, available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=3396> (accessed 20/09/2019).

31 Supreme Court, Information on the activities of the Supreme Court in 2018 and Information on the activities of the Disciplinary Chamber of the Supreme Court in 2018, available at: <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=541-Odc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia> (accessed: 12/9/2019).

Justice, but it was necessary to obtain the opinion of an appropriate assembly of judges (if the assembly gave a negative opinion, the Minister of Justice could appoint a candidate for the position of president after obtaining the positive opinion of the National Council of the Judiciary, a negative opinion of the National Council of the Judiciary was binding on the Minister). The presidents of regional courts were appointed by the presidents of courts of appeal.

After the amendments of July, 2017, the Minister of Justice dismissed almost 150 presidents and vice-presidents of courts throughout Poland. The presidents and vice-presidents of courts were dismissed on the basis of a single-sentence decision (usually sent to the court by fax) without any reasons given. At the same time, judges were appointed in their place, some of whom had close working or private relations with persons cooperating with the Ministry of Justice.<sup>32</sup>

In April, 2018, under pressure from the European Commission (see → **Dispute with the European Union, p. 91**), the ruling majority changed the rules on the dismissal of court presidents. The Minister of Justice may currently dismiss the president of a court in specific cases (e.g. gross or persistent breach of official duties) only after consultation with the court college, while the appointment of a new president of a court still depends only on the Minister's decision.

In September, 2019, the European Court of Human Rights notified the Polish government of two complaints from judges dismissed from their positions in courts – the case is being examined with respect to a violation of the right to a court based on an arbitrary decision of the Minister of Justice.<sup>33</sup>

## **Changes in the retirement age of judges**

In 2017, changes were introduced which lowered the retirement age of judges. Under the new regulations, women over the age of 60 and men over the age of 65 could remain in the position of judges, provided that the Minister of Justice has given his consent. Similarly as in the case of the dismissal of presidents of courts, also in this case the decision of the Minister of Justice was not supported by any detailed analysis of the work of a judge and was completely discretionary and not subject to judicial review. By April, 2018, 219 judges had filed motions to continue holding office despite

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32 B. Grabowska-Moroz, M. Szuleka, *It begins with the personnel. A change of presidents and vice-presidents in the common courts in the period from August, 2017, to February, 2018*, available at: <https://www.hfhr.pl/odwolani-sedziowie/> (accessed: 12/9/2019).

33 Broda v. Poland (application No. 26691/18) and Bojara v. Poland (application No. 27367/18).

reaching retirement age, of which the Minister had considered 130 motions and agreed to continue the positions held in only 69 cases.<sup>34</sup>

Under pressure from the European Commission, the ruling majority withdrew from these changes, again amending the legislation in April, 2018. At that time, the retirement age for judges was equalised to the age of 65 and the provision conferring powers on the Minister of Justice to decide whether a judge may remain in office was removed. Despite these changes, there is an ongoing case before the Court of Justice of the European Union. In June, 2019, the Advocate General of the Court issued an Opinion declaring the provisions to be incompatible with European Union law (see → **Dispute with the European Union, p. 91**).<sup>35</sup> Nevertheless, the legislator did not regulate the question of a possible return to the judgement of those judges who were not allowed to remain in office.

### **Disciplinary proceedings against judges<sup>36</sup>**

The amendments that have had the greatest impact on the protection of judicial independence have related to disciplinary proceedings. Prior to 2018, they were conducted without any influence from the executive (the Minister of Justice being able to submit a request for disciplinary proceedings). Following the changes that entered into force in April, 2018, the Minister of Justice was given much more powers. First of all, the Minister appoints all judges of disciplinary courts at courts of appeal. The decision of the Minister of Justice also determines the appointment of the Disciplinary Ombudsman for Judges of Common Courts and his deputies.

Changes in disciplinary proceedings have worsened the standard of procedural guarantees for judges charged in disciplinary proceedings. For example, disciplinary

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34 Response of the Ministry of Justice to the request of the Helsinki Foundation for Human Rights for access to public information.

35 Opinion of the Advocate General, Evgeni Tanchev, delivered on 20<sup>th</sup> June, 2019, Case C-192/18, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=215261&page-Index=0&doclang=pl&mode=req&dir=&occ=first&part=1&cid=369069> (accessed 21/09/2019).

36 See Amnesty International, *Free Courts, Free People*, available at: <https://amnesty.org.pl/kampanie/wolne-sady-wolni-ludzie/> (accessed 21/09/2019), Kalisz M., Szuleka M., *Disciplinary proceedings against judges and prosecutors*, available at: <https://www.hfhr.pl/en/disciplinary-proceedings-against-judges-and-prosecutors/> (accessed 21/09/2019), M. Kalisz, M. Szuleka, M. Wolny, *The Time of Trial. How do changes in justice system affect Polish judges?*, available at: <https://www.hfhr.pl/en/hfhrs-report-the-time-of-trial-how-do-changes-in-justice-system-affect-polish-judges/> (accessed 21/09/2019), Justice Defence Committee, *A state that punishes*, available at: <https://komitetobronysprawiedliwosci.pl/panstwo-ktore-karze-raport-komitetu-obrony-sprawiedliwosci-kos/> (accessed 21/09/2019).

proceedings may take place even in the absence of a judge, and a judge acquitted in a court of first instance may still be sentenced by a court of appeal. As a result, this standard is lower than that of criminal proceedings.

Since 2018, there have been numerous instances of disciplinary proceedings against judges who are active in the public debate on the judiciary. The disciplinary ombudsmen initiated investigations or disciplinary proceedings in cases where judges were purported to have brought their office into disrepute by, for example, wearing a toga during a simulation of a hearing at a rock festival<sup>37</sup> or by holding a public meeting with another judge.<sup>38</sup>

Particularly worrying were the proceedings initiated in connection with a judgement issued by judges, such as asking a question for a preliminary ruling<sup>39</sup> or acquittal of a person associated with an opposition politician.<sup>40</sup> One of the most worrying examples of this trend was the case of Judge Alina Czubieniak, who was disciplined by the Disciplinary Chamber of the Supreme Court for her decision to overturn the pre-trial detention of a person with intellectual disabilities who did not have a defence counsel at the first arrest session.<sup>41</sup> The UN Special Rapporteur on the Independence of Judges and Prosecutors intervened in the case of Judge Czubieniak. This was the rapporteur's first intervention in a case concerning a Polish judge.<sup>42</sup>

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37 M. Jątoszewski, *Ziobro's disciplinary ombudsman interrogates judges from Iustitia regarding their participation in Owsiak's festival*, available at: <https://oko.press/rzeczniczka-dyscyplinarna-ziobry-przesluchuje-sedziow-z-iustitii-za-udzial-w-festiwalu-owskiaka/> (accessed: 16/9/2019).

38 *The disciplinary officer resumes proceedings concerning Judge Frackowiak and Judge Brazewicz*, Rzeczpospolita, available at: <https://www.rp.pl/Sadownictwo-dyscyplinarne/311249960-Rzeczniczka-dyscyplinarna-wznawia-postepowania-ws-sedzi-Frackowiak-i-sedziego-Brazewicza.html> (accessed: 16/9/2019).

39 IUSTITIA, *Disciplinary proceedings against Judge Ewa Maciejewska for a preliminary ruling before the Court of Justice of the European Union - Request for clarification*, available at: <https://www.iustitia.pl/postepowania-dyscyplinarne/2732-postepowanie-dyscyplinarne-wobec-sedzi-ewy-maciejewskiej-za-zadanie-pytania-prejudycjalnego-do-trybunalu-sprawiedliwosci-unii-europejskiej-etap-wezwania-do-wyjasnien> (accessed: 16/9/2019).

40 *Disciplinary charges against the judge who acquitted the wife of the Mayor of Poznań*, Dziennik Gazeta Prawna, available at: <https://prawo.gazetaprawna.pl/artykuly/1397821.zarzuty-dyscyplinarne-dla-sedziego-ktory-uniewinnil-zone-prezydenta-poznania.html> (accessed: 16/9/2019).

41 M. Gaczyńska, *The Disciplinary Chamber of the Supreme Court condemns the judge for a fair trial? "It was a tragicomedy"*, Onet.pl, available at: <https://wiadomosci.onet.pl/tylko-w-oniecie/alina-czubieniak-skazana-przez-izbe-dyscyplinarna-sn-na-kare-upomnienia/n1bf22e> (accessed 16/9/2019).

42 Helsinki Foundation for Human Rights, *UN Special Rapporteur on the independence of judges asks the Polish government about the case of Judge Czubieniak*, available at:

## Attacks on judges

Changes in the judiciary have been accompanied by numerous attacks from the public media, the media favouring the ruling majority and the government itself.

In 2017, in response to mass protests in defence of the courts, the Polish National Foundation (established by State Treasury companies) launched the “Fair Courts” campaign. Manipulated information on judges and their work was published on billboards throughout Poland.<sup>43</sup> Additionally, a number of articles relating to judges appeared in the public media and the media supporting the ruling majority.<sup>44</sup>

Attacks on judges in discussions on the justice system can also be seen in social media – anonymous accounts duplicate or publish manipulated information about individual judges. In this respect, the information disclosed by the media in 2019 is particularly worrying. In their light, former Deputy Minister of Justice, Łukasz Piebiak, his closest associates and some judges who were appointed by the Minister of Justice to function in courts, could have been responsible for inspiring such attacks.

*Emilia: I'll talk to journalists and send out letters. [...] I'll do everything I can, as I always do. I can't vouch for the result, but I'll try. I hope they don't put me away.*

*Piebiak: We don't put people away for doing good.*

**Fragment of a conversation between Deputy Minister  
Łukasz Piebiak and Emilia, revealed by the media,  
who led attacks on judges in social media<sup>45</sup>**

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<https://www.hfhr.pl/specjalny-sprawozdawca-onz-ds-niezaleznosci-sedziow-pyta-pol-ski-rzad-o-sprawie-sedzi-czubieniak/> (accessed: 16/9/2019).

43 *End of the “Fair Courts” campaign. The Polish National Foundation closed it because it was a “success”,* Polsat News, available at: <https://www.polsatnews.pl/wiadomosc/2017-10-11/koniec-kampanii-sprawiedliwe-sady-polska-fundacja-narodowa-zamknela-ja-bo-odnios-la-sukces/> (accessed 21/09/2019).

44 *Still a judge, or perhaps an internet troll? Waldemar Żurek's scandalous words on disciplinary proceedings: “Police State!”*, wpolityce.pl, available at: <https://wpolityce.pl/polityka/445712-jeszcze-sedzia-czy-juz-pieniacz-szokujace-slowa-zurka> (accessed 21/09/2019).

45 *M. Gałczyńska, Investigation by Onet. Troll farm in the Ministry of Justice, or “We don't lock people away for doing good”,* Onet.pl, accessed at: <https://wiadomosci.onet.pl/tylko-w-onecie/sledztwo-onetu-farma-trolli-w-ministerstwie-sprawiedliwosci-czyli-za-czynienie-dobra/j6hwp7f> (accessed: 12/9/2019).

Attacks on judges were conducted using information from the personal files of judges, investigations, disciplinary proceedings, as well as material collected by the Institute of National Remembrance. After the disclosure of information by Onet.pl, Minister Piebiak resigned and his colleague was dismissed from the delegation to the Ministry of Justice. These judges have returned to their positions in the common courts.<sup>46</sup>

Despite the fact that the ruling majority tried to present this problem as only an internal issue for the judiciary, the participation of the Ministry's leadership in inspiring attacks on judges has still not been established and has not been clarified. The Prosecutor's Office, which initiated the proceedings in this case, secured the appropriate media and computers only after more than a week from the first media publications on the subject.<sup>47</sup>

Continuous attacks on the judiciary result in steadily decreasing public confidence. Studies from 2019 showed that in 2018 confidence in judges in Poland dropped by 8 percentage points (from 54% to 46%), while this professional group is only 28<sup>th</sup> in the ranking of trust in professions (which is characteristic for countries with an unstable political system and struggling with problems).<sup>48</sup>

## **The situation in the courts after four years of reform**

The continuous changes in the judiciary have not translated into an improvement in its work. Since the beginning of 2016, the number of vacancies in courts has been steadily increasing, with 745 vacant judicial posts at the end of 2018.<sup>49</sup> At the same time, approximately 160 judges have for years now been delegated to the Ministry of Justice.<sup>50</sup>

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46 *Piebiak has submitted his resignation. "Out of a sense of responsibility for the success of the reforms"*, Polsat News, available at: <https://www.polsatnews.pl/wiadomosc/2019-08-20/piebiak-podal-sie-do-dymisji/> (accessed 21/09/2019).

47 P. Rutkiewicz, *The Prosecutor's Office has secured the computers in the Ministry of Justice*, Wyborcza.pl, available at: <http://wyborcza.pl/7,75398,25129256,afeta-prokuratura-w-ministerstwie-sprawiedliwosci-zabezpieczono.html> (accessed 21/09/2019).

48 K. Sobczak, *The confidence in judges and all lawyers has decreased*, Prawo.pl, available at: <https://www.prawo.pl/prawnicy-sady/zaufanie-do-sedziow-i-prawnikow-nizsze-raport-z-badan-opinii,366877.html> (accessed: 12/9/2019).

49 M. Kryszkiewicz, *Bad staffing situation in the courts: The worst problem is at the district level*, gazetaprawna.pl, available at: <https://prawo.gazetaprawna.pl/artykuly/1405826,braki-kadrowe-w-sadach.html> (accessed; 12/9/2019).

50 Jacek Przygucki, *Judges delegated to the ministry - beneficial or a loss?*, rp.pl, available at <https://www.rp.pl/Sady-i-prokuratura/311119982-Sedziowie-delegowani-do-ministerstwa-pozytek-czy-strata.html>.

The lack of an adequate number of judges translates into an increase in the workload of the remaining judges, which in turn is reflected in indicators showing a slowdown in the work of the judiciary – the average duration of proceedings in courts increased from 4 months in 2015 to 5.4 months in 2018.<sup>51</sup>

The work of the courts is additionally hampered by the introduction in 2018 of the System for the Random Allocation of Cases. The system does not take into account the complexity of cases, which leads to a situation where sole judges are overburdened with work, nor does it take into account the specific nature of the work of a judge and the time needed to prepare for a hearing.<sup>52</sup> The Ministry of Justice has refused to provide the algorithm according to which the system allocates cases – the lack of this information leads to a suspicion of possible external influence on the work of the system.

Finally, the situation of the administrative staff of courts has still not significantly improved. After the protests of court employees, which took place from the end of 2018, the Ministry of Justice informed in July, 2019, that the salaries of employees would increase by a total of 900 zloty gross. Despite the wage increases, the situation of administrative court staff still needs to be improved, with the number of staff being too small in relation to their workload and responsibilities. At the same time, difficult working conditions translate into an increase in the number of employees who leave their jobs – in the period from 2015 to 2019, twenty thousand employees left their jobs.<sup>53</sup>

## **CHANGES IN THE NATIONAL COUNCIL OF THE JUDICIARY OF POLAND**

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One of the most important changes made in the justice system was the one concerning the National Council of the Judiciary. The National Council of the Judiciary is the body

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51 A. Defratyka, *How long do court proceedings last in Poland*, ciekaweliczby.pl, available at: [http://ciekaweliczby.pl/sprawnosc\\_sadow\\_2018/](http://ciekaweliczby.pl/sprawnosc_sadow_2018/) (accessed: 12/9/2019).

52 A. Łazarska, *The system for the allocation of cases promotes absenteeism by judges*, rp.pl, available at: <https://www.rp.pl/Sady-i-prokuratura/302169974-Aneta-Lazarska-System-przydzialu-spraw-premiuje-absencje-sedziow.html> (accessed: 12/9/2019).

53 *The end of the protest by employees of the courts and prosecutor's offices. There is an agreement with the Ministry*, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/porozumienie-w-sprawie-podwyzek-dla-pracownikow-sadow-i-prokuratur,950188.html> (accessed: 12/9/2019).



responsible for guarding the independence of courts and judicial independence. It is also responsible for appointing new judges.

### **Amendment of the act on the National Council of the Judiciary**

In January, 2017, the Ministry of Justice presented a draft amendment to the act on the National Council of the Judiciary, which changed the procedure for the election of 15 member judges of the Council, constituting the majority of the body's composition. In the light of the draft, judges would be elected by the Sejm, and not, as hitherto, by representatives of judges. Despite the critical comments on this solution, the draft was directed for further work.<sup>54</sup>

The need for changes in the National Council of the Judiciary coincided with the rapid judgement of the Constitutional Tribunal,<sup>55</sup> issued in June, 2017, only two months after the date of submission of the application by the Prosecutor General – the Minister of Justice (see → **Changes in the Constitutional Tribunal, p. 13**). The Tribunal found the current method of selecting members of the National Council of the Judiciary to be unconstitutional, questioning, among other things, the individual character of the term of office of members of the National Council of the Judiciary.

In July, 2017, after mass social protests against the changes in the judiciary, the President vetoed the amendment to the act on the National Council of the Judiciary and announced the submission of his own draft.

### **New draft law on the National Council of the Judiciary and candidates for members of the National Council of the Judiciary**

In September, 2017, the President submitted a new draft law on the National Council of the Judiciary to the Sejm, which was adopted in December, 2017. In the light of the new law, judges are elected to positions in the National Council of the Judiciary by the Sejm with a 3/5 majority (or an absolute majority if the

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54 Helsinki Foundation for Human Rights, *Comments by the HFHR on the draft act amending the act on the National Council of the Judiciary and certain other acts (draft of 23rd January, 2017)*, available at: <http://www.hfhr.pl/wp-content/uploads/2017/02/HFPC-opinia-KRS-2017-02-22.pdf> (accessed: 16/09/2019).

55 Judgement of the Constitutional Tribunal of 5<sup>th</sup> June, 2017, in case K 5/17, OTK ZU A/2017, item 48.

required 3/5 majority is not achieved in the first vote). Candidates for members of the National Council of the Judiciary must have the support of at least 25 judges or 2000 citizens.

The regulations entered into force in January, 2018, and the terms of office of existing members of the Council were interrupted. Despite appeals by the judicial profession to boycott the procedure for appointing new members of the National Council of the Judiciary, 18 judges submitted their candidature.<sup>56</sup>

In the process of appointing new members of the National Council of the Judiciary, the lists of support for candidates were kept secret. In proceedings before administrative courts, NGOs, among others, demanded disclosure of the lists of support for candidates for members of the National Council of the Judiciary. In June, 2019, the Supreme Administrative Court decided that these lists constitute public information and are subject to being made available to interested parties.<sup>57</sup> However, this judgement remains to be executed. The Chancellery of the Sejm refused to execute the judgement citing the decision of the President of the Office for the Protection of Personal Data,<sup>58</sup> who obliged the Chancellery of the Sejm to refrain from publishing the lists of support for judges to the National Council of the Judiciary.

*It is possible that the members of the National Council of the Judiciary are concealing who they supported because they supported each other or supported themselves, like Maciej Nawacki.<sup>59</sup>*

**Krystian Markiewicz,  
President of the Association of Polish Judges “Iustitia”**

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56 18 candidates for members of the NCJ, tvp.info, available at: <https://www.tvp.info/35762940/18-kandydatow-na-czlonkow-krs> (accessed: 16/9/2019).

57 Supreme Administrative Court, Communiqué on the judgement of the Supreme Administrative Court of 28<sup>th</sup> June, 2018. regarding making available public information on judges supporting candidates for the NCJ, available at: <http://www.nsa.gov.pl/komunikaty/komunikat-w-sprawie-wyroku-nsa-z-dnia-28-czerwca-2019-r-dotyczacego-udostepnienia-informacji-publicznej-o-sedziach-popierajacych-kandydatow-do-krs-aktualizacja-30-lipca-2019-r,news,4,675.php> (accessed: 16/9/2019).

58 Order of the President of the Office for the Protection of Personal Data of 19<sup>th</sup> July, 2019, available at: <https://www.rpo.gov.pl/sites/default/files/Postanowienie%20Prezesa%20UODO%202.pdf> (accessed: 16/9/2019).

59 Ibid.

In the absence of the disclosure of the lists of support for candidates, there are a multitude of theories as to what irregularities the lists contain. There were signs in the public space that one of the judicial members of the National Council of the Judiciary did not provide the required number of signatures due to the withdrawal of support from at least four judges. And this is even despite the fact that he supported himself.<sup>60</sup> A challenge to the correctness of its election, as a result of a joint vote of all candidates by the Sejm, could in the future result in an attempt to undermine the legitimacy of the election of the entire new National Council of the Judiciary.

### **Activity of the National Council of the Judiciary**

The new National Council of the Judiciary, unlike its predecessors, consisted mostly of regional court judges who did not perform their duties. However, this quickly began to change as a result of the numerous delegations and promotions of its members. Currently, out of 15 elected judicial members of the National Council of the Judiciary, 5 adjudicate on a delegation in a higher court, and 2 have been recommended by the National Council of the Judiciary for promotion. At the same time, as many as 9 judges elected by the National Council of the Judiciary, by nomination of the Minister of Justice, perform the function of president or vice-president of a court.

The activities of the new National Council of the Judiciary raise important concerns for the fulfilment of its mission as the body responsible for safeguarding the independence and autonomy of the judiciary. The Council does not take action on disciplinary proceedings initiated against judges active in public debate on the judiciary, nor does it oppose the media attacks on judges. Moreover, according to press reports, three members of the National Council of the Judiciary were purported to have participated in slander campaigns against other judges, including the First President of the Supreme Court.<sup>61</sup> In addition, one of them, according to the press, has made anti-Semitic posts on an internet forum in the past.<sup>62</sup>

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60 Mariusz Jatoszewski, *Has Maciej Nawacki been legally elected to the new NCJ? He might not have had the required signatures*, OKO.press, available at: <https://oko.press/czy-maciej-nawacki-zostal-legalnie-wybrany-do-nowej-krs-mogl-nie-miec-wymaganych-podpisow/> (accessed: 16/9/2019).

61 Magdalena Gaczyńska, *Troll Farm in the Ministry of Justice, part 3. Judges organise a hate campaign against the Supreme Court President*, available at: <https://wiadomosci.onet.pl/tylko-w-onecie/farma-trolli-w-ministerstwie-sprawiedliwosci-cz-3-sedziowie-organizuja-hejt-przeciwko/jg5lhx7> (accessed: 16/9/2019).

62 Wojciech Czuchnowski, Antoni Kowalski, Jarosław Dudzicz, *a "good change" judge about Jews: "A base, deceitful nation"*, available at: <http://wyborcza.pl/7,75398,25182479,jaroslaw-dudzicz-sedzia-dobrej-zmiany-o-zydach-podly-parszywy.html> (accessed: 16/9/2019).

Notwithstanding these events, the status of the National Council of the Judiciary is currently being examined by the Court of Justice of the European Union.<sup>63</sup> The ruling of the CJEU may confirm the allegations regarding the independence of the Council, which in turn may lead to the risk of calling into question the status of 543 persons indicated by the National Council of the Judiciary for the position of judge, of which the President of the Republic of Poland has appointed 293 judges.<sup>64</sup>

### **Changes in the public prosecutor's office**

One of the first draft laws that the Sejm dealt with after the elections in 2015 was a draft reform of the public prosecutor's office and the reunification of the offices of the Prosecutor General and the Minister of Justice. According to the authors of the project, the separation of the functions of Prosecutor General and Minister of Justice has not worked in practice. The authors further motivated the reunification of the two offices by stating that, according to the Constitution, the Council of Ministers ensures state security and public order, hence the public prosecutor's office should be supervised by a member of the government.<sup>65</sup>

*The return to a unified Minister of Justice and General Prosecutor will lead to the recovery of a strong position by the person in charge of the public prosecutor's office, both in relation to subordinate prosecutors and external bodies, which is an essential element of proper implementation of the tasks imposed by the legislator on this institution.*<sup>66</sup>

### **Justification for the project**

The new law on the public prosecutor's office conferred broad competences on the Prosecutor General, which were previously unknown. The Prosecutor General has

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63 Proceedings in the cases C-585/18, C-624/18 and C-625/18.

64 Patryk Wachowiec (report), *List of nominees for the new National Council of the Judiciary*, RuleofLawPL, available at: <https://ruleoflaw.pl/krs-lista.pdf> (accessed: 16/9/2019).

65 Members' bill on the Law on the Public Prosecutor's Office, available at: <http://orka.sejm.gov.pl/Druki8ka.nsf/0/8318081684D46B25C1257F2B002F31CC/%24File/162-ustawa.docx> (accessed on 27<sup>th</sup> August, 2019).

66 Members' bill on the Law on the Public Prosecutor's Office, available at: <http://orka.sejm.gov.pl/Druki8ka.nsf/0/8318081684D46B25C1257F2B002F31CC/%24File/162-ustawa.docx> (accessed on 27<sup>th</sup> August, 2019).

obtained the status of a superior prosecutor in relation to prosecutors of common organisational units of the prosecution service and prosecutors of the Institute of National Remembrance. As a result, he was given the power to fully interfere in their investigative activities.

In addition, any superior prosecutor, including the Prosecutor General, is now empowered to issue orders, guidelines and instructions that the subordinate prosecutor is required to carry out. Instructions may include, for example, the lodging of a complaint, the filing of an indictment or the issuing of a statement of opposition to a decision converting a pre-trial detention into a precautionary measure in the form of a financial guarantee. Such an order shall be in writing and shall be placed in a handwritten file, which shall be an internal document, to which neither the parties to the proceedings nor the public shall have access by way of access to public information.<sup>67</sup> If the prosecutor does not agree with the supervisor's instructions, he or she may request that the instructions are changed or that the prosecutor is excluded from acting or participating in the case. However, the act does not grant him any way to challenge the decision of his superior.

The Prosecutor General and the superior prosecutors are entitled to take over the cases conducted by the prosecutors subordinate to them and to perform the activities falling within their competence. Moreover, the Prosecutor General may provide other persons (including public authorities, the media, and also third parties) with information from ongoing proceedings.

Additionally, the new act on the Public Prosecutor's Office granted the Prosecutor General powers to request that operational and exploratory activities be carried out, which are directly related to the preparatory proceedings in progress, and to familiarise himself with the material collected in the course of such activities.

As a result of the changes discussed, the Prosecutor General – Minister of Justice has access to the files of every preparatory proceedings conducted by the prosecution, may order the initiation of an operational review or perform specific procedural activities, may influence the direction of the investigation, the procedural decisions taken, and in particular may decide on the establishment of charges, motions for pre-trial detention, or the withdrawal of a bill of indictment.

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67 Judgement of the Supreme Administrative Court of 4<sup>th</sup> April, 2019, ref. I OSK 1709/17.

Already at the stage of the legislative work, the draft amendment of the law on the public prosecutor's office was met with strong criticism from the legal profession, including the hitherto governing bodies of the public prosecutor's office, the Supreme Court and civil society organisations. It was pointed out that the new regulations pose a threat to the reliability of proceedings and to human rights and freedoms. The Supreme Court in its opinion stated that "the independence of the prosecutor in carrying out his or her statutory tasks, as declared in the draft, remains illusory".<sup>68</sup>

The independence of prosecutors was also highlighted by the Venice Commission, which indicated that the amendments adopted risk politicising the activities of the Public Prosecutor's Office. In its opinion, the model linking the Public Prosecutor's Office with the work of the government requires an apolitical stance, autonomy and protection against political influence.

*(...) a system with such broad and uncontrolled powers is not acceptable in a state governed by the rule of law, as it creates a field of arbitrariness.*<sup>69</sup>

#### **Venice Commission**

The HFHR made a request to the Public Prosecutor's Office for it to indicate, among other things, the number of orders issued to prosecutors of common prosecution units. The answer obtained shows that the Public Prosecutor's Office does not collect information about the application of specific supervisory measures at all. The Public Prosecutor's Office's report for the year 2019 presents information that the number of supervisory proceedings (with the reference Dsn) increased from 7,299 registered in 2015 to 43,776 registered in 2018.<sup>70</sup>

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68 Supreme Court, Opinion on the draft Law on the Prosecutor's Office, available at: <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?documentId=8D61344119236BCFC1257F38003DEAFC> (accessed on 12<sup>th</sup> September, 2019).

69 European Commission for Democracy through Law (Venice Commission), Opinion on the Act on the Public Prosecutor's Office, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e) (accessed on 12<sup>th</sup> September, 2019), translation by Lex Super Omnia.

70 The Public Prosecutor's Office, *Challenges and Successes. Public Prosecution in 2019*, p. 17, available at: <https://pk.gov.pl/wp-content/uploads/2019/08/PROKURATURA-2019-1.pdf> (accessed on 12<sup>th</sup> September, 2019).

## Staff changes in the Public Prosecutor's Office

One of the first steps taken by the Prosecutor General after the merger of its functions with those of the Minister of Justice was to introduce deep structural and staffing changes in the prosecution service.

The Prosecutor General and Appellate Prosecutor's Offices were abolished first and replaced by National and Regional Prosecutor's Offices respectively. The new institutions have taken over the competences and jurisdiction of the previous ones, differing only in name from them. However, these changes were used to verify the staff of both prosecutorial levels. The Prosecutor General has been given the power to arbitrarily decide which prosecutor of the Prosecutor General will be able to work in the new National Public Prosecutor's Office and which will be delegated to lower prosecution units. As a result of these changes, almost 33% of the number of liquidated units, namely 113 persons, including 22 prosecutors of the Prosecutor General, were transferred to lower prosecutor's offices.<sup>71</sup>

The provisions introducing changes in the prosecution service expired simultaneously with the expiry of the terms of office of all prosecutors appointed to perform functions in common organisational units of the prosecution service. The new law abolished terms of office for regional and district prosecutors. Also, the function of regional prosecutor, unlike that of appellate prosecutor, does not currently have a fixed term of office. The fate of those holding these offices is almost exclusively the responsibility of the Prosecutor General and the National Prosecutor. As a result of these changes, in the years 2016 – 2017, 44 district prosecutors (out of 45 district prosecutor's offices) and 313 regional prosecutors were appointed, which, according to the Lex Super Omnia association, affected 90% of regional prosecutor's offices.<sup>72</sup>

The pretext for the personnel changes was also to liberalise the provisions concerning the delegation of prosecutors without their consent. In the previous legal status, such a delegation could only take place if it corresponded to the prosecutor's qualifications. A prosecutor delegated under such a procedure for an indefinite period of time was entitled to resign from the delegation with three months' notice.

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71 "Good change" at the public prosecutor's office, Lex Super Omnia, page 22, available at: <http://lexso.org.pl/2018/06/07/dobra-zmiana-w-prokuraturze-raport-stowarzyszenia-prokuratorow-lex-super-omnia/> (accessed on 12<sup>th</sup> September, 2019).

72 Ibid., page 27.

The new legal situation has both these elements removed. Currently, the Prosecutor General or the National Prosecutor may, without any obstacles, delegate the prosecutor of a common organisational unit of the prosecution service to another organisational unit of the prosecution service. If the period of the delegation does not exceed 6 months, the consent of the prosecutor concerned is not required. The best known case of using this procedure was the case of prosecutor Mariusz Krasoń, who was one of the initiators of the resolution of the Assembly of Regional Public Prosecutors in Kraków drawing attention to the restriction in the independence of prosecutors.<sup>73</sup>

*I read: “On the basis of the Law on the Public Prosecutor’s Office I delegate you to perform official duties in the Regional Prosecutor’s Office for Wrocław-Krzyki”. For six months. From Monday. Do you know what this is called? (...) Mobbing.<sup>74</sup>*

**Mariusz Krasoń, Prosecutor of the Regional Prosecutor’s Office**

## **Disciplinary proceedings**

Amendments to the law on the Public Prosecutor’s Office also concerned the provisions governing disciplinary proceedings against judges. In place of the previous disciplinary courts, a Disciplinary Court at the Prosecutor General was established, whose members are elected by: the assembly of the prosecutors of the National Prosecutor’s Office and the assembly of prosecutors operating within the regional prosecutor’s offices. The president of the court and his deputies are currently nominated by the Prosecutor General himself.

The act also introduced the function of Disciplinary Officer at the Prosecutor General, which has the right to take over the prosecution of any disciplinary proceedings. Next to him there is the First Deputy of the Disciplinary Officer and the deputies of the disciplinary officer, one in each regional district.

The manner of appealing against decisions of courts of first instance was also changed. The law on the public prosecutor’s office abolished the second level of disciplinary jurisdiction of

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73 *Kraków prosecutors raise the alarm about the restriction of their independence, they adopted the resolution unanimously*, tvn24.pl, available at: <https://www.tvn24.pl/krakow-prokuratorzy-alarmuja-ze-ich-niezalezosc-jest-ograniczana,936099.html> (accessed 12/09/2019).

74 *K. Włodkowska, Prosecutor Krasoń: I may get a disciplinary hearing for this interview, but silence does not guarantee peace today*, wyborcza.pl, available at: <http://wyborcza.pl/duzyformat/7,127290,25111898,prokurator-krason-za-ten-wywiad-moge-miec-dyscyplinarnke-ale.html> (accessed 12/09/2019).



the prosecutor's office, introducing in its place the possibility of an appeal to the Disciplinary Chamber of the Supreme Court. In those proceedings the prohibition of *reformationis in peius* does not apply, which means that, following an appeal in favour of the appellant, the court may impose a more severe penalty on him, leaving only the opportunity to appeal to a different composition of the Disciplinary Chamber (cf. Disciplinary proceedings against judges).

The new form for disciplinary proceedings constitutes a form of pressure exerted by the Prosecutor General – the Minister of Justice – on prosecutors, especially those taking part in discussions on the independence of the prosecution and its non-participation in political disputes. For example, prosecutor Krzysztof Parchimowicz was presented with disciplinary charges concerning, among others, the issuance of a press release in protest against the instrumental use of investigations.<sup>75</sup> Another prosecutor, whose case was investigated by the disciplinary court at the Prosecutor General's Office, was prosecutor Mariusz Wójtowicz, charged with taking part in a demonstration on the independence of the judiciary. The proceedings in this case ended in acquittal.<sup>76</sup>

### **“Supervising” prosecutor**

In addition to institutional changes, the prosecution has also been strengthened in the procedural sphere. However, these activities were carried out at the expense of the jurisdictional autonomy of the courts.

The first of these changes gave the prosecutor the right to take a final decision on the exclusion of *in camera* hearings. Currently, the court has the power to take such a decision only if the prosecutor does not oppose it.<sup>77</sup>

Another change<sup>78</sup> enabled the prosecutor to influence the *lis pendens* of a case before the court. In all cases in which, prior to 5<sup>th</sup> August, 2017, an indictment, among

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75 Lex Super Omnia, *The Association's position on the instrumental initiation of investigations*, available at: <http://lexso.org.pl/2017/02/14/stanowisko-stowarzyszenia-w-sprawie-instrumentalnego-podejmowania-sledztw/> (accessed 12/09/2019).

76 M. Jątoszewski, *Good Prosecutor Wójtowicz won against the National Prosecutor Bogdan Świączkowski*, available at: <https://oko.press/dobry-prokurator-wojtowicz-wygral-z-prokuratorem-krajowym-bogdanem-swieczkowskim/>, (accessed 12/09/2019).

77 Article 1 of the act of 10<sup>th</sup> June, 2016, amending the act - The Code of Criminal Procedure, the act on the Professions of Doctors and Dentists and the act on the Rights of Patients and the Patient Ombudsman, Journal of Laws from 2016, item 1070.

78 Article 5 of the Act of 10<sup>th</sup> June, 2016, amending the act - The Code of Criminal Procedure, the act on the Professions of Doctors and Dentists and the act on the Rights of Patients and the Patient Ombudsman, Journal of Laws from 2016, item 1070.

others, was sent to the court, the prosecutor could decide to refer the case to the court in order to complete the investigation. The condition for this type of activity was the vague disclosure of important circumstances, the need to search for evidence or the need to carry out other activities aimed at clarifying the circumstances of the case. The aim of such a solution was an attempt to change the provisions on which the proceedings took place, and in particular to limit the number of such proceedings which took place under the conditions of an adversarial criminal trial.<sup>79</sup>

In 2019, the Sejm adopted another amendment to the Code of Criminal Procedure. According to the new regulations, the prosecutor has the right, among other things, to suspend the execution of the court's decision to revoke the arrest of a suspect and to apply a financial guarantee. This means that the decisive word for the deprivation of liberty of an individual is then the responsibility of the public prosecutor, which is contrary to the provisions of the European Convention on Human Rights.

### **The politicisation of the prosecution**

The reunification of the functions of Minister of Justice and Prosecutor General has strongly influenced the politicisation of the work of the prosecution. The new powers of the Minister of Justice – Prosecutor General, in creating a field for an active politician to arbitrarily interfere in the work of prosecutors, is affecting the credibility of the prosecution as an institution. None of the provisions of the law on the Public Prosecutor's Office guarantees that the Prosecutor General will not use his powers to pursue the current political interest.

In the period from 2015 to 2019 there were at least a few cases of proceedings in cases of public interest in which the activities of the prosecutor's office, on the one hand, were in line with the interests of the ruling parliamentary majority and, on the other hand, were characterised by slowness or lack of proper investigation.

One of the examples of such proceedings was the discontinuance of proceedings for failure to publish the judgement of the Constitutional Tribunal of March 2016. Although the court annulled the original decision refusing to initiate proceedings in this case and issued specific recommendations to prosecutors to question the persons responsible for the publication of the judgement of the Constitutional Tribunal, it was

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79 M. Kryszkiewicz, *Judge Zbigniew Ziobro. The Minister will decide which criminal sentence should be repealed*, gazetaprawna.pl, available at: <https://prawo.gazetaprawna.pl/artykuly/981955,prokuratorzy-beda-mogli-przeciagac-postepowania.html> (accessed 12/09/2019).

not fully implemented (e.g. Prime Minister Beata Szydło was not questioned).<sup>80</sup> Among other similar cases, there are proceedings concerning the financing of conventions of one of the parties forming part of the ruling camp<sup>81</sup> or the Prime Minister's accident.<sup>82</sup>

On the other hand, the prosecutor's office is very thorough in explaining those cases, which could indicate a strengthening of the image of the Minister of Justice – Prosecutor General in the eyes of the public. Such action might be, for example, public criticism of too low a penalty, in the opinion of the Prosecutor General, imposed for a murder committed and ordering the prosecutor in charge of the case to appeal against this decision.<sup>83</sup>

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80 Decision of the Regional Court for Warsaw Śródmieście in Warsaw of 13<sup>th</sup> October, 2016 (ref. II Kp 1256/16), available at: <https://www.hfhr.pl/wp-content/uploads/2017/11/ii-kp-1256.16-postanowienie-z-uzasadnieniem-zanonimizowane.pdf> (accessed 12/09/2019).

81 *Embezzlement of Solidarna Polska. Prosecutors found a way out of investigating illegality by Ziobro's party*, newsweek.pl, available at: <https://www.newsweek.pl/polska/defraudacja-solidarnej-polski-prokuratorzy-wybrneli-z-tropienia-przekretow-partii/gmrjt64> (accessed 12/09/2019).

82 *The Prosecutor's Office wants conditional discontinuance of the case involving the accident by Prime Minister Szydło*, tvn24.pl, available at: <https://www.tvn24.pl/krakow,50/prokuratura-chce-warunkowego-umorzenia-sprawy-wypadku-premier-szydlo,822424.html> (accessed 12/09/2019).

83 *Zbigniew Ziobro announces an appeal regarding the sentence for the murder of Paweł K. "15 years for the perpetrator is a mockery"*, polskieradio.pl, available at: <https://www.polskieradio24.pl/5/1222/Artykul/2343990,Zbigniew-Ziobro-zapowiada-apelacje-ws-wyroku-za-zabojstwo-Pawla-K-15-lat-dla-sprawcy-to-kpina> (accessed 12/09/2019).

# INDEPENDENT INSTITUTIONS

Since the beginning of its term of office, the government and the ruling majority have taken a number of measures to weaken independent institutions. Attacks on the Commissioner for Human Rights and non-governmental organisations translate into a weakening of the entire system of human rights protection and citizens' involvement in building a civil society.

## **COMMISSIONER FOR HUMAN RIGHTS**

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The Commissioner for Human Rights plays an important role in the system of human rights protection. First and foremost, he is a guardian of freedom and human rights. He is also responsible for monitoring compliance with the principle of equal treatment and the prohibition of torture. The 7<sup>th</sup> term Commissioner for Human Rights, Dr Adam Bodnar, elected in June, 2015, was the first Commissioner for Human Rights whose candidacy was put forward and supported by civil society organisations.<sup>84</sup> The new ruling majority objected to this choice accusing the Commissioner of political involvement and presenting extreme views.

*The Commissioner for Human Rights is not there to please those in power.*<sup>85</sup>

**Dr Adam Bodnar, Commissioner for Human Rights**

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84 *Bodnar is the candidate for the Commissioner for Human Rights*, gazetaprawna.pl, available at: <https://www.gazetaprawna.pl/artykuly/878395,rpo-bodnar-kandydatem-na-rzecznika-praw-obywatelskich.html> (accessed 19/09/2019).

85 *"The Commissioner for Human Rights is not there to please those in power"*, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/adam-bodnar-jesli-wladza-mnie-atakuje-to-jakby-uderzala-w-obywateli,948517.html> (accessed 12/09/2019).

The opposition of the ruling majority to the function of the Commissioner manifested itself in limiting the financing of the office of the Commissioner for Human Rights, a lack of cooperation and attacks on the office of the Commissioner for Human Rights and the Commissioner himself. Already in the first months of the new term of the Sejm, a decision was taken to reduce the annual budget of the Commissioner for Human Rights. During the debate, MPs accused the Commissioner for Human Rights of the fact that the 18% increase in expenditure by the office of the Commissioner for Human Rights is related to the creation of a new division of equal treatment, despite the fact that the Commissioner for Human Rights indicated that the funds will be allocated to improve the functioning of the National Torture Prevention Mechanism.

*Ladies and gentlemen, this is a vote that will determine whether we support gender ideology, [...].*<sup>86</sup>

**Tomasz Rzymkowski, MP in the 8<sup>th</sup> term Sejm**

Finally, the funds originally allocated in the draft budget act for the functioning of the Office of the Commissioner for Human Rights were allocated in a decision by the Sejm to the general reserve of the state budget,<sup>87</sup> the construction of a national road in Radom,<sup>88</sup> the operation of the Social Opinion Research Centre,<sup>89</sup> as well as renovation of the Clinic of the Medical University of Lublin's Dentistry Centre.<sup>90</sup> Compared to the draft submitted, the expenditure of the office for the Commissioner for Human Rights was reduced by 10 million zloty, leading to it being set at the level from 2011.<sup>91</sup> It was the second year in a row in which the funds allocated for the functioning of the Commissioner for Human Rights was decreased in comparison with the previous budget.

In the following years, the Commissioner for Human Rights applied for additional funds, pointing to the need to strengthen the institution's staffing levels. However, in

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86 Session No. 29 of the Parliamentary Committee on Public Finance of 15<sup>th</sup> January, 2016.

87 Vote on the adoption of amendment 42 to the government's draft budget for the year 2016.

88 Vote on the adoption of amendment 43 to the government's draft budget for the year 2016.

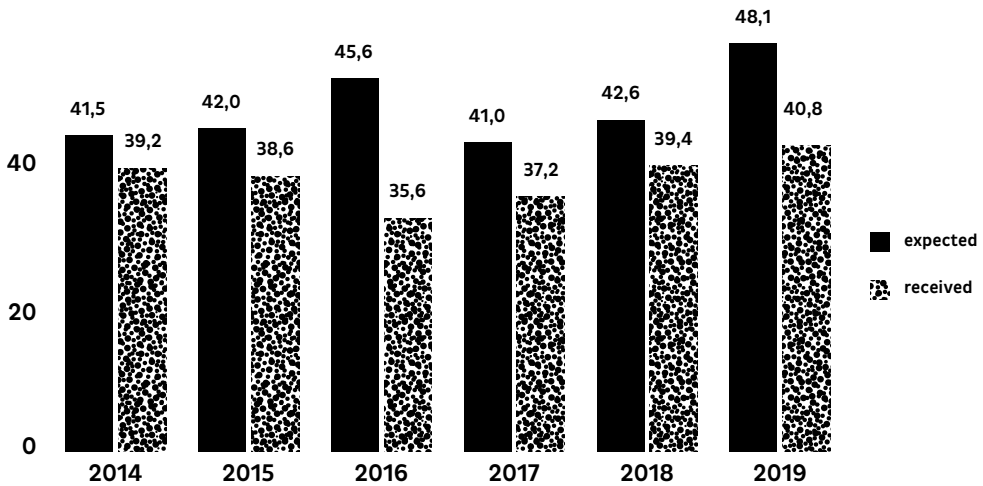
89 Vote on the adoption of amendment 44 to the government's draft budget for the year 2016.

90 Vote on the adoption of amendment 45 to the government's draft budget for the year 2016.

91 Session No. 46 of the Parliamentary Commission on Justice and Human Rights of 27<sup>th</sup> October, 2016.

none of the budgets in the years 2016-2019 did the final allocation of funds reflect the resources requested by the Commissioner for Human Rights.

### Budget for the Office of Commissioner for Human Rights (in millions of zloty)



At the same time, the public authorities imposed new tasks on the office of Commissioner for Human Rights. The extraordinary complaint institution introduced in 2017 made it possible to verify almost every case heard by the courts since 1997. It has resulted in almost 3000 requests for extraordinary complaints to the Office of the Commissioner for Human Rights just up to 31<sup>st</sup> December, 2018.<sup>92</sup> However, the additional tasks were not accompanied by a significant increase in the number of posts in the Office of the Commissioner for Human Rights. In the years 2014 – 2018 the number of posts in the Office of the Commissioner for Human Rights was at the level of 288 – 294.

The lack of adequate funding also translated into the functioning of the National Torture Prevention Mechanism office, which, among other things, due to the lack of adequate funds, had to limit the number of monitoring visits. The poor financial situation of the National Torture Prevention Mechanism was highlighted by international institutions dealing with the fight against torture – the European Committee for the

92 The Senate is working on the state budget. Information on the draft budget relating to Part 08 - the Commissioner for Human Rights, Commissioner for Human Rights, available at: <https://www.rpo.gov.pl/pl/content/senat-pracuje-nad-budzetem-panstwa-informacja-o-projekcie-budzetu-dotyczacej-RPO> (accessed 21/09/2019).

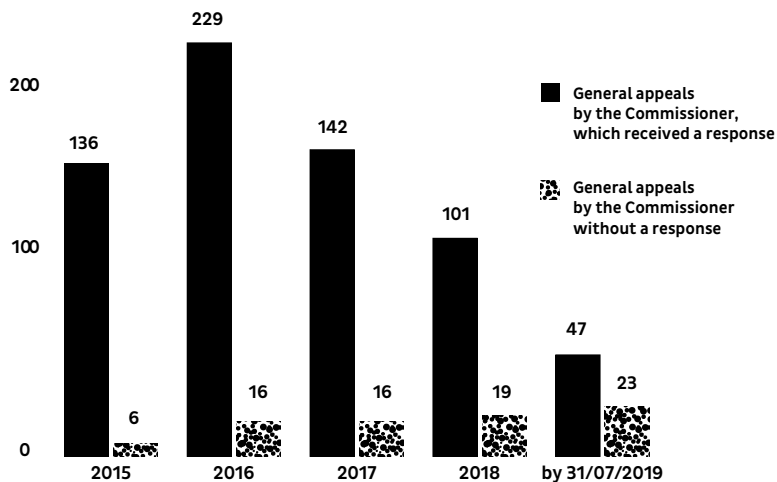
Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>93</sup> and the Committee against Torture (CAT).<sup>94</sup>

## General interventions

Pursuant to the act on the Commissioner for Human Rights, in connection with cases under consideration, the Commissioner may submit assessments and motions to competent authorities, organisations and institutions aimed at ensuring the effective protection of human and civil liberties and rights and improving the manner in which their cases are handled. The body, organisation or institution to which the request was addressed must inform the Commissioner without undue delay, but no later than 30 days, of the action taken or position taken, and must cooperate with the Commissioner.

Despite explicit provisions, between 2015 and 2018, out of 665 general interventions by the Commissioner almost one in eight did not receive a reply from the body or institution concerned.

### Public statements by the Commissioner for Human Rights and references to them by public authorities



93 Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11<sup>th</sup> to 22<sup>nd</sup> May, 2017, available at: <https://rm.coe.int/16808c7a91> (accessed 12/09/2019).

94 UN Committee against Torture, *Concluding observations on the seventh periodic report of Poland*, available at: [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT\\_C\\_POL\\_CO\\_7\\_35715\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf) (accessed: 12/09/2019).

The nature of the general interventions addressed by the Commissioner for Human Rights means that each of them refers to worrying developments in the area of civil rights and freedoms and justifies the need to make changes in this area. Among the interventions which did not receive any reaction, e.g. from the Minister of Justice, are those concerning the recording of procedural activities in criminal proceedings,<sup>95</sup> problems related to the investigation of compensation for unjustified temporary arrest,<sup>96</sup> as well as refusal to provide access to files in preparatory proceedings.<sup>97</sup>

### **Attacks on the Commissioner for Human Rights**

In the years 2015-2019, the Commissioner for Human Rights was also subject to attacks from representatives of the ruling majority, the public media and certain circles.

The Commissioner for Human Rights was criticised, among other things, for his cooperation with international organisations, including the UN Human Rights Committee<sup>98</sup>, but also for his individual actions, such as his intervention on the manner in which a person suspected of the brutal murder of a child was arrested. The latter action also served as a pretext for attacking the Commissioner's family.<sup>99</sup> In September, 2019, in turn, during the presentation of information on the annual activities of the Commissioner for Human Rights in the Sejm, the Commissioner was refused the right to take the floor and respond to questions from MPs.<sup>100</sup>

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95 Address to the Minister of Justice on providing the parties to criminal proceedings with full and real access into the course of procedural activities, Commissioner for Human Rights, available at: <https://www.rpo.gov.pl/pl/content/rzecznik-w-sprawie-obowiazkowego-nagrywania-czynnosci-w-postepowaniu-karnym> (accessed: 12/09/2019).

96 Letter of the Commissioner for Human Rights to the Minister of Justice regarding compensation for wrongful arrest or conviction, Commissioner for Human Rights, available at: <https://www.rpo.gov.pl/pl/content/rpo-o-problemach-z-odszkodowaniami-za-niesluszny-areszt-czy-skazanie> (accessed: 12/09/2019).

97 Address to the Minister of Justice on refusal to provide access to files in preparatory proceedings, Commissioner for Human Rights, available at: <https://www.rpo.gov.pl/pl/content/rpo-pisze-do-ministra-sprawiedliwosci-w-sprawie-odmowy-udostapniania-akt> (accessed: 12/09/2019).

98 E. Siedlecka, "Wiadomości" TVP and Law and Justice party spokeswoman dismiss the Commissioner for Human Rights, *wyborcza.pl*, available at: <http://wyborcza.pl/7,75968,20938158,wiadomosci-i-rzeczniczka-pis-odwoluja-rzecznika-praw-obywatelskich.html> (accessed: 16/09/2019).

99 A. Szczeńniak, *Getting to Bodnar using his son. TVP continues to attack the Commissioner for Human Rights*, *OKO.press*, available at: <https://oko.press/synem-w-bodnara-tvp-nie-ustaje-w-ataku-na-rzecznika-praw-obywatelskich/> (accessed: 16/09/2019).

100 Session No. 193 of the Parliamentary Commission on Justice and Human Rights of 10<sup>th</sup> September, 2019.



## **PUBLIC MEDIA**

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Public media are among those institutions over which the ruling majority has developed its political influence the fastest, leading to a significant reduction in their independence.

### **Changes in public media**

The Sejm adopted an amendment to the act on radio and television broadcasting at the end of December, 2015. The amendment gave the Minister responsible for the State Treasury the right to dismiss and appoint members of supervisory boards and management boards of public media, and abolished open and public competitions for positions in public media authorities. The terms of office of members of the management boards and supervisory boards of Polish Television and Polish Radio expired on the day the provisions of the amendment to the act came into force. In addition, the law eliminated the fixed terms of office for the governing bodies of public media. Consequently, the new regulations have limited the role of the National Broadcasting Council in the appointment of the governing bodies for public media.

Similarly to other acts adopted at that time by the Sejm (including, first of all, amendments to the act on the Constitutional Tribunal), these changes were also adopted at an express pace. The whole legislative process lasted three days<sup>101</sup> and no comments from experts were taken into account. The changes came into force on 8<sup>th</sup> January 2016, on the same day the Minister of the Treasury appointed new presidents of public media – Jacek Kurski (TVP) and Barbara Stanisławczyk (Polskie Radio).

The new management of Polish radio and television has started in-depth personnel changes, as a result of which many journalists have been dismissed, resigned from their jobs or transferred to other duties.<sup>102</sup>

In this context, cases of dismissal or disciplinary dismissal of journalists who opposed changes in the public media are particularly relevant. For example, after the Sejm passed the law on public media, the then director of the “Jedynka” radio station

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101 Members draft bill amending the act on radio and television broadcasting, available at: <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=D26F8A373E8AD3A9C1257F2A003E9559> (accessed: 16/09/2019).

102 Cf. Journalism Association, *Good change in the media*, available at: <http://towarzystwodziennikarskie.pl/dobra-zmiana-w-mediach/> (accessed: 16/09/2019).

decided that the Polish anthem would be broadcast on the radio every hour, alternating with the anthem of the European Union. This was to draw attention to the threats to freedom of expression posed by the new regulations on public media. After the new management board for the radio took up its duties, the journalist was dismissed from the position of station director and then dismissed on disciplinary grounds from his job. The reason for his dismissal was “a breach of employee obligations by deciding to broadcast anthems”. The court of first instance found that Dąbrowa’s release was unfounded,<sup>103</sup> but the appeal court overturned the judgement and referred the case back for reconsideration. The proceedings are still ongoing. The proceedings in the case of Jerzy Sosnowski, a long-time radio journalist of “Trójka” and the then chairman of the Union of Journalists and Employees of the Third and Second Polish Radio Programmes, who was dismissed in March, 2016, for, among other things, criticism of his employer, were legally concluded. The court found that the dismissal of journalists was unjustified.<sup>104</sup>

In turn, two journalists of the Third Polish Radio Programme, Wojciech Dorosz and Paweł Sołtys, were dismissed on disciplinary grounds for “exerting psychological pressure and attempting to force the management board of Polskie Radio SA to make decisions concerning employment policy in the company” and “public harassment” of the new management board by, among other things, demanding mediation between employees and the management of the radio.<sup>105</sup> Another radio journalist, Tomasz Zimoch, was suspended after an interview with him in the press, in which he criticised the changes introduced at Polish Radio. A few days later, the journalist also terminated his contract due to the fault of the employer. Polish Radio sued Tomasz Zimoch, demanding compensation for unjustified termination of his employment contract without notice. However, the court found that the suspension of the journalist from

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103 *Kamil Dąbrowa dismissed illegally from Polish Radio. Compensation awarded*, wirtualnemedial.pl, available at: <https://www.wirtualnemedial.pl/artyku/sad-kamil-dabrowa-bez-prawnie-zwolniony-z-polskiego-radia-dostanie-odszkodowanie> (accessed: 16/09/2019).

104 The Helsinki Foundation for Human Rights, *Jerzy Sosnowski won in court against Polish Radio. The exemption was unjustified*, available at: <http://www.hfhr.pl/jerzy-sosnowski-wygral-w-sadzie-z-polskim-radiem-zwolnienie-bylo-nieuzasadnione/> (accessed: 21/09/2019).

105 M. Kozielski, *Wojciech Dorosz disciplinary dismissed from Polish Radio*, press.pl, available at: <https://www.press.pl/tresc/46640,wojciech-dorosz-zwolniony-dyscyplinarnie-z-polskiego-radia> (accessed: 16/09/2019).

his duties had no grounds and therefore the termination of the employment contract by Tomasz Zimoch without notice due to the employer's fault was justified.<sup>106</sup>

Journalists working in the public media are also under pressure. Examples include the cases of Dorota Nygren, a professionally and financially degraded woman who refused to mention the nationality of the perpetrator of a crime in her material,<sup>107</sup> or Grażyna Bochenek, punished for having emitted three unflattering opinions from listeners about President Andrzej Duda.<sup>108</sup>

### **Judgement of the Constitutional Tribunal**

In December, 2016, the Constitutional Tribunal issued a judgement on the amendment of the act on radio and television broadcasting of December, 2015.<sup>109</sup> The constitutionality of the act was challenged before the Constitutional Tribunal by, among others, the Commissioner for Human Rights, indicating that the new provisions violate, inter alia, freedom of speech and freedom of the media.<sup>110</sup>

The Constitutional Tribunal found that the amendment of the Broadcasting Act, to the extent that it limits the competences of the National Broadcasting Council within its scope of competence (including, among others, influencing the filling of positions on public media boards), is unconstitutional.

In the judgement, the Constitutional Tribunal indicated that the legislator should take steps to bring the provisions concerning the position of the National Broadcasting Council, including in particular the restoration of its decisive role in the management

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106 The Helsinki Foundation for Human Rights, *Tomasz Zimoch won in court against Polish Radio. The suspension from official duties was unlawful*, available at: <http://www.hfhr.pl/tomasz-zimoch-wygral-w-sadzie-z-polskim-radiem-zawieszenie-w-obowiazkach-sluzbowych-bylo-bezprawne/> (accessed: 16/09/2019).

107 A. Ambroziak, *Journalist sues Polish Radio for discrimination. OKO.press joins the proceedings, Oko.press*, available at: <https://oko.press/w-obronie-standardow-etyki-dziennikarskiej-dziennikarka-informacyjnej-agencji-radiowej-pozywa-polskie-radio-za-dyskryminacje-oko-press-przylacza-sie-do-postepowania/> (accessed: 21/09/2019)

108 The Helsinki Foundation for Human Rights, *The Regional Court in Rzeszów has repealed the penalty of reprimand imposed on editor Grażyna Bochenek*, available at: <http://www.hfhr.pl/sad-rejonowy-w-rzeszowie-uchylil-kare-nagany-nalozona-na-red-grazyne-bochenek/> (accessed: 21/09/2019).

109 Judgement of the Constitutional Tribunal of 13<sup>th</sup> December, 2016, Case No. K 13/16, OTK ZU A/2016, item 101.

110 Commissioner for Human Rights, *Request of the Commissioner for Human Rights in case K 13/16*, available at: [https://ipo.trybunal.gov.pl/ipo/dok?dok=F956798265%2FK\\_13\\_16\\_wns\\_2016\\_03\\_24\\_ADO.pdf](https://ipo.trybunal.gov.pl/ipo/dok?dok=F956798265%2FK_13_16_wns_2016_03_24_ADO.pdf) (accessed: 16/09/2019).

of public media, into line with the Constitution. The judgement of the Constitutional Tribunal has not yet been implemented in this respect.

### **Establishment of the National Media Council**

The amendments to the Broadcasting Act introduced at the end of 2015 were temporary changes that would expire after 30<sup>th</sup> June, 2016. In fact, since the beginning of the Sejm's term of office, the majority of the ruling majority indicated the need to reform public media, which is why in the first half of 2016 further legislative work on new regulations for the public media was undertaken. They resulted in the preparation of the so-called media pact, which consisted of three draft laws: on national media; on audio-visual contribution and regulations introducing the act on national media and the act on audio-visual contribution. However, in June, 2016, the ruling majority withdrew from these solutions and presented a draft of the so-called bridging act, which introduced, among others, the National Media Council.

The National Media Council is composed of five members elected by the Sejm and the President (two seats in the Council are intended for representatives of the two largest opposition parties) for a six-year term of office. The Council is responsible for appointing and dismissing the management boards and supervisory boards of public radio and television, as well as the Polish Press Agency.

The introduction of the regulations concerning the National Media Council has been criticised, among others, for the lack of a transparent procedure for appointing members of the Council and defining the criteria to be met by members. The new regulations also did not introduce any additional regulations which should be followed by the Council when appointing members of public media authorities.<sup>111</sup>

### **Situation in the public media**

The subordination of the public media to individuals closely associated with the ruling majority and elected through discretionary decisions has led to the politicisation of the public media and the lowering of journalists' working standards. In this respect, the most striking example is the work of the most important news programme of Public

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111 The Commissioner for Human Rights, *Changes in public media – Bridging Act: Opinion of the Commissioner for Human Rights*, available at: [http://www.obserwatorium.org/index.php?option=com\\_content&view=article&id=4828:zmiany-w-mediach-publicznych--ustawa-pomostowa-opinia-hfpc&catid=47:aktualnosciproq&Itemid=66](http://www.obserwatorium.org/index.php?option=com_content&view=article&id=4828:zmiany-w-mediach-publicznych--ustawa-pomostowa-opinia-hfpc&catid=47:aktualnosciproq&Itemid=66) (accessed: 16/09/2019).

Television – “Wiadomości”. The news reports broadcast in this programme very often serve primarily to create a positive image of the ruling majority and, at the same time, to undermine confidence in the opposition. Some of the material emitted is also used to undermine and create attacks on other institutions (see → **Attacks on NGOs, p. 60**, → **Attacks on the Commissioner for Human Rights, p. 49**, → **Attacks on LGBTQI organisations and activists, p. 80**).

This material also often does not meet journalistic standards – information is presented in a biased way, comments are intertwined with information, and the language used in them contributes to a deepening in the polarisation of society (such terms as “the caste of judges” or “total opposition” are used). An analysis of the information material prepared within the framework of the local government campaign conducted by the Association of Journalists indicates that over 70% of the time of direct statements of all candidates in local government elections was taken up by candidates of the ruling party.<sup>112</sup> The news was also favourable to the ruling majority in the campaign to the European Parliament. An analysis by the Society of Journalists and the Batory Foundation showed that Jarosław Kaczyński was the most quoted politician in the material prepared by “Wiadomości” two weeks before the elections (his share in all the speeches made by politicians was 10%). At the same time, the politicians of the ruling majority were over-represented in the main journalistic programme broadcast immediately after “Wiadomości” – “Gość Wiadomości” (64% for the ruling majority v. 36% for the opposition).<sup>113</sup>

Simultaneously, public media, including in particular Telewizja Polska (Polish Television), remain one of the main sources of information (a survey conducted in 2018 shows that TVP is ranked 4<sup>th</sup> in terms of frequency of use by the audience, just behind TVN, Polsat News and RMF).<sup>114</sup>

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112 The Journalists Association, *Propaganda on the public media threatens the integrity of elections*, wyborcza.pl, available at: <http://wyborcza.pl/7,95891,24625848,propaganda-mediow-publicznych-zagraza-prawidlowosci-wyborow.html> (accessed: 16/09/2019).

113 Journalism Association, *Report on the monitoring of TVP's “Wiadomości” during the election campaign to the European Parliament 10-24 May, 2019*, available at: [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/RaportTD13NN\\_7%20czerwca\\_fi-nal2.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/RaportTD13NN_7%20czerwca_fi-nal2.pdf) (accessed: 16/09/2019).

114 G. Piechota, *Digital News Report: Poland*, available at: <http://www.digitalnewsreport.org/survey/2018/poland-2018/> (accessed: 16/09/2019).

The gradual lowering of the quality standards for journalistic work in public media programmes, combined with the polarisation of the media, leads to increased threats to the protection of freedom of expression and the work of journalists (see → **Freedom of expression**, p. 69).

## **NON-GOVERNMENTAL ORGANISATIONS**

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The changes introduced in the period from 2015 to 2019 also concerned the functioning of non-governmental organisations and primarily related to changes in the scope of support for organisations from public funds, a weakening in the mechanisms for consultation and dialogue with non-governmental organisations and cases of attacks on individual persons and organisations.

### **Changes in cooperation between state institutions and non-governmental organisations**

Non-governmental organisations participate in the process of social consultations, as well as perform, among other things, the tasks commissioned by the state administration. Both these processes should be based on the principles of transparency and participation. However, since 2015, we have seen a steadily deteriorating practice that does not take full account of the participation of representatives of society in these processes.

The data published by the Civic Legislative Forum shows that over the last four years, laws have been adopted more and more frequently without proper social consultation and in a non-transparent manner.<sup>115</sup> Particular attention should also be paid to the pace of adoption of individual laws that are important from the point of view of the state system. The amendment of the Constitutional Tribunal Act in 2015 was adopted in just over a week (with a significant part of the committee's work taking place at

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115 *Hidden draft laws, XII Communiqué of the Citizens' Legislative Forum*, available at: [http://www.batory.org.pl/dla\\_mediow/skrywane\\_projekty\\_ustaw\\_xii\\_komunikat\\_obywatelskie-go\\_forum\\_legislacji](http://www.batory.org.pl/dla_mediow/skrywane_projekty_ustaw_xii_komunikat_obywatelskie-go_forum_legislacji) (accessed: 12/09/2019).

night),<sup>116</sup> and the Supreme Court Act was dealt with at a similar pace in 2017.<sup>117</sup> Despite the participation of numerous experts in these legislative processes (the Commissioner for Human Rights, the Sejm's Analysis Office, representatives of legal corporations and non-governmental organisations), their participation was marginalised to only providing comments.

At the same time, the practice of cooperation between NGOs and the administration at national level also deteriorated. The Polish National Federation of Non-Governmental Organisations documented 35 cases of violation by the government of the principle of subsidiarity of cooperative partnership with non-governmental organisations in the implementation of cooperation programmes with non-governmental organisations or conducting dialogue bodies.<sup>118</sup> For example, in 2015, the State Council for Nature Conservation (an opinion and advisory body to the Minister of the Environment) issued a negative opinion on the Minister of the Environment's plans for the Białowieża Forest. Shortly afterwards, the Sejm received a bill abolishing the term of office of the Council, and three months later in May, 2016, a new composition of the Council was announced.<sup>119</sup>

### **Changes in the financing of non-governmental organisations**

Non-governmental organisations in Poland depend to a large extent on subsidies from public funds. These funds are operated on several levels. One of the main sources of financing are funds allocated by local government entities. Non-governmental organisations may also apply for funding from, among others, special funds managed by individual ministries and EU funds distributed at the national level. The most serious changes have taken place in the last four years in these two areas.

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116 M. Szuleka, M. Szwed, M. Wolny, *The Constitutional Crisis in Poland. 2015-2016*, available at: <http://www.hfhr.pl/wp-content/uploads/2016/09/HFPC-Kryzys-konstytucyjny-w-Polsce-2015-2016.pdf> (accessed: 12/09/2019).

117 Members bill on the Supreme Court Act, the course of work, available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=79AFE72D21974105C125815B006FF6EC> (accessed: 12/09/2019).

118 K. Polubicka, K. Kietbiowska, A. Gąsiorowska, *Report from the Repository of the National Federation of Non-Governmental Organisations*, available at: <https://repozytorium.ofop.eu/wp-content/uploads/2018/11/Raport-podsumowuj%C4%85cy-XI-2015-XI-2018.pdf> (accessed: 12/09/2019).

119 Ibid.

## National Freedom Institute – Centre for the Development of a Civil Society

In 2017, the Sejm adopted the act on the National Freedom Institute – the Centre for the Development of a Civil Society. The Institute took over some of the tasks related to the distribution of public funds for non-governmental organisations at the national level, including primarily funds from the Civic Initiatives Fund.

The establishment of the National Freedom Institute has been widely criticised by non-governmental organisations. During the public consultation, 33 out of the 48 opinions presented expressed strong opposition to the establishment of the new institution.<sup>120</sup> The Commissioner for Human Rights<sup>121</sup> and the Organisation for Security and Cooperation in Europe also gave critical opinions on the National Freedom Institute Act.<sup>122</sup> The opinions stressed the Institute's dependence on the government and the lack of guarantees in terms of equal treatment of non-governmental organisations. Additionally, NGOs indicated that the previous practice of distributing public funds did not require any changes, and that the establishment of the Institute was not necessary.

The National Freedom Institute is an organisation largely dependent on the government. The Director of the Institute is appointed by the Chairman of the Committee for Public Benefit, who is also a member of the Council of Ministers. The influence of NGOs on the activities of the Institute is limited – 5 representatives of civil society are members of the 11-person Council of the Institute, which is primarily consultative in nature.

*It is a small ministry (about the Public Benefit Committee – ed.), a constitutional institution for which I am responsible. The fact that its President is a member of the*

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120 E. Kulik - Bielińska, Ł. Domagała, J. Kluczyńska, *The act on the National Freedom Institute - is it dangerous?*, available at: <https://www.hfhr.pl/ustawa-o-narodowym-instytucie-wolnosci-czy-jest-grozna/> (accessed: 12/09/2019).

121 Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on the draft act on the National Freedom Institute*, available at: <https://www.rpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-przedstawia-opinie-o-rzadowym-projekcie-ustawy-o-narodowym-instytucie> (accessed: 12/09/2019).

122 Office for Democratic Institutions and Human Rights, *Opinion on the draft act on the National Freedom Institute - Centre for the Development of a Civil Society*, available at: <https://archiwumosiatsynskiego.pl/images/2017/11/Opinia-OIDHR-OSCE-o-ustawie-o-Narodowym-Instytucie-Wolnos%CC%81ci.pdf> (accessed: 12/09/2019).



*Council of Ministers will raise the political level for the resolution of many issues. That is why we have transferred the responsibilities of servicing non-governmental organisations from the Ministry for the Family to the Prime Minister's Office. In this way, NGOs gain more prestige and political power.*

**Deputy Prime Minister Piotr Gliński<sup>123</sup>**

The Institute has a substantial budget. After the changes introduced in 2018, the annual budget of the Institute amounts to 40 million zloty. The Institute distributes resources under the programmes for the Civic Initiatives Fund, the Development of Civic Organisations, the Solidarity Corps, the Government Programme to Support the Development of Scouts and Scouting Organisations, and the Programme to Support the Development of People's Universities.<sup>124</sup>

An analysis of the National Freedom Institute's activities so far indicates that the priority in financing is primarily given to projects submitted by local organisations for activities aimed at activating local communities.

## EU funds

Since Poland's accession to the European Union, European funds have become one of the most important sources of financing for non-governmental organisations, especially those dealing with the protection of the rights of foreign nationals and refugees. Since 2007, funds for supporting foreign nationals have been transferred by the European Commission to the governments of individual countries, which, through open tenders, transfer them to projects related to refugee assistance and integration of foreign nationals. In 2016, the Ministry of the Interior, which is the operator of these funds, first postponed the decision on two tenders and then annulled them. The Ministry explained these decisions with the necessity of, among other things, developing a new migration policy.<sup>125</sup> As a result, for over a year and a half the monies from these Funds were not distributed, which for many organizations dealing with

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123 M. Janik, *Piotr Gliński: NGOs gain more prestige and political power*, available at: <https://lodz.tvp.pl/42035476/piotr-glinski-organizacje-pozarzadowe-zyskuja-wiekszy-pres-tiz-i-sile-polityczna> (accessed: 12/09/2019).

124 National Freedom Institute, available at: <https://niw.gov.pl/nasze-programy/> (accessed 12/09/2019).

125 Reply to Question No. 12214, available at: <http://www.sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=43FB497F> (accessed 12/09/2019).

legal assistance for refugees and migrants, meant a significant deterioration in their financial condition.

In 2017 the voivodes announced an open call for partners for the joint implementation of projects financed from the Asylum, Migration and Integration Fund, but they were not obliged to implement these projects with the participation of social partners. A call for social partners was announced in 11 of the 16 voivodships. A total of 8 organisations were selected (wherein one of the organisations, Caritas Polska, was selected five times).<sup>126</sup> For comparison, 44 organisations received funding in the competition for co-financing from the Asylum, Migration and Integration Fund resolved in 2015.<sup>127</sup> The limitation in access to the Fund's resources (which for many organisations was one of the main sources of financing) had a negative impact on the functioning of non-governmental organisations carrying out activities for foreign nationals – an analysis by the Association for Legal Intervention and the HFHR shows that the limitation of this source of financing led, inter alia, to the disintegration of qualified teams of lawyers, psychologists and integration advisors previously employed by organisations.<sup>128</sup>

### Funds operated by ministries

Between 2015 and 2019, the practice of distributing funds from ministries' funds also changed. Particularly negative changes were introduced with regard to the functioning of the Fund for the Victims of Crime and Post-Penitentiary Assistance (since 2017 the Justice Fund) run by the Ministry of Justice. This Fund is one of the main sources of funding for organisations conducting projects aimed at supporting victims of crime (the annual budget of the Fund for these activities is approximately 16 million zloty).

In 2016, the Ministry of Justice announced the results of a competition for project offers in this area. Three organisations: the Women's Rights Centre, the Lubuskie

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126 W. Klaus, E. Ostaszewska-Żuk, M. Szczepanik, *European Funds and their role in supporting integration of foreign nationals in Poland*, available at: [https://interwencjaprawna.pl/wp-content/uploads/2017/09/raport\\_po-FAMI\\_net.pdf](https://interwencjaprawna.pl/wp-content/uploads/2017/09/raport_po-FAMI_net.pdf) (accessed: 12/09/2019).

127 Results of the competitive selection procedure for recruitment No. 2/2015/FAMI, available at: [http://copemswia.gov.pl/files/FAMI/wyniki\\_naborow/FAMI\\_nabor\\_nr\\_2%20\\_lista\\_rankingowa.pdf](http://copemswia.gov.pl/files/FAMI/wyniki_naborow/FAMI_nabor_nr_2%20_lista_rankingowa.pdf) (accessed: 12/09/2019).

128 W. Klaus, E. Ostaszewska-Żuk, M. Szczepanik, *European Funds and their role in supporting the integration of foreign nationals in Poland*, available at: [https://interwencjaprawna.pl/wp-content/uploads/2017/09/raport\\_po-FAMI\\_net.pdf](https://interwencjaprawna.pl/wp-content/uploads/2017/09/raport_po-FAMI_net.pdf) (accessed: 12/09/2019).

Women's Rights Centre BABA and Nobody's Children Foundation (currently We Give Strength to Children) did not receive any funding. The Ministry explained that the bids received a lower score than the other projects submitted. An additional reason for not funding the Women's Rights Centre was the fact that the aid provided by the organisation is not comprehensive, as it is aimed only at women.<sup>129</sup>

In successive years, the monies from the Justice Fund were allocated, among others, to voluntary fire brigade units,<sup>130</sup> to purchase equipment for hospitals<sup>131</sup> or to the Central Anti-Corruption Bureau.<sup>132</sup> An audit by the Supreme Chamber of Control in 2018 showed that "the Ministry of Justice did not ensure the proper implementation of the Fund's tasks in the area of assistance to victims of crime, and thus adequate and effective assistance to victims of crime".<sup>133</sup>

## Attacks on NGOs

The limitation in the sphere of activity of non-governmental organisations also included attacks on individual organisations by, among others, public media.

In 2016, "Wiadomości" published a series of reports on the financing of some NGOs, suggesting that obtaining these funds was influenced by the close private or family relationships of NGO leaders with, for example, politicians or judges. These

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129 Address by the Commissioner for Human Rights to the Minister of Justice, available at: <https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20MS%20w%20sprawie%20finansowania%20organizacji%20przeciwdzia%C5%82aj%C4%85cych%20przemocy%20wobec%20kobiet%2029.07.2016.pdf> (accessed: 12/09/2019).

130 See e.g. *Resources from the Justice Fund for Firefighters in the Zambrów Municipality*, available at: [http://www.ugzambrow.pl/aktualnosc-1-437-srodki\\_z\\_funduszu\\_sprawiedliwosci\\_dla.html](http://www.ugzambrow.pl/aktualnosc-1-437-srodki_z_funduszu_sprawiedliwosci_dla.html), *Co-financed by the Justice Fund administered by the Minister of Justice*, available at: <http://www.zelow.pl/pl/news/wsp%C3%B3C%5%82finansowano-ze-%C5%9Brod%C3%B3w-funduszu-sprawiedliwo%C5%9Bci-kt%C3%B3re-go-dysponentem-jest-mi-nister> and *Equipment purchased as part of a grant from the Justice Fund to firefighters*, <http://www.prazmow.pl/art,643,przekazanie-strazakom-sprzetu-zakupionego-w-ramach-dotacji-z-funduszu-sprawiedliwosci> (accessed: 12/09/2019).

131 Ministry of Justice, *Signing of the agreement on the BUDZIK Clinic for Adults in Warsaw*, available at: <https://www.gov.pl/web/sprawiedliwosc/podpisanie-umowy-o-klinice-budzik-dla-doroslych-w-warszawie> (accessed: 12/09/2019).

132 S. Klauziński, *Ziobro on the money from the Justice Fund to the Central Anti-Corruption Office: What is the problem? A big problem - it is a violation of the law*, oko.press, available at: <https://oko.press/ziobro-fundusz-sprawiedliwosci-manipulacja/> (accessed: 12/09/2019).

133 The Supreme Chamber of Control, *Assistance to the Victims of Crime in the framework of the Victims Assistance Fund (Justice Fund)*, available at: <https://www.nik.gov.pl/aktualnosci/fundusz-pomocy-pokrzywdzonym.html> (accessed: 12/09/2019).

attacks were conducted on the basis of publicly available information, but were presented in an atmosphere of a potential scandal.<sup>134</sup>

*Public television is unnecessarily trying to hit the NGO sector. I am sorry that there is a madhouse at TVP – after the change I have been working on for so many years.*

**Piotr Gliński, Minister of Culture**<sup>135</sup>

NGOs were also subject to criminal proceedings and inspections, which did not result in any binding findings. In 2017, police officers entered the offices of the BABA Association in the Lubuskie voivodship and the Women's Rights Centre in order to secure documents and computers. The activities were conducted within the framework of proceedings concerning the use of funds from the Victims of Crime and Post-Penitentiary Assistance Fund. According to activists in these organisations, the activities were primarily aimed at intimidation, but they also influenced the perception of the organisations by victims of crime, who might consider turning to them for help.<sup>136</sup>

In turn, in 2018, the Minister of Internal Affairs and Administration applied to the courts for the introduction of a judge commissioner at the Free Citizens of the Republic of Poland Foundation. This was another action taken by state administration bodies against an organisation criticising the government's actions. From the end of 2016, activists of Free Citizens of the Republic of Poland foundation organised and participated in counter-demonstrations against governmental public assemblies. The Minister argued that the activities of the Foundation “insult the lawful and democratically active bodies of executive power, including the President of the Republic of Poland” and that “in practice the Foundation's activities, inter alia, by blocking and disrupting the cyclical public gathering held to pay homage to the Victims of the

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134 E. Siedlecka, „*Wiadomości*” is attacking NGOs. Will it end like Putin?, wyborcza.pl, available at: <http://wyborcza.pl/7,75968,20924093,wiadomosci-atakuja-organizacje-pozarządowe-skonczy-sie-jak.html> (accessed: 12/09/2019).

135 A. Jastrzębski, *Deputy Prime Minister Gliński: TVP unnecessarily criticizes NGOs*, wp.pl, available at: <https://wiadomosci.wp.pl/wicepremier-glinski-tvp-niepotrzebnie-krytykuje-organizacje-pozarządowe-6063202397344385a> (accessed: 12/09/2019).

136 Human Rights Watch, “*The Breath of the Government on My Back*” Attacks on Women's Rights in Poland, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/poland0219\\_web2\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/poland0219_web2_0.pdf) (accessed: 12/09/2019).

Smolensk disaster (...) undermine the constitutionally guaranteed freedom of assembly.<sup>137</sup> The Court dismissed the Minister's application.<sup>138</sup>

Over the last four years, there have also been attacks on the headquarters of some NGOs. In 2016, unknown perpetrators broke into or threw paint on the offices of LGBT organisations (Stonewall Group, the Campaign Against Homophobia, the Lambda Warsaw Association).<sup>139</sup> In 2019, unknown perpetrators attacked the offices of several liberal and left-wing organisations in Wrocław.<sup>140</sup>

Individual activists and civil society activists were also attacked – for example, Krystyna Pawłowicz, an MP, attacked the head of Amnesty International, Draginja Nadazdin, after the organisation had defended people demonstrating in front of the Sejm.<sup>141</sup>

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137 *Citizens of the Republic of Poland under forced administration. This is what the minister wants*, tvn.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/minister-spraw-wewne-trznych-chce-przejac-zarzad-fundacji-obywatele-rp,839186.html> (accessed: 12/09/2019).

138 M. Deja, *The Ministry of the Interior and Administration wanted to "take over" the "Citizens of the Republic of Poland" foundation. The court did not allow it*, wp.pl, available at: <https://wiadomosci.wp.pl/mswia-chcialo-przejac-fundacje-obywateli-rp-sad-nie-pozwolil-6318629700081793a> (accessed: 12/09/2019).

139 Helsinki Foundation for Human Rights, *Another attack on an LGBT rights organisation*, available at: <https://www.hfhr.pl/kolejny-atak-na-organizacje-zajmujaca-sie-prawami-osob-lgbt/> (accessed on 12<sup>th</sup> September, 2019).

140 P. Witkowski, *The Nationalist cesspit has overflowed in Wrocław. Attack on NGOs*, oko.press, available at: <https://oko.press/nacjonalistyczne-szambo-wylalo-we-wroclawiu-atak-na-organizacje-pozarzadowe/> (accessed: 12/09/2019).

141 *Pawłowicz severely attacks the head of Polish Amnesty International. "Go back home, woman"*, dorzeczy.pl, available at: <https://dorzeczy.pl/kraj/72324/Pawlowicz-ostro-atakuje-szefowa-polskiego-Amnesty-International-Wracaj-kobieto-do-siebie.html> (accessed: 21/09/2019).

# THE SHRINKING SPACE FOR HUMAN RIGHTS

## FREEDOM OF ASSEMBLY

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In December, 2016, the Sejm adopted an amendment to the law on assemblies. As in the case of other important acts concerning civil rights and freedoms, the draft amendments were submitted as a private member's bill and were not subject to public consultations.

The most important change introduced by the amendment was the creation of "cyclical assemblies", i.e. those which are organised by the same organiser, in the same place or on the same route at least 4 times a year or at least once a year on a public or national holiday, and are aimed in particular at celebrating significant and important events in the history of the Republic of Poland. Consent for the cyclical organisation of an assembly is given by the voivode.

The justification to the bill<sup>142</sup> does not provide detailed information on the reasons for introducing such a solution. In the informal speeches of the representatives of the ruling camp, one could, however, find a connection between the amendment and the issue of the meetings held at the Presidential Palace on the 10<sup>th</sup> of each month to commemorate the crash of the Presidential plane in Smolensk. From the middle of 2016 counter manifestations were organised for every monthly gathering to commemorate the Smolensk crash.

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142 Print No 1044, Project Explanatory Memorandum, available at: <http://orka.sejm.gov.pl/Druki8ka.nsf/0/0594AA2B8F158B67C125806F003D9FC4/%24File/1044-uzasadnienie.docx> (accessed: 12/09/2019).

*This change in the law could be called a change that will solve problems related to the confrontation between one manifesting group and another, for example. Therefore, this is an act to resolve conflicts.*<sup>143</sup>

**Mariusz Błaszczak, Minister of Internal Affairs and Administration**

The effect of considering a meeting to be cyclical is a statutory guarantee of priority over any other meeting held at the same time or place. In such cases, the competent authority of the commune, within 24 hours of receiving information about a cyclical assembly, is obliged to issue a decision prohibiting the assembly. If it does not do this, the voivode is entitled to immediately issue a substitute ordinance prohibiting the assembly.

In principle, cyclical assemblies were to take precedence over ordinary assemblies, but at the legislative stage the legislator did not explicitly prejudge the effects of a collision between cyclical assemblies and normal assemblies. As a result, doubts have arisen as to whether such an assembly can be prohibited because it is organised in the same place and at the same time as a cyclical assembly (see → **Practical application of the new rules on assemblies, p. 65**).

This issue has not been unequivocally assessed by the common courts adjudicating on appeals against substitute decisions of a voivode. In some cases, the District Court in Warsaw indicated that the voivode was not competent to issue a substitute ordinance prohibiting the holding of a normal assembly.<sup>144</sup> In response to these objections, the voivode of Mazowsze, in his orders, referred to an unpublished judgement of the Regional Court in Warsaw,<sup>145</sup> indicating that the voivode had such a right.<sup>146</sup>

Moreover, if an assembly is to be considered cyclical, other assemblies held at the same time have to be at least 100 metres away from it, making it difficult to have counter-demonstrations. Such a solution raised concerns from the point of view of the

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143 P. Kościński, *The Sejm passes the law on assemblies. The authorities will have priority over citizens?*, wyborcza.pl, available at: <http://wyborcza.pl/7,75398,21062023,sejm-przyjal-ustawe-o-zgromadzeniach-wladza-ma-pierwszenstwo.html> (accessed: 12/09/2019).

144 Decision of the Regional Court in Warsaw of 10<sup>th</sup> May, 2016, case ref. no. XXIV Ns 38/17, lex no. 2287663 and the decision of the Regional Court in Warsaw of 10<sup>th</sup> May, 2017, case ref. no. XXIV Ns 37/17, lex no. 2287662.

145 Decision of the Regional Court in Warsaw of 14<sup>th</sup> August, 2017, case reference no. XXIV NS 129/17, unpublished.

146 Letter from the Mazowsze Voivode to the Commissioner for Human Rights of 29<sup>th</sup> December, 2017, available at: <https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20Wojewody%20Mazowieckiego%20na%20wyst%C4%85pienie%20RPO.pdf> (accessed: 12/09/2019).

Constitution – the Helsinki Foundation for Human Rights and other NGOs assessed this provision as disproportionate interference in the freedom of assembly.<sup>147</sup> However, the Constitutional Tribunal<sup>148</sup> ruled differently, stating that the provisions on cyclical assemblies were in line with the Constitution.

### **Practical application of the new rules on assemblies**

The application of the new provisions of the law on assemblies has caused a number of practical problems both in terms of recognising the priorities of cyclical assemblies and in terms of using the provisions of the new law to restrict assemblies other than counter-demonstrations (including e.g. Equality Marches).

#### Cyclical assemblies

Since 2017, voivodes have issued 21 decisions on granting cyclical status to assemblies.<sup>149</sup> As many as 6 of them were issued by the voivode for Mazowsze. The same authority also issued the largest number (36) of substitute ordinances<sup>150</sup> prohibiting assembly, despite doubts about the legality of such a decision.

The Mazowsze voivode's practice of informing about issued substitute ordinances was also problematic. Out of 36 substitute ordinances, in 25 cases the substitute ordinance prohibiting the holding of an assembly was published on the day the assembly was held, of which in 11 cases the voivode's officials published the order after the start of the assembly.<sup>151</sup>

Such a state of affairs made it impossible for the court to effectively control the voivode's substitute ordinances in terms of their legality and proportionality, which in turn results in a violation of the standards provided for by the European Convention on Human Rights. The establishment of judicial control over decisions concerning

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147 Helsinki Foundation for Human Rights, *Comments on the members draft of the act amending the Law on Assemblies*, available at: <http://www.hfhr.pl/wp-content/uploads/2016/11/Opinia-HFPC-prawo-o-zgromadzeniach.pdf> (accessed: 16/09/2019).

148 Judgement of the Constitutional Tribunal of 16<sup>th</sup> March, 2017, Case No Kp 1/17, OTK ZU A/2017, item 28.

149 Based on the Public Information Bulletins of voivodship offices.

150 The Mazowsze Voivodship Office according to the access to public information procedure.

151 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the legal issue submitted for the decision to the enlarged Supreme Court (file no. III SZP 1/18)*, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/wp-content/uploads/2018/03/SN-amicus-zgromadzenia-HFPC.pdf> (accessed: 12/09/2019).



the organisation of assemblies was one of the main points of compliance with the ECHR judgement in *Bączkowski v. Poland*<sup>152</sup> (the case concerned the prohibition of an Equality March in Warsaw in 2007). These solutions were only implemented in 2015. After less than two years in which these provisions were in force, the standard of protection for freedom of assembly has once again been lowered.

## Equality Marches

Since 2018, the presidents of five cities (Lublin,<sup>153</sup> Rzeszów,<sup>154</sup> Gniezno,<sup>155</sup> Gorzów Wielkopolski<sup>156</sup> and Kielce<sup>157</sup>) have issued bans on organising Equality Marches. The prohibitions were motivated primarily by the need to ensure the safety of residents. However, none of those decisions contained any precise indication of the circumstances which would have made that risk plausible. All of these decisions were subsequently annulled by the courts.

In addition, the decisions prohibiting equality marches and the threats discussed were seen not in the actions of those persons who would take part in the banned assembly, but among the participants of the counter-demonstration. In fact, in some cities, including Białystok and Lublin, the behaviour of the counter-demonstrators was

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152 Judgement of the ECtHR of 3rd May, 2007, in the case of *Bączkowski v. Poland*, complaint No. 1543/06.

153 *Position of the Helsinki Foundation for Human Rights on the ban on organising the Equality March in Lublin*, Helsinki Foundation for Human Rights, available at: [https://www.hfhr.pl/wp-content/uploads/2018/10/Marsz-Rownosci-Lublin-pismo-SA-Lublin-stanowisko-11.10\\_ost\\_anonim\\_PDF.pdf](https://www.hfhr.pl/wp-content/uploads/2018/10/Marsz-Rownosci-Lublin-pismo-SA-Lublin-stanowisko-11.10_ost_anonim_PDF.pdf) (accessed: 12/09/2019).

154 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the ban on organising the Equality March in Rzeszów*, available at: [http://www.hfhr.pl/wp-content/uploads/2019/06/Marsz-R%C3%B3wno%C5%9Bci-w-Rzeszowie\\_opinia-HFPC.pdf](http://www.hfhr.pl/wp-content/uploads/2019/06/Marsz-R%C3%B3wno%C5%9Bci-w-Rzeszowie_opinia-HFPC.pdf) (accessed: 12/09/2019).

155 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the ban on organising the Equality March in Gniezno*, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/wp-content/uploads/2019/04/amicus-marsz-3-anonim.pdf> (accessed: 12/09/2019).

156 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the ban on organising the Equality March in Gorzów Wielkopolski*, Helsinki Foundation for Human Rights, available at: <https://www.hfhr.pl/wp-content/uploads/2019/08/Zakaz-Marszu-R%C3%B3wno%C5%9Bci-w-Gorzowie-Wielkopolskim-HFPC-sklada-amicus-curiae.pdf> (accessed: 12/09/2019).

157 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the ban on organising the Equality March in Kielce*, Helsinki Foundation for Human Rights, available at: [http://www.hfhr.pl/wp-content/uploads/2019/07/SO-Kielce-Marsz-R%C3%B3wno%C5%9Bci-amicus\\_anonim\\_PDF.pdf](http://www.hfhr.pl/wp-content/uploads/2019/07/SO-Kielce-Marsz-R%C3%B3wno%C5%9Bci-amicus_anonim_PDF.pdf) (accessed: 12/09/2019).

dangerous. In Białystok, the participants of the Equality March had “stones, fireworks, eggs and bottles thrown at them and abuse shouted at them”.<sup>158</sup> The events in Białystok provoked numerous comments on the situation of LGBTQI people and their rights (see → **LGBTQI rights, p. 78**). The comments from the ruling majority, which suggested limiting the freedom of assembly for LGBTQI people, should be considered particularly worrying.

*“Such marches, triggered by groups trying to force through non-standard sexual behaviour, provoke enormous resistance, [...] not only in the Podlasie region, but also in other parts of Poland. Therefore, It is worth considering whether such events should be organised in the future, because they lead to riots and may endanger the health of many passers-by”.*<sup>159</sup>

**Dariusz Piontkowski, Minister of Education**

### Independence Day March

In 2018, the President of Warsaw banned the organisation of the Independence Day March on 11<sup>th</sup> November.<sup>160</sup> The President’s decision was motivated primarily by the threat to public safety. As in the case of Equality Marches, this ban has also been annulled by the court.

### Treatment of people participating in demonstrations

In addition to attacks on participants in individual demonstrations, the statements allowing for such behaviour or failure to react to it were also of concern. One example of this is the events in Radom, where participants were attacked during the peaceful march of the Committee for the Defence of Democracy. Beata Mazurek, spokeswoman for the Law and Justice parliamentary club, said that “*every action triggers a certain*

158 *Twenty proceedings after the Equality March in Białystok*, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/zamieszki-na-marszu-rownosci-w-bialym-stoku-dwadziescia-postepowan,959551.html> (accessed: 12/09/2019).

159 J. Skórzyński, *Attack on the Equality March in Białystok*. *Skórzyński’s Chronicle (20-26 July, 2019)*, oko.press, available at: <https://oko.press/atak-na-marsz-rownosci-w-bialymstoku-kronika-skorzynskiego-20-26-lipca-2019/> (accessed: 12/09/2019).

160 *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the ban on organising the Independence Day March in Warsaw*, available at: <http://www.hfhr.pl/wp-content/uploads/2018/11/SA-Warszawa-amicus-HFPC-Marsz-Niepodleg%C5%82o%C5%9Bci-2018.pdf> (accessed: 12/09/2019).

*reaction. As long as we're alive, we have emotions. And those emotions gave were vented in Radom. It's a situation that shouldn't happen, but I understand it too".*<sup>161</sup>

On the other hand, we should be critical of the situation in which law enforcement agencies failed to take action against those people who violated the physical integrity of women who were in the counter-demonstration against the Independence Day March. The justification of the prosecutor's decision to discontinue the proceedings in this case showed that the prosecutor's office considered that the prosecution of perpetrators who committed physical violence against protesting women was not justified by the public interest.<sup>162</sup>

Finally, when assessing the state's behaviour towards participants of peaceful demonstrations, we should point to the actions of the police in recording the identities, detaining and punishing people who have taken part in peaceful demonstrations.<sup>163</sup> In some of these cases, the police activities were characterised by unprecedented meticulousness and creativity. The latter was manifested, for example, in the creative interpretation of the provisions of the Code of Misdemeanours in search of a regulation that could be applied to a given individual. An example of such might be the attempt to punish a participant in a spontaneous assembly with an injunction for blocking traffic<sup>164</sup> or a request for punishment for not providing the place of employment when it is only punishable to mislead a state authority about such a place.<sup>165</sup>

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161 J. Mikulski, Beata Mazurek: *Attack in Radom? "I understand them." The words of the spokesperson for the Law and Justice party circulated in the world media*, rp.pl, available at: <https://www.rp.pl/Prawo-i-Sprawiedliwosc/170629198-Beata-Mazurek-Atak-w-Radomiu-Rozumiem-ich-Slowa-rzecznicz-PIS-obięgly-swiatowe-media.html> (accessed: 12/09/2019).

162 M. Piasecki, *The court: there will be proceedings against the nationalists who attacked the women who blocked the Independence Day March*, available at: <https://oko.press/bedzie-postepowanie-przeciwko-narodowcom-zaatakowali-kobiety-blokujace-marsz-niepodleglosci/> (accessed 16/09/2019).

163 See: Amnesty International, Poland: *Demonstrations in support of Human Rights. Intimidation, Surveillance and Investigation of Protest Participants*, available at: [https://amnesty.org.pl/wp-content/uploads/2017/10/Polska\\_Demonstracje-w-obronie-praw-czlowieka.pdf](https://amnesty.org.pl/wp-content/uploads/2017/10/Polska_Demonstracje-w-obronie-praw-czlowieka.pdf) (accessed: 12/09/2019).

164 Citizens of the Republic of Poland, "*ObyPomoc*" Report, October 2018, available at: <https://obywatelerp.org/wp-content/uploads/2018/11/Raport-ObyPomoc-Miesieczny-2018-10.pdf> (accessed: 12/09/2019).

165 Citizens of the Republic of Poland, "*ObyPomoc*" Report, October 2018, available at: <https://obywatelerp.org/wp-content/uploads/2018/11/Raport-ObyPomoc-Miesieczny-2018-10.pdf> (accessed: 12/09/2019).

A particularly drastic form of this kind of behaviour has taken place in relation to people protesting against the illegal logging in the Białowieża Forest, contrary to the decision of the Court of Justice of the European Union.<sup>166</sup> By virtue of an administrative act, it was forbidden for third parties to enter the forest, causing each person participating in a gathering held there to actually commit an offence under article 151 § 1 of the Code of Misdemeanours. Forest Service and Police officers reacted strongly to these cases by sending requests to the courts to punish the protesters.

## **FREEDOM OF EXPRESSION**

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In addition to changes in the public media, there have also been a number of significant changes in the protection of freedom of expression, both in law and in the working practices of individual state bodies, which have to a large extent translated into a restriction of this freedom.

### **Restrictions on the work of journalists and attacks on journalists**

One of the most worrying trends that can be observed in the period from 2015 to 2019 is the decrease in the work of journalists as far as reporting on the work of state bodies is concerned. An example of this was the ban issued by the President of the Constitutional Tribunal on entering the courtroom of the Tribunal. President Julia Przyłębska stated that the obligation to make hearings public is fulfilled by the Tribunal by ordering the online transmission of a hearing, and she herself “as a judge of a common court is not accustomed to having the media at all hearings”.<sup>167</sup>

What is more, in December, 2016, the Press Office of the Sejm’s Administrative Office published information on changes in the organisation of journalists’ work in the Sejm. Journalists would have limited opportunities to record or photograph the work of the Sejm. The plans triggered a strong protest from opposition MPs, who in response blocked the Sejm’s rostrum, which in turn led to the transfer of the Sejm’s

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166 Order of the Court of Justice of the European Union (Grand Chamber) of 20<sup>th</sup> November, 2017, in Case C-441/17, ECLI:EU:C:2017:877.

167 *The President of the Constitutional Tribunal, Julia Przyłębska, has introduced a ban on access by journalists to the Tribunal*, tokfm.pl, available at: <http://www.tokfm.pl/Tokfm/7,130517,21223155,prezes-tk-julia-przylebska-wprowadzila-zakaz-wstepu-do-trybunalu.html> (accessed: 16/09/2019).

deliberations to the column room and a parliamentary crisis lasting over 3 weeks.<sup>168</sup> Finally, the Press Office of the Sejm's Administrative Office withdrew from the changes announced. Nevertheless, in situations of political tension (e.g. the protest by disabled people in May, 2018, or protests in defence of the courts in July, 2017), restrictions were still imposed on the issue of one-off passes for journalists.<sup>169</sup>

Legal actions taken by individual state bodies in response to press criticism were equally important in limiting the working space for journalists. One of the most important examples from recent years of this trend were the activities of the Polish Security Printing Works, which in 2016 sued the publisher of *Gazeta Wyborcza* demanding an apology and 100,000 zloty compensation for seven publications concerning the situation at the Polish Security Printing Works. The lawsuits concerned not only the facts described in the press articles, but also the terms used in them (e.g. "The Polish Security Printing Works tries to freeze the *Wyborcza* newspaper").<sup>170</sup> In turn, in relation to *Newsweek*, the Polish Security Printing Works demanded one million zloty in damages, and its president filed a private indictment against the author of the publication.<sup>171</sup> In another case, in response to articles published by *Gazeta Wyborcza* journalists on changes to criminal proceedings and the activities of the prosecutor's office, the National Prosecutor's Office sent letters demanding an apology and payment of 60,000 zloty to charity. The National Prosecutor's Office perceived the journalists' publications as "activity against the prosecutor's office".<sup>172</sup> In turn, the National Bank

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168 *The President of the Constitutional Tribunal, Julia Przyłębska, has introduced a ban on access by journalists to the Tribunal, tokfm.pl*, available at: <http://www.tokfm.pl/Tokfm/7,130517,21223155,prezes-tk-julia-przylebska-wprowadzila-zakaz-wstępu-do-trybunalu.html> (accessed: 16/09/2019).

169 D. Flis, *Kuchciński has even banned journalists from the Sejm. Contrary to the Constitution. To hide the protest by carers of the disabled, Oko.press*, available at: <https://oko.press/kuchcinski-zakazal-wstępu-do-sejmu-nawet-dziennikarzom-wbrew-konstytucji-zeby-ukryc-protest-opiekunow-niepełnosprawnych/> (accessed: 21/09/2019).

170 *Polish Security Printing Works - 0, "Wyborcza" newspaper - 2. Lawsuit rejected, wyborcza.pl*, available at: <http://wyborcza.pl/7,75398,23074489,pwpw-wyborcza-0-2-pozew-oddalony.html> (accessed: 16/09/2019).

171 *The Management Board of the Polish Security Printing Works demands one million zloty from "Newsweek". HFHR: Suppression of press criticism, wyborcza.pl*, available at: <http://wyborcza.pl/1,75398,20785162,zarząd-pwpw-zada-miliona-złoty-od-newsweeka-to-tlumienie.html> (accessed: 16/09/2019).

172 *The National Prosecutor's Office is threatening to sue journalists. It demands an apology and 60,000 zloty*, available at: <https://wiadomosci.wp.pl/prokuratura-krajowa-grozi-dziennikarzom-pozwami-zada-przeprosin-i-60-tys-zl-6127806699960449a> (accessed: 16/09/2019).

of Poland, in its motion to secure a lawsuit concerning the infringement of personal rights, demanded that the media be ordered to remove articles connecting the NBP with the former head of the Polish Financial Supervision Authority.<sup>173</sup>

As in previous years, the period from 2015 to 2019 also saw cases of the prosecution of journalists on the basis of article 212 of the Code of Criminal Procedure (defamation). TVP lodged a suit against the journalists Ewa Siedlecka and Wojciech Czuchnowski for their comments on TVP after the murder of the President of Gdańsk, Paweł Adamowicz.<sup>174</sup> What is more, over the last four years journalists have also been faced with the threat of accusations of insulting or humiliating a constitutional body of the Republic of Poland (the case of Marcin Piątek after the publication of a book about Antoni Macierewicz,<sup>175</sup> or the investigation after the notification sent by the President of the Constitutional Tribunal Julia Przyłębska regarding a publication by *Gazeta Wyborcza*<sup>176</sup>), or propagating Nazi ideology (the case of TVN operator Piotr Wacowski, who prepared a report about a neo-Nazi group in Silesia).<sup>177</sup>

Between 2015 and 2019, there were also at least several worrying cases where state authorities demanded that journalists be released from professional confidentiality. One such case was the case of Wojciech Bojanowski, who published material from the police station in Wrocław, where Igor Stachowiak died in police detention. The prosecution first requested the court to order the journalist be released from professional

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173 M. Domagalski, *Polish Financial Supervision Authority affair: The National Bank of Poland's motions to the court regarding the publication of texts in the media*, *Rzeczpospolita*, available at: <https://www.rp.pl/Prawo-prasowe/312039971-Afera-KNF-wnioski-NBP-do-sadu-ws-publikacji-tekstow-w-mediach.html> (accessed: 21/09/2019).

174 M. Jątoszewski, *TVP is pursuing Ewa Siedlecka and Wojciech Czuchnowski. The journalists reply: "They will not intimidate us"*, *Oko.press*, available at: <https://oko.press/tvp-sciga-ewe-siedlecka-i-wojciecha-czuchnowskiego-dziennikarze-odpowiadaja-nie-zastrasza-nas/> (accessed: 21/09/2019).

175 *The next instalment of the Macierewicz-Piątek conflict*, *Onet.pl*, available at: <https://wiadomosci.onet.pl/kraj/kolejna-odslona-konfliktu-macierewicz-piatek/hj4jyp1> (accessed: 21/09/2019).

176 W. Czuchnowski, *"We have insulted a state authority". There is an investigation against "Wyborcza"*, *Wyborcza.pl*, available at: <http://wyborcza.pl/7,75398,22880545,zniewazyl-ismy-organ-jest-sledztwo-przeciwko-wyborczej.html> (accessed: 21/09/2019).

177 *The prosecutor's office has dismissed the investigation against Piotr Wacowski from TVN*, *Press*, available at: <https://www.press.pl/tresc/56416.prokuratura-umorzyła-sledztwo-przeciwko-piotrowi-wacowskiemu-z-tvn> (accessed: 21/09/2019).

confidentiality and then withdrew its request.<sup>178</sup> In turn, after broadcasting a report in Polsat News about a person wanted on a charge of disseminating child pornography, the journalist Ewa Źarska was called upon to disclose her informant's data to the prosecutor's office.<sup>179</sup>

Along with the progressing polarization of the media, more and more often there are also cases of attacks on journalists reporting on, for example, public gatherings. Such events took place, for example, in the Białowieża Forest, where a Polsat News cameraman reporting on the protest by defenders of the Forest was beaten by two attackers.<sup>180</sup> In turn, a journalist from TVP Info reporting on the protests in front of the Sejm in July, 2017, was shouted down by protesters – the protesters crowding around the TVP film crew shouted “propaganda”.<sup>181</sup>

### **The financing of private media**

In the period from 2015 to 2019, changes in the way in which individual private media were financially supported were also clearly visible. In this area, the negative practices already observed in the past have worsened. During the first three years of the rule of the Law and Justice party, the amount of money that State Treasury companies allocate to five press titles, which in terms of their editorial profiles are close to the ruling camp (Gazeta Polska, Gazeta Polska Codziennie, Sieć, Do Rzeczy and Nasz Dziennik), increased almost 15-fold.<sup>182</sup>

A similar practice of supporting media favourable to the authorities can also be observed in relation to television and radio stations. Since 2015, TVN has seen

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178 *The prosecutor's office does not want Wojciech Bojanowski to reveal his informant in the Stachowiak case*, wyborcza.pl, available at: <http://wyborcza.pl/7,75398,22679151,prokuratura-odstapila-od-scigania-wojciecha-bojanowskiego-ktory.html> (accessed: 16/09/2019).

179 *The prosecutor's office demands the disclosure of a journalistic secret. The position of HFHR, Helsinki Foundation for Human Rights*, available at: <https://www.hfhr.pl/prokuratura-za-da-ujawnienia-tajemnicy-dziennikarskiej-stanowisko-hfpc/> (accessed: 21/09/2019).

180 *One year in prison for assault on a Polsat News cameraman*, polsatnews.pl, available at: <https://www.polsatnews.pl/wiadomosc/2019-07-29/rok-wiezienia-za-napasc-na-operatora-polsat-news/> (accessed: 16/09/2019).

181 *TVP Info film crew shouted down by demonstrators, including the deputy editor of “Wprost”, Press*, available at: [https://www.press.pl/tresc/49301,ekipa-tvp-info-zakrzyczana-przez-manifestantow\\_-m\\_in\\_przez-wicenaczelnego-](https://www.press.pl/tresc/49301,ekipa-tvp-info-zakrzyczana-przez-manifestantow_-m_in_przez-wicenaczelnego-) (accessed: 16/09/2019).

182 *State companies pump millions into pro-government newspapers*, forbes.pl, available at: <https://www.forbes.pl/biznes/reklamy-panstwowych-spolek-w-prawicowych-mediach/jzbjpp7> (accessed: 16/09/2019).

a significant fall in advertising commissions from State Treasury companies – in 2015 TVN had 22.3% of the shares in orders from State Treasury companies to purchase services, and in the first half of 2017 only 1.6% at the expense of an increase in orders for Public Television and Polsat. Also in the case of radio, up to 2015, the RMF group received the highest number of orders for media services from State Treasury companies (a 33.3% share in the orders in 2015). However, in the first half of 2017, Polish Radio became the leader, and the share of the RMF Group decreased to 27.1%.<sup>183</sup>

### **Amendment of the act on the Institute of National Remembrance**

In February, 2018, the Sejm adopted an amendment to the act on the Institute of National Remembrance. The amendment introduced two controversial solutions. Firstly, under the new provisions, the crime consisting of the public attribution to the Polish nation or the Republic of Poland of responsibility for any crimes against humanity (including crimes committed during World War II) was to be punishable by a penalty of up to three years' imprisonment. Inadvertent action in this respect would also be punishable. The regulations posed a serious threat to the freedom of academic debate and historical publications on, for example, the participation of Poles in German crimes. Under the influence of international criticism, the ruling majority withdrew from these solutions, adopting another amendment to the law in June, 2018, which abolished the disputed provisions.<sup>184</sup>

However, the February amendment to the Institute of National Remembrance's act also introduced provisions governing civil liability for slandering the reputation of the Republic of Poland or the Polish Nation. In the light of these regulations (which are not limited to historical debate only), an organisation which, within the scope of its statutory tasks, has the task of protecting the good name of Poland may bring an action for infringement of the good name of Poland. Critics of this solution pointed out that

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183 *Expenditure by state-owned companies on sponsorship, media and advisory services. Report of audit findings, Supreme Chamber of Control*, available at: <https://www.nik.gov.pl/plik/id,18371,vp,20970.pdf> (accessed: 16/09/2019).

184 *The Sejm has amended the act on the Institute of National Remembrance: The Law and Justice party has departed from criminal law provisions*, available at: <https://www.gazetaprawna.pl/artykuly/1152438,sejm-zmiana-ustawy-o-ipn-bez-przepisow-karnych.html> (accessed: 16/09/2019).



the legislation could be used to suppress criticism of the government's actions.<sup>185</sup> So far, one such lawsuit has been brought against an Argentinian newspaper.<sup>186</sup>

## WOMEN'S RIGHTS

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Between 2015 and 2019, the protection of women's rights was dominated by two main topics in the public discourse: the application of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the so-called Istanbul Convention) and changes in the law on access to legal abortion.

### Ratification of the Istanbul Convention

In January, 2015, after heated discussions, the Sejm adopted the Council of Europe Convention on preventing and combating violence against women and domestic violence. The MPs of the Law and Justice party (then in opposition), strongly protested against the adoption of the Convention, pointing out that it poses a threat to the traditional definition and role of the family and will also serve to “promote gender ideology”.

*This law is harmful, under the guise of domestic violence it applies all pathologies to the family, to tradition, smuggling in hostile content contrary to nature and it is imbued with leftist ideology. People support it, but only because the name is catchy.*

**Andrzej Duda**<sup>187</sup>

The Convention, which in fact provides a framework for preventing violence against women in terms of preventing, combating and prosecuting domestic violence and violence against women, has been repeatedly criticised by right-wing MPs and

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185 *Position of the Helsinki Foundation for Human Rights on the amendment of the act on the Institute of National Remembrance, Helsinki Foundation for Human Rights*, available at: <https://www.hfhr.pl/ustawa-o-ipn-moze-zagrozc-swobodzie-wypowiedzi- stanowisko-hfpc/> (accessed 16/09/2019).

186 *The Polish League Against Defamation sues the Argentinean Pagina news service 12. The local journalist associations are disgusted*, *dziennik.pl*, available at: <https://wiadomosci.dziennik.pl/polityka/artykuly/569929,nowa-ustawa-o-ipn-reduta-dobrego-imienia-pozywa-argentyński-dziennik-pagina-12.html> (accessed: 21/09/2019).

187 *The Sejm has adopted the anti-violence convention. After an ill-tempered debate*, *dziennik.pl*, available at: <https://wiadomosci.dziennik.pl/polityka/artykuly/482195,konwencja-antyprzemocowa-przyjeta-sejm-przeglosowal-ratyfikacje.html> (accessed 12/09/2019).

conservative NGOs. Less than a year and a half after the ratification of the Convention, the media reported that the government was working on a draft law to repeal the Convention.<sup>188</sup> Although this process was never commenced, for more than three years the government has not taken any action to implement the provisions of the Convention – no institution has been established to coordinate government plans to prevent violence, no provisions of the Code of Criminal Procedure to define rape or economic violence have been adapted to the provisions of the Convention, and no specialist assistance system for victims of violence has been established<sup>189</sup>. It was not until 2019 that the government presented a draft of new legislation, which includes, among other things, the possibility for the police to order the perpetrator of domestic violence who threatens life or health to immediately leave the premises occupied by a victim of violence.<sup>190</sup>

Apart from the failure to implement the provisions of the Istanbul Convention, no significant or meaningful efforts were made in 2015-2019 to develop a support system for victims of domestic violence. On the contrary, the draft amendment to the act on Counteracting Domestic Violence, drafted by the Ministry of the Family, Labour and Social Policy and disclosed by the media at the beginning of 2019, indicated that the government was working on solutions that would aggravate the situation of victims. In the light of the project, the definition of domestic violence, for example, would be amended to include “repeated intentional acts violating general rights and personal rights” rather than “one-off acts of violence”. After a wave of criticism, the government withdrew from this project.<sup>191</sup>

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188 R. Kowalski, *The government of the Law and Justice party is preparing to withdraw from the anti-violence convention*, available at: <https://oko.press/rzad-pis-przygotowuje-wypowiedzenie-konwencji-antyprzemocowej/> (accessed 12/09/2019).

189 A. Ambroziak, *Duda on the anti-violence convention: “above all not to apply it”. Polish law is “very good”*, available at: <https://oko.press/duda-trzeba-stosowac-konwen-antyprzemocowej-polskie-prawo-dobre/> (accessed on 12<sup>th</sup> September, 2019). See also the *Opinion amicus curiae of the Helsinki Foundation for Human Rights on the case of A. K. v. Poland*, available at: [http://beta.hfhr.pl/wp-content/uploads/2019/01/A.-K.-p.-Polsce-amicus\\_EN.pdf](http://beta.hfhr.pl/wp-content/uploads/2019/01/A.-K.-p.-Polsce-amicus_EN.pdf) (accessed 12/09/2019).

190 Draft act amending the act – the Civil Procedure Code and certain other acts, Government Legislation Centre, available at: <https://legislacja.rcl.gov.pl/projekt/12322070/katalog/12602868#12602868> (accessed: 21/09/2019).

191 *The Prime Minister withdraws the controversial draft amendments to the act on domestic violence*, tvn24.pl, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/jednorazowa-przemoc-nie-bylaby-przemoca-projekt-nowelizacji-ustawy-o-przemocy-w-rodzynie,896663.html> (accessed 12/09/2019).

## Access to abortion

In the period from 2015 to 2019, two attempts were made to tighten up the rules on access to legal abortion. In 2016, the “Stop abortion” Legislative Initiative Committee submitted to the Sejm a citizens’ bill prohibiting abortion in every case. In addition, the project provided for criminal liability for inadvertent acts that would result in death or injury to the foetus. In September, 2016, the project was submitted to the Sejm. With the commencement of legislative work on this project, social protests against stricter anti-abortion laws increased. In September, 2016, a grassroots initiative called the All-Poland Women’s Strike was launched, which organised numerous protests throughout Poland against the bill. At the peak of the protests, on 3rd October, 2016, the so-called Black Monday, protests took place in over 200 towns and cities in Poland and abroad<sup>192</sup> (it is estimated that 30,000 people took part in the protests in Warsaw alone).<sup>193</sup> Three days later, the Sejm rejected the bill at its second reading.

*We only came to the conclusion, by simply observing the social situation, that it would be a project [a draft law on banning abortion – editor], which would lead to processes, the effects of which would be exactly the opposite to what you have been talking about here [protection of the foetus].*

**Jarosław Kaczyński MP, referring to the presentation in the Sejm by a representative of the “Stop Abortion” Legislative Committee.**

In 2017, the Sejm started work on a second citizens’ bill introducing a ban on abortion, which was introduced by the “#Stop Abortion” Legislative Committee. However, since January, 2018, when the draft was sent to committee meetings, no work has been undertaken on it.<sup>194</sup>

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192 *Black Monday*, [strajkkobiet.eu](http://strajkkobiet.eu), available at: <http://strajkkobiet.eu/czarny-poniedzialek/> (accessed 12/09/2019).

193 “Black Monday”. *Approximately 30,000 people at the demonstration in Warsaw*, wp.pl, available at: <https://wiadomosci.wp.pl/czarny-poniedzialek-na-manifestacji-w-warszawie-ok-30-tys-osob-6043662168585345a> (accessed 12/09/2019).

194 Civic draft act amending the act of 7<sup>th</sup> January, 1993, on family planning, protection of the human foetus and the conditions for permitting an abortion. The course of the legislative process, available at: <http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=CDD22B-469F73D121C125820B0057A399> (accessed 12/09/2019).

What is more, no solutions have been introduced so far which would ensure real access to abortion procedures, and in particular would comply with the judgement of the Constitutional Tribunal of 2015,<sup>195</sup> which declared the regulation of the act on the professions of doctor and dentist incompatible with the Constitution of the Republic of Poland in so far as they obliged a doctor refraining from providing a health service incompatible with his conscience to indicate real possibilities of obtaining such a service from another doctor or another medical entity (the so-called conscience clause). The ruling of the Constitutional Tribunal means that currently there is no legal provision in Polish law which could order a doctor or other members of the staff in a health care institution to indicate to a patient a genuine possibility of obtaining health care in another place in the event of the refusal to perform a health service on the basis of the conscientious objection clause. The legal situation which arose after the expiry of the binding force of the provisions challenged by the Constitutional Tribunal resulted in a significant disproportion between the protection of the freedom of conscience of doctors and the right of patients to receive health care services. In 2018 and March, 2019, the Committee of Ministers of the Council of Europe called on the Polish government to ensure an effective procedure to ensure access to legal abortion procedures.<sup>196</sup>

### **Attacks on women's organisations**

At the same time, organisations dealing with anti-discrimination and protection of rights were struggling with unprecedented difficulties. In 2017, police searched the offices of the women's organisations BABA and the Women's Rights Centre, and secured the documentation maintained by these organisations (see → **Non-governmental organisations, p. 55**). In turn, the Minister of Family, Labour and Social Policy, after an inquiry by one of the right-wing MPs concerning the use of funds from the ministerial fund for anti-discrimination projects, terminated the grant agreement with the Autonomia Foundation, despite the fact that an audit of the project did not reveal any infringements related to the spending of these funds.<sup>197</sup>

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195 Judgement of the Constitutional Tribunal of 7<sup>th</sup> October, 2015, ref. No. K 12/14.

196 Decision of the Committee of Ministers of the Council of Europe of 14<sup>th</sup> March, 2019, No. CM/ Del/Dec(2019)1340/H46-13, available at: <http://hudoc.exec.coe.int/eng?i=004-20614>

197 *The ministry terminates the agreement with the Autonomia Foundation after a "sudden inspection"*, ngo.pl, available at: <https://publicystyka.ngo.pl/ministerstwo-zrywa-umowe-z-fundacja-autonomia-po-naglej-kontroli> (accessed: 12/09/2019).

## LGBTQI RIGHTS

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For years, Poland has been among the European Union countries that have had the lowest standard of protection of LGBTQI rights.<sup>198</sup> Polish law does not provide for punishment for hate crimes motivated by homophobia and does not provide for any regulations allowing for the establishment of same-sex unions, and thus for the regulation of joint custody of children or inheritance. In addition, in the years 2015-2019, the standard of protection of LGBTQI rights deteriorated rapidly as a result of the actions of state authorities and the creation by some media of a negative image of LGBTQI people.

### The activities of the Prosecutor General and LGBTQI rights

Polish same-sex couples who have entered into a marriage abroad in Poland must apply for a transcript of the marriage record and record this fact in their records at the Registry Office. Registry offices usually refuse to record a marriage with a person of the same sex and then the case goes to court. At the beginning of 2017, the Deputy Prosecutor General sent a letter to all regional prosecution offices with the Deputy Prosecutor General indicating that prosecutors should join the proceedings for the transcription of the marriage record of same-sex couples in order to protect the rule of law.<sup>199</sup>

A similar fate also affected minors of Polish citizens born in same-sex couples. For similar reasons, the prosecution questioned the transcription of birth certificates of children from such unions or supported Registry Offices, which refused to transcribe birth certificates in which people of the same sex were entered as the parents of the child.<sup>200</sup> The case of one such refusal to transcribe was finally settled in 2018. The Supreme Administrative Court ruled on the necessity of entering a birth certificate containing the data of two women as parents in the Polish civil register -status

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198 Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis – Update 2015, European Union Agency for Fundamental Rights, fra.europa.eu, available at: <https://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015> (accessed: 16/09/2019).

199 *It is not permitted to register a marriage concluded by persons of the same sex in Poland, the National Public Prosecutor's Office*, available at: <https://pk.gov.pl/dzialalnosc/dzialalnosc-cywilna-i-administracyjna/niedopuszczalne-jest-zarejestrowanie-w-polsce-malzenstwa-zawartego-przez-osoby-tej-samej-plci/> (accessed: 21/09/2019).

200 *Provincial Administrative Court judgement on the transcription of a birth certificate for an LGBT family*, available at: <http://www.hfhr.pl/wyrok-wsa-w-sprawie-transkrypcji-aktu-urodzenia-dziecka-rodziny-lgbt/> (accessed 16/09/2019).

records.<sup>201</sup> Despite this ruling, the public prosecutor's office continues to take action to challenge the interpretation adopted by the Supreme Administrative Court.<sup>202</sup>

The General Prosecutor has also used his powers in other cases to limit the protection of LGBT rights. In 2015, an employee of a printing works in Łódź refused to carry out an order for an LGBT organisation. The printer was convicted for refusing to provide the service on the basis of the provisions of the Code of Misdemeanours (article 138 of the Code). The Prosecutor General instructed the public prosecutor to join the case and the convicted printer appealed against the judgement. When the court of second instance again found the printer guilty, the prosecutor filed a cassation appeal with the Supreme Court. At the same time, the Prosecutor General filed a motion with the Constitutional Tribunal to declare the provision on the basis of which the printer was sentenced to be unconstitutional. In June, 2018, the Supreme Court dismissed the cassation appeal<sup>203</sup>, but a year later the Constitutional Tribunal ruled that the provision of the Code of Misdemeanours was unconstitutional.<sup>204</sup>

### Local government resolutions

The stigmatisation of LGBTQI people intensified in early 2019, when in response to the LGBTQI Declaration signed by the Mayor of Warsaw, Rafał Trzaskowski, some local government authorities began to adopt resolutions "against LGBT ideology". The resolutions are contrary to the prohibition of discrimination in article 32 of the Constitution and stigmatise LGBTQI people. By July, 2019, similar resolutions had been adopted in 26 local government authorities (from resolutions of the voivodship councils to commune councils).<sup>205</sup>

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201 Judgement of the Supreme Administrative Court of 10<sup>th</sup> October, 2018, ref. No. II OSK 2552/16, LEX No. 2586953.

202 *The prosecutor's office abused its rights by challenging the Supreme Administrative Court's judgement on the birth certificate of a child in a union of two women, Commissioner for Human Rights*, available at: <https://www.rpo.gov.pl/pl/content/rpo-prokurator-na-duzyl-prawa-kwestionujac-wyrok-nsa-ws-aktu-urodzenia-dziecka-w-zwiazku-dwoch-kobiet> (accessed: 16/09/2019).

203 *The case of a printer from Łódź - from a printing house to the Constitutional Tribunal, Campaign Against Homophobia*, available at: <https://kph.org.pl/sprawa-drukarza-z-lodzi-od-drukarni-do-trybunalu-konstytucyjnego/> (accessed: 16/09/2019).

204 Judgement of the Constitutional Tribunal of 26<sup>th</sup> June, 2019, in case K 16/17, Journal of Laws from 2019, item 1238.

205 A. Ambroziak, *Gay and lesbian-free zones? Lawyers: local government resolutions against LGBT persons illegal*, oko.press, available at: <https://oko.press/prawnicy-uchwaly-samorzadowcow-przeciwko-osobom-lgbt-nielegalne/> (accessed: 16/09/2019).

Attacks on LGBTQI people increased during the campaign to the European Parliament in May, 2019, and the organisation of Equality Marches in June, 2019. One of the manifestations of such activities was the activity of *Gazeta Polska*, which after the events connected with the Equality March in Białystok (see → **Freedom of assembly**, p. 63), added a “LGBT Free Zone” sticker to its edition. As soon as the court decided to secure a lawsuit filed by one of the LGBT activists against the publisher of *Gazeta Wyborcza*, the editorial staff changed the stickers to a version with the inscription “LGBT ideology-free zone”.<sup>206</sup> In August, 2019, the Warsaw prosecutor’s office announced that it would not start an investigation into the stickers of *Gazeta Polska*.<sup>207</sup>

### **Attacks on LGBTQI organisations and activists**

Over the last four years, there have also been attacks on the headquarters of some NGOs. In 2016, unknown perpetrators broke into or threw paint over the offices of LGBT organisations (the Stonewall Group, the Campaign Against Homophobia or the Lambda Warsaw Association)<sup>208</sup> (see → **Non-governmental organisations**, p. 55).

## **THE RIGHTS OF FOREIGN NATIONALS**

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The migration crisis of 2015 had a major impact on migration policy in Europe. European Union Member States have been confronted with the need to deal with a significant group of persons seeking international protection in their territory or making a decision to migrate for economic reasons. In the years 2015-2016, a total

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206 *Gay and lesbian-free zones? Lawyers: resolutions of local government against LGBT people illegal*, *newsweek.pl*, available at: <https://www.newsweek.pl/polska/strefa-wolna-od-ideologii-lgbt-gazeta-polska-zmienia-tresc-stickers/wbz1n5r> and *Help ourselves to defend against the offensive of LGBT ideology. “Gazeta Polska” with a sticker still available*, *independent.pl*, available at: <https://niezalezna.pl/281660-pomagajmy-sobie-w-obronie-przed-ofensywa-ideologii-lgbt-gazeta-polska-z-naklejka-wciaz-dostepna> (accessed: 16/09/2019).

207 *There will be no prosecutor’s investigation of the “LGBT-free zone stickers”*, *polsatnews.pl*, available at: <https://www.polsatnews.pl/wiadomosc/2019-08-07/nie-bedzie-dochodzenia-ws-naklejek-strefa-wolna-od-lgbt/> (accessed: 16/09/2019).

208 *Another attack on an organisation concerned with LGBT rights*, *Helsinki Foundation for Human Rights*, available at: <https://www.hfhr.pl/kolejny-atak-na-organizacje-zajmujaca-sie-prawami-osob-lgbt/> (accessed: 12/09/2019).

of four times more people applied for international protection at the borders of the European Union than in 2014.<sup>209</sup>

### **Foreign nationals in the public discourse**

The height of the migration crisis coincided in Poland with the beginning of the election campaign to the Sejm and Senate, constituting one of its most important motives. Unfortunately, the public debate in this aspect was shaped not by substantive arguments, but by stirring up emotions and playing on fears. The obligations of the Republic of Poland resulting from acts of international law were completely disregarded.

*Poland has never been a country with colonies, and therefore we have no obligations towards immigrants.*<sup>210</sup>

#### **Mariusz Błaszczak, MP to the 7<sup>th</sup> term Sejm**

After the parliamentary elections, Beata Szydło's government opposed the quotas for the relocation of refugees adopted by the government of Ewa Kopacz on the grounds that it wanted to provide and finance humanitarian aid to communities affected by war or famine in their place of residence.<sup>211</sup>

In this context, the increase in the amount of money earmarked for humanitarian aid should be welcomed. However, there must be a question about the attempts of the ruling parliamentary majority to use xenophobic arguments at the same time. Their most important element was the #SecureSelf-Government<sup>212</sup> spot presented in the election campaign before the local elections, threatening, among other things, an influx of Muslims and the creation of “no-go” zones by them.<sup>213</sup>

209 *Asylum applications (non-EU) in the EU-28 Member States, 2008-2018, Eurostat*, available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics) (accessed: 12/09/2019).

210 R. Grochol, A. Kondzińska, *Polish politicians play the refugee card in the campaign. Szydło: Germany wants to blackmail Europe*, Wyborcza.pl, available at: <http://wyborcza.pl/1,75398,18746167,polscy-politycy-graja-uchodzcami-w-kampanii-szydlo-niemcy.html> (accessed: 12/09/2019).

211 *The position of @pisorgpl on immigration policy*, available at: <https://twitter.com/beatamk/status/947130171169132549?s=20> (accessed on 12<sup>th</sup> September, 2019).

212 Spot available at: <https://twitter.com/pisorgpl/status/1052530980190334977?s=20> (accessed 16/09/2019).

213 A. Mikulska – Joles, *Migrants, Refugees and Xenophobia in the 2018 Election Campaign*, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/wp-content/>



*I was ashamed. It was a bad spot.*<sup>214</sup>

**Jarosław Gowin, Deputy Prime Minister**

## **Hate crimes**

Along with an escalation of the negative message around foreigners, the problem of preventing hate crimes is also worsening. In the years 2013 – 2016, the number of proceedings in this respect doubled. In 2017, it fell by 11% to 1449 cases, with many crimes remaining unreported to the police. Research by the Commissioner for Human Rights shows that only 5% of hate crimes are reported to the police.<sup>215</sup> It is also important that, in recent years, the profile of hate crimes victims has changed. While until six years ago these acts were most often directed against people of Jewish or Roma nationality, in 2017 they most often affected Muslims and Ukrainians.<sup>216</sup>

## **Difficulties in obtaining international protection**

Since 2015, there has been a significant increase in the number of persons refused international protection. The number of cases where a person applying for entry to Poland has been refused has also started to increase.<sup>217</sup> In 2016, Poland issued the largest number of decisions on refusal of entry out of all EU Member States, i.e. as many as 118,202 (in total there were 206,656 decisions, including 151,167 issued at land borders). As many as 75% of foreign nationals who were refused entry to

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[uploads/2018/12/Raport-monitoring-mowy-nienawi%C5%9Bci-w-kampanii-wyborczej.pdf](#) (accessed: 12/09/2019).

214 Gowin: *I was ashamed, it was a bad spot*, available at: <https://www.tvn24.pl/wiadomosci-z-kraju,3/rozmowa-piaseckiego-spot-pis-o-uchodzicach-gowin-komentuje,878518.html> (accessed: 12/09/2019).

215 *Study on the nature and scale of unreported hate crimes against members of selected communities in Poland*, Commissioner for Human Rights, available at: <https://www.rpo.gov.pl/sites/default/files/Badanie%20charakteru%20i%20skali%20niezg%C5%82aszanych%20przest%C4%99pstw%20z%20nienawi%C5%9Bci.pdf>, (accessed: 12/09/2019).

216 *Extracts from reports on cases concerning crimes committed for racist, anti-Semitic or xenophobic motives conducted in organisational units of the prosecutor's office, National Public Prosecutor's Office*, available at: <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/> (accessed: 12/09/2019).

217 J. Białas, M. Górczyńska, D. Witko, *Access to the asylum procedure at the external borders of Poland. Current state and future challenges*, Helsinki Foundation for Human Rights, available at: <https://www.hfhr.pl/wp-content/uploads/2019/04/Dost%C4%99p-do-procedury-azylowej-v2.pdf> (accessed: 12/09/2019).

the territory of Poland tried to cross the border at the border crossing point in Terespol.<sup>218</sup>

It was at this border crossing that the effects of the Polish authorities' policy towards refugees were visible. Monitoring by the Commissioner for Human Rights<sup>219</sup> and non-governmental organisations showed "the existence of systemic irregularities consisting of refusing to accept applications for protection from foreign nationals"<sup>220</sup> by the Border Guard. Persons trying to cross the border were prevented from submitting applications for protection and were denied the assistance of plenipotentiaries and representatives of non-governmental organisations. Those seeking protection were returned to the territory of Belarus. Many of them, including children, then travelled to Brest railway station, making further attempts to apply for international protection. At its peak it reached as many as 3000 people.<sup>221</sup>

Moreover, in four cases, the Polish authorities disregarded the decisions of the European Court of Human Rights to apply a provisional measure prohibiting the return of asylum seekers to the territory of Belarus.

This policy has resulted in a progressive decrease in the number of people seeking international protection in Poland. An attempt to amend the act on granting protection to foreign nationals within the territory of the Republic of Poland is a reflection of this fact. These attempts were intended to make it more difficult for Poland to grant international protection, easier to detain persons undertaking such efforts (the so-called border procedures) and to return them to seemingly safe countries, e.g. Belarus.

On the other hand, it should be noted that Poland has still not complied with the ECtHR judgement in the *Bistieva and others v. Poland* case.<sup>222</sup> In this ruling, the

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218 Ibid., page 23.

219 *Inspection of the railway border crossing in Terespol, Commissioner for Human Rights*, available at: <https://www.rpo.gov.pl/pl/content/inspection-railway-border-crossing-terespol> (accessed: 12/09/2019).

220 J. Białas, M. Górczyńska, D. Witko, *Access to the asylum procedure at the external borders of Poland. Current state and future challenges*, Helsinki Foundation for Human Rights, available at: <https://www.hfhr.pl/wp-content/uploads/2019/04/Dost%C4%99p-do-procedury-azylowej-v2.pdf>, (accessed: 12/09/2019).

221 J. Białas, M. Górczyńska, D. Witko, *Access to the asylum procedure at the external borders of Poland. Current state and future challenges*, Helsinki Foundation for Human Rights, available at: <https://www.hfhr.pl/wp-content/uploads/2019/04/Dost%C4%99p-do-procedury-azylowej-v2.pdf>, (accessed: 12/09/2019).

222 Judgement of the ECtHR of 10<sup>th</sup> April, 2018, *Bistieva and others v. Poland*, application No. 75157/14.

European Court of Human Rights referred to the practice of placing families with children in guarded centres for foreign nationals and not applying alternative non-isolation measures to them. It considered that the placement of a Chechen family seeking international protection in a guarded centre for foreign nationals for a period of more than 5 months constituted a breach of article 8 of the Convention.

## **HUMAN RIGHTS AND SECURITY**

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In the period from 2015 to 2019, a number of developments in criminal law and criminal policy were introduced, which significantly reduced the rights of defendants and posed a significant threat to, inter alia, the right to privacy. At the same time, the last four years have also been a wasted opportunity to remedy systemic problems (e.g. conditions in prisons, better health protection in prisons and preventing police brutality).

### **Penal populism**

During the term of the Sejm, in the years 2015-2019, the Code of Criminal Procedure was amended more than 20 times. Some of these changes should be assessed positively, e.g. the introduction of provisions allowing for the prosecution of crimes consisting of failing to notify law enforcement agencies of the crime of sexual exploitation of a minor and solutions enabling an improvement in pursuing the crime of non-payment of alimony. On the other hand, the vast majority of changes were motivated primarily by the assumption that criminal law is an effective means of solving most social problems and changes in this area should take place regardless of the indications of science, and overlooking any data indicating a decrease in crime or the increasing safety and security of Poles.<sup>223</sup>

In this context, the most obvious example of penal populism was the amendment of the Code of Criminal Procedure of 13<sup>th</sup> June, 2019. Its adoption was presented as an expression of the fight against paedophilia, despite the fact that the related issues constituted a small part of the amendment. The hasty mode of work on the draft, the non-participation of experts in the field of criminal law and the lack of full public

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223 Social Opinion Research Centre, Research communication No. 61/2018, A sense of security and the threat of crime, available at: [https://www.cbos.pl/SPISKOM.POL/2018/K\\_061\\_18.PDF](https://www.cbos.pl/SPISKOM.POL/2018/K_061_18.PDF) (accessed: 12/09/2019).

consultation resulted in the fact that the draft adopted by the Sejm was characterised by numerous errors.<sup>224</sup> One of them was the abolition of punishment for the crime of bringing a minor under the age of 15 to sexual intercourse,<sup>225</sup> which was abandoned only at the Senate stage. Finally, the procedure for the adoption of the law, in particular the omission in its procedure of requirements reserved for legal codes, were decisive in the President of the Republic of Poland requesting that its constitutionality be examined by the Constitutional Tribunal.

### **Procedural guarantees in criminal proceedings**

Together with the amendments to the Code of Criminal Procedure a number of amendments to the Code of Criminal Procedure were also introduced, which favoured the position of the prosecutor in proceedings (see → “**Supervising” prosecutor, p. 42**) and weakened procedural guarantees in the criminal process.

One of the key examples of the latter was the introduction of regulations abolishing the ban on the use of criminal evidence in criminal proceedings. The added wording of article 168a requires a criminal court to accept evidence obtained by means of a criminal act. The only exception in this respect concerns evidence obtained by a public officer who has committed murder, deprivation of liberty or intentional bodily harm. As a result, it became legal to include evidence obtained as a result of a police officer making criminal threats against the accused or using non-physical violence against him or her. In 2019, the Committee Against Torture (CAT) called on Poland to withdraw from this regulation.<sup>226</sup>

The basic procedural guarantees protecting the individual against the risk of ill-treatment are still not implemented. People deprived of their liberty, contrary to European Union law,<sup>227</sup> have little chance of being accompanied by a lawyer or solic-

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224 A. Barczak - Oplustil, W. Górowski, M. Iwański, M. Małecki, W. Zontek, S. Tarapata, W. Wróbel, J. Duda, *Opinion on the act amending the Code of Criminal Procedure and certain other acts adopted by the Sejm of the Republic of Poland at its 81<sup>st</sup> session on 16<sup>th</sup> May, 2019, Cracow Institute of Criminal Law*, available at: [https://kipk.pl/dokumenty/kipk\\_opinia\\_nowelizacja\\_k\\_2019.pdf](https://kipk.pl/dokumenty/kipk_opinia_nowelizacja_k_2019.pdf) (accessed: 16/09/2019).

225 Ibid.

226 Concluding observations on the seventh periodic report of Poland, CAT, available at: [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT\\_C\\_POL\\_CO\\_7\\_35715\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf) (accessed: 12/09/2019).

227 Directive 2013/48/EU of the European Parliament and of the Council of 22<sup>nd</sup> October, 2013, on the right of access to a lawyer in criminal proceedings and European arrest warrant

itor during their first police questioning. It is even worse with providing such help to people who cannot afford it. Procedural acts carried out in such conditions are not necessarily recorded by audio-video devices.

The increasing number of requests for pre-trial detention is also worrying. While in 2015 prosecutors issued 13,665<sup>228</sup> requests for pre-trial detention, in 2018 there were already 19,655 requests for pre-trial detention.<sup>229</sup> This trend still faces relatively little resistance from the courts, which accept 90% of requests for pre-trial detention.

### **The situation in penal institutions**

One of the inseparable consequences of penal populism in the development of new legislation is the increase in sanctions for criminal offences. This in turn entails the risk of an increased population of penal facilities.

According to statistics from the Prison Service, in recent years the average length of imprisonment served in the Polish penal system has systematically increased. Whereas in 2012 such a penalty lasted an average of 32.52 months, its average length is now 39.07 months.<sup>230</sup>

For years, the problem has also been the high population density of penal facilities. The population density of penal facilities on 23rd August, 2019, amounted to 92.7%. On that day, there were 74,244 detainees in penal facilities, including 8,487 persons under temporary arrest.<sup>231</sup> Just four years ago, on 30<sup>th</sup> November, 2015, these numbers stood at 71,806 detainees, including 4,329 detainees under temporary arrest.<sup>232</sup> The

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proceedings and on the right to information to third parties about custody and the right to communicate with third parties and consular authorities during custody.

228 *PK-P1K statistical reports for 2015, National Public Prosecutor's Office*, available at: <https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/sprawozdania-statystyczne-pg-p1k-pg-p1ca-i-pg-1n-za-2015-r/> (accessed: 16/09/2019).

229 *PK-P1K statistical reports for 2018, National Prosecutor's Office*, available at: [https://pk.gov.pl/wp-content/uploads/2019/04/PG\\_P1K.pdf](https://pk.gov.pl/wp-content/uploads/2019/04/PG_P1K.pdf) (accessed: 16/09/2019).

230 The average length of the basic imprisonment sentence (in months, without life imprisonment and 25 years imprisonment), which has been finally decided upon. Prison Service Quarterly Statistics, Prison Service, available at: <https://sw.gov.pl/strona/Statystyka-kwartalna> (accessed: 16/09/2019).

231 *Information on the population of penitentiary units on 23rd August, 2019*, Prison Service, available at: <https://www.sw.gov.pl/assets/11/27/43/2031a1f5439a89b-61fa0529e22020345f663c766.pdf> (accessed: 28/08/2019).

232 *Monthly Statistical Information, November 2015*, Prison Service, available at: [https://www.sw.gov.pl/uploads/5846ca6d\\_f330\\_4bff\\_ada8\\_213cc0a80015\\_listopad\\_2015.pdf](https://www.sw.gov.pl/uploads/5846ca6d_f330_4bff_ada8_213cc0a80015_listopad_2015.pdf) (accessed: 12/09/2019).

number of the latter increased in less than 4 years by almost 100%. This increase is partly due to changes in the Code of Criminal Procedure increasing the potential size of a penalty for a person suspected of a crime, as well as the amendment to the Code of Criminal Procedure adopted in 2016, restoring the legal status, in which the negative premise for the application of an isolation preventive measure was a penalty exceeding 1 year of imprisonment (in the period of 2015 – 2016 it was 2 years of imprisonment).

The living conditions in penal facilities are still in conflict with international standards. The average cell area per incarcerated person amounts to 3 m<sup>2</sup>. Among the countries of the Council of Europe, a lower standard in this respect is in force only in Northern Macedonia and Hungary.<sup>233</sup> Meanwhile, the state authorities did not use the period 2015-2016, when the number of prisoners was the lowest in a decade, to gradually raise the standards for imprisonment.

Prison health care is also still a matter of concern. For years, it has been a permanent subject of complaints filed with the Helsinki Foundation for Human Rights by incarcerated persons. They complain about, among other things, the lack of access to care by specialist doctors, failure to receive prescribed medicines, or the inability to undertake treatment in non-prison health care facilities. In this context, the case of the prisoner Agnieszka Pysz, who died in the Warsaw-Grochów Detention Centre as a result of, most likely, negligence on the part of the prison service, is particularly shocking.<sup>234</sup> In addition, the manner in which this event was explained also raised considerable doubts. The appointed team was headed by a doctor personally responsible for the medical care of the deceased. The team concluded its report on this event with a note that Agnieszka Pysz did not show any symptoms of disease and her death was sudden.<sup>235</sup>

## Police violence

Health care was not the only area in which there were breaches in the ban on inhuman and degrading treatment of persons deprived of their liberty. In this context, the cases

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233 Council of Europe Annual Penal Statistics, available at: [http://wp.uni.lch/space/files/2017/04/SPACE\\_I\\_2015\\_FinalReport\\_161215\\_REV170425.pdf](http://wp.uni.lch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf) (accessed: 12/09/2019).

234 J. Schwertner, *Agnieszka. A monitored death*, onet.pl, available at: <https://wiadomosci.onet.pl/tylko-w-onecie/agnieszka-smierc-monitorowana/3t8y6y9> (accessed: 12/09/2019).

235 Information from the Minister of Justice on the causes and circumstances of the death of Ms Agnieszka Pysz, 7<sup>th</sup> June, 2017, in the Detention Centre in Warsaw's Grochów district.

of abuse of detainees by state officials were particularly shocking. The case of the death of Igor Stachowiak, who was repeatedly stunned with a taser by police officers at a police station in Wrocław, caused the most concern in this respect.<sup>236</sup> In its judgement of the District Court in Wrocław of 21<sup>st</sup> June, 2019, the court found the police officers conducting the interventions against Igor Stachowiak were guilty of the alleged acts.<sup>237</sup>

This tragedy could not have happened if those responsible for police work had not ignored the conclusions of a report commissioned by the Ministry of Internal Affairs and Administration at the end of 2015 by one of the research companies.<sup>238</sup> This report indicated that at least 585 cases of unauthorised or excessive use of violence by police officers occurred in 2014.

The use of torture and inhuman treatment by police officers remains an unresolved issue. Limiting the funding for the office of the Commissioner for Human Rights (see → **Commissioner for Human Rights, p. 45**) and, consequently, the National Torture Prevention Mechanism, may make this problem worse in the future.

## **Security and the right to privacy**

The negative changes have also had an impact on the right to privacy. The two biggest limitations in this area were related to the increased powers of special services, motivated by the need to ensure universal security.

The pretext for the adoption of the first of these was the judgement of the Constitutional Tribunal, which stated that some of the solutions to the laws regulating the work of special services were unconstitutional.<sup>239</sup> In this judgement, the Tribunal challenged, inter alia, the lack of control over telecom companies making telecommunications data available to the special services.

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236 W. Bojanowski, *Death at the police station. Report by "Superwizjer"*, tvn24.pl, available at: <https://www.tvn24.pl/superwizjer-w-tvn24,149,m/smierc-igora-stachowiaka-w-komisariacie-zobacz-reportaz-superwizjera,741647.html> (accessed: 12/09/2019).

237 *The case of Igor Stachowiak. Four former police officers convicted*, tvn24.pl, available at: <https://www.tvn24.pl/wroclaw,44/igor-stachowiak-zmarl-w-komisariacie-koniec-procesu-bylych-policjantow,935717.html> (accessed: 16/09/2019).

238 Report summarising the research on the problem of aggression directed against persons from outside the Police, with whom an officer has contact in connection with the performance of official duties, 7/12/2015, available at: <http://www.hfhr.pl/wp-content/uploads/2018/04/Raport-MSWiA.pdf> (accessed 31/08/2019).

239 Judgement of the Constitutional Tribunal of 30<sup>th</sup> July, 2014, in case K 23/11, OTK ZU 7A/2014, item 80.

The so-called “surveillance law”<sup>240</sup> adopted as a result of this judgement only seemingly fulfilled the requirements outlined in the judgement. In addition to the obligation to destroy irrelevant data, it has facilitated access to internet data by special services by creating mechanisms for permanent access by the special services to the metadata collected by telecommunications companies. On the other hand, it set up an ineffective mechanism to control the collection of such data by special services. Within its framework, every six months the Regional Court in Warsaw receives summary information on the number of cases of obtaining data, the type of data, as well as on the legal classification of acts for which data was requested, which in fact does not allow it to discern the legitimacy of the use of these rights by the special services.

The second of the changes affecting the right to privacy was the anti-terrorist act. It introduced mechanisms allowing for carrying out activities related to operational control with regard to foreign nationals. Within their framework, the Internal Security Agency acquired competences, among other things, to acquire and record the content of conversations.

Moreover, the act did not require a court’s consent to conduct such activities (for the first three months), and the inspection itself could be justified only by the fear of committing an act prohibited by the person monitored, and not by substantiating such behaviour. At the same time, the anti-terrorism act did not provide for any independent control over the way in which the special services use the powers established by it.

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240 The act of 15<sup>th</sup> January, 2016, amending the act on the Police and certain other acts (Journal of Laws from 2016, item 147).



# DISPUTE WITH THE EUROPEAN UNION

Systemic changes in Poland are also important for the entire European Union and for the protection of the rule of law within the community. Since the beginning of 2016, the European Commission has taken a number of actions (including applying, for the first time in history, to implement the procedure of article 7 of the Treaty on European Union) to protect EU values and halt further erosion of the rule of law. Of all the measures taken by the European Commission over the last four years, the most effective have been the rulings of the European Court of Justice, which have forced the ruling majority to make certain concessions in terms of judicial reform.

## **Procedure for monitoring the rule of law and launching the procedure under article 7 of the Treaty on European Union**

In response to changes in the law on the Constitutional Tribunal and public media, the European Commission decided, in January, 2016, to launch a so-called rule of law review procedure.

The rule of law review procedure is based primarily on dialogue between the government of the country and the European Commission. In the course of the procedure, the Commission makes concrete recommendations on the violation of the rule of law by the state. In the case of Poland, the Commission presented its recommendations four times (in July and December, 2016, and 2017).

Successive Commission recommendations responded to new threats to the rule of law that have emerged as a result of developments in Poland. Initially, the Commission recommended in particular the implementation of the Constitutional Court judgements of 3rd and 9<sup>th</sup> December, 2015 (concerning the election of new Constitutional Tribunal

judges) and the publication of the Constitutional Court judgements (including in particular the judgement of 9<sup>th</sup> March, 2016).<sup>241</sup> Subsequently, when the law allowing the ruling majority to scrutinise the procedure for the election of the new President of the Constitutional Tribunal was adopted, the Commission recommended that the election of the new President should not take place until the three judges of the Tribunal who had been legally elected by the previous ruling majority had been sworn in.<sup>242</sup> In July 2017, when the work on amendments to the acts on courts was ongoing, the Commission recommended that judicial reform should respect the rule of law and be in line with EU law and eliminate new rules on the retirement age of judges.<sup>243</sup> From the outset, the Commission has also recommended that the government refrain from attacks on judges and the judiciary.

With the exception of the recommendation to publish the judgements of the Constitutional Tribunal (which was implemented almost two years late and at a time when completely new laws on the Tribunal had already been adopted), none of the Commission's recommendations have been fully implemented. Some of the Commission's recommendations (such as withdrawal from lowering of the retirement age for judges of common courts) were followed up, but this was mainly the result of infringement proceedings launched against European Union law and not the result of a constructive dialogue with the Commission.

Despite initial declarations on the need for dialogue with the European Commission, the Polish government presented a rather confrontational position on the European Commission's actions in relation to the situation in Poland. The government pointed out that the dispute over the rule of law "is a political dispute, not a substantive one", and that issues related to the functioning of the justice system "are an internal matter of Poland" over which the European Commission has no competence.<sup>244</sup>

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241 *Commission Recommendation (EU) 2016/1374 of 27<sup>th</sup> July, 2016, on the rule of law in Poland*, available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:32016H1374&from=EN> (accessed: 12/09/2019).

242 *Commission Recommendation (EU) 2017/146 of 21<sup>st</sup> December, 2016, on the rule of law in Poland, complementing Recommendation (EU) 2016/1374*, available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:32017H0146&from=EN> (accessed: 12/09/2019).

243 *Commission Recommendation (EU) 2017/1520 of 26<sup>th</sup> July, 2017, on the rule of law in Poland, complementing Commission Recommendations (EU) 2016/1374 and (EU) 2017/146*, available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:32017H1520&from=EN> (accessed: 12/09/2019).

244 *Parliamentary debate with Prime Minister Beata Szydło on the rule of law in Poland*, *europarl.europa.eu*, available at: <http://www.europarl.europa.eu/news/pl/press-room/>

*Poland does not deserve to be judged by the European Commission at the moment, there are no violations of human rights or the rule of law in Poland [...] We are a sovereign state and a free nation [...] The best proof that Poland is a democratic state is the fact that Polish citizens living here today can also express their dissatisfaction in protests*

**Speech by Prime Minister Beata Szydło to the European Parliament**<sup>245</sup>

Along with further developments (including changes in the National Council of the Judiciary), the Polish government indicated that the reforms introduced did not differ from the seemingly similar solutions applied in other EU member states. In this respect, the example of Spain or the Netherlands, on which the method of electing the members of the new National Council of the Judiciary was based, was particularly frequently cited. The government also justified the changes in the justice system with the need to dismantle the vestiges of the communist period still present in the system (apart from the fact that the average age of a Polish judge is 40) and the need to rebuild social trust in the justice system.<sup>246</sup>

The failure to implement recommendations on the rule of law and the continued reform of the judiciary, which jeopardises the independence of the judiciary, have led the European Commission to launch, for the first time in its history, the procedure provided for in article 7 of the Treaty on European Union (TEU). Unlike the rule of law procedure, the article 7 procedure may result in the imposition of sanctions on a Member State (withdrawal of the right to vote in the Council of the European Union), but, like the first procedure, the Treaty procedure is based primarily on political will and action.

Since the launch of Article 7 TEU procedure in the framework of the meetings of the General Affairs and External Relations Council (GAERC) there have been regular monitoring sessions by the European Commission on the situation in Poland. However, in the two years of this process, the European Council has not decided to

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[20160114IPR09899/debata-poselska-z-premier-beata-szydlo-na-temat-praworzadnosci-w-polsce](https://www.europarl.europa.eu/press-portal/20160114IPR09899/debata-poselska-z-premier-beata-szydlo-na-temat-praworzadnosci-w-polsce) (accessed: 12/09/2019).

245 *Debate in the European Parliament with the participation of Prime Minister Beata Szydło, premier.gov.pl*, available at: <https://www.premier.gov.pl/wydarzenia/aktualnosci/debata-w-parlamencie-europejskim-z-udzialem-premier-beaty-szydlo.html> (accessed: 12/09/2019).

246 *The government presents the White Paper on reforms of the Polish judiciary, premier.gov.pl*, available at: <https://www.premier.gov.pl/mobile/wydarzenia/aktualnosci/rzad-przedstawi-biala-ksiege-w-sprawie-reform-polskiego-wymiaru.html> (accessed: 12/09/2019).

identify a “clear risk of a serious breach” of the rule of law by Poland, which would complete the first stage of the procedure under article 7 of TEU. A majority of 4/5 of the members of the European Union is required to identify such a risk.

At the same time, parallel infringement proceedings have proved to be the most effective means of stopping further attacks on the rule of law in Poland.

### **Infringement proceedings against European Union law**

The European Commission has launched three infringement procedures against Poland concerning three changes in the justice system.

The first procedure concerned the lowering of the retirement age of judges in common courts. In the light of the changes introduced in 2017, the retirement age for men was reduced to 65, and for women to 60. In deciding to initiate this procedure, the Commission pointed out that those provisions may infringe European Union law in so far as it prohibits discrimination on grounds of sex. The Advocate General of the Court of Justice, in his opinion of June, 2019, shared these reservations and concluded that the provisions reducing the retirement age violated the principle of judicial independence.<sup>247</sup>

The second procedure concerned a similar issue, i.e. the lowering in the retirement age for Supreme Court judges. The procedure initiated by the European Commission in July, 2018, was quickly brought to court two months later. In this procedure, the protective measures issued by the Tribunal ordering the Polish government to suspend the provisions concerning the retirement of Supreme Court judges were important. On the basis of the Court’s decision itself, the Supreme Court judges who were retired returned to adjudication (see → **Attacks on judges, p. 31**). Meanwhile, and without waiting for the Court’s ruling, the ruling majority has again amended the Supreme Court Act, which introduced a provision to reinstate Supreme Court judges in office. The Court of Justice of the European Union continued its proceedings and in its judgement of June, 2019, found that the provisions reducing the retirement age of the judges of the Supreme Court violated European Union law.<sup>248</sup>

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247 *Opinion of the Advocate General of the CJEU of 20<sup>th</sup> June, 2019, in the case of the European Commission v. Poland (C - 192/18)*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=215261&pageIndex=0&doclang=en&mode=req&dir=&occ=-first&part=1> (accessed: 12/09/2019).

248 *Judgement of the CJEU of 24<sup>th</sup> June, 2019, in case C 619/18*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=215341&pageIndex=0&doclang=PL&->

The third procedure, which is currently in the pre-trial phase, concerns new provisions setting out a disciplinary regime for judges that undermine the independence of judges. In this proceeding, the Commission is focusing mainly on three issues. The first concerns the position and role of the Supreme Court's Disciplinary Chamber in the system of disciplinary proceedings against judges. In the Commission's view, the Chamber, which was entirely elected by the new National Council of the Judiciary, does not meet the criteria of independence and autonomy. Secondly, the Commission notes that the procedural rights of judges indicted in disciplinary proceedings are not sufficiently guaranteed (see → **Disciplinary proceedings against judges**, p. 29). Finally, the Commission stated that the opening of disciplinary proceedings against the judges who referred questions to the Court of Justice of the European Union for a preliminary ruling constituted an infringement of European Union law.<sup>249</sup>

### References for a preliminary ruling

An additional instrument in the hands of Polish courts for the protection of the rule of law were also questions (referrals) referred for a preliminary ruling to the CJEU. In this mode, a court of an EU Member State directs its doubts concerning the interpretation of an element of EU law to the CJEU in a given case, and the role of the Court is to interpret EU law or to rule on its validity, in isolation from the facts of the case. In the years 2018-2019, Polish courts asked at least a dozen or so questions referred for a preliminary ruling concerning the rule of law.

The highest number of questions referred for a preliminary ruling was referred to the CJEU between August, 2018, and June, 2019, by the Supreme Court. These included, among others, the following:

- the impact of lowering the retirement age of Supreme Court judges on the principle of the non-removability of judges;
- the obligation for the court to apply specific national rules in the event of an appeal against a resolution to appoint a judge based on EU law prohibiting age discrimination;

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[mode=req&dir=&occ=first&part=1&cid=155824](#) (accessed: 12/09/2019).

249 *The rule of law: The European Commission launches infringement proceedings to protect Polish judges from political control*, europa.eu, available at: [https://europa.eu/rapid/press-release\\_IP-19-1957\\_pl.htm](https://europa.eu/rapid/press-release_IP-19-1957_pl.htm) (accessed: 12/09/2019).

- whether the method of appointing member judges of the National Council of the Judiciary is in line with the standards;
- whether the Supreme Court's Disciplinary Chamber, elected by the National Council of the Judiciary, can be considered an independent court;
- the possibility of Supreme Court judges subject to a lowered retirement age to continue to hold office;
- whether the court consisting of nominated judges, despite withholding the execution of the nomination resolution, meets the requirements of independence and impartiality;
- the possibility of assessing the correctness of the appointment of Supreme Court judges by national courts and the status of the Supreme Court Disciplinary Chamber.

The Supreme Administrative Court also referred questions to the CJEU for a preliminary ruling, including in November, 2018, when it asked about certain aspects related to the appeal procedure against the NCJ's appointment resolutions.

Questions referred for a preliminary ruling were also submitted by the common courts. In August, 2018, the Regional Court in Łódź asked about the impact of the new model of disciplinary proceedings, carrying with it the threat of political influence, on effective judicial protection in cases related to EU law. An analogous question was also asked by the District Court in Warsaw. In turn, the Regional Court in Gorzów Wielkopolski addressed the issue of the fairness of the disciplinary process before a body that is not independent.

On 27<sup>th</sup> June, 2019, the Advocate General for the Court of Justice of the European Union, E. Tanchev, delivered his opinion<sup>250</sup> in the combined cases of C-585/18, C-624/18 and C-625/18 concerning questions referred for a preliminary ruling by the Supreme Court. In its conclusions, the Advocate General stated, inter alia, that the newly established chamber of the court of last instance (the Disciplinary Chamber of the Supreme Court), in which only judges elected by the National Council of the Judiciary of Poland could adjudicate, does not meet the requirements of judicial independence

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250 Opinion of the Advocate General, Evgeni Tanchev, delivered on 27<sup>th</sup> June, 2019, in Joined Cases C-585/18, C-624/18 and C-625/18, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=215565&pageIndex=0&doclang=PL&mode=lst&dir=&oc-c=first&part=1&cid=14810822> (accessed: 16/9/2019).

due to the systemic model of its form and the way the Council operates. According to the Advocate General, the way in which National Council of the Judiciary members are appointed reveals irregularities that may jeopardise its independence from legislative and executive bodies. If the Court in its ruling accepts the Advocate General's opinion, both the Disciplinary Chamber and the Extraordinary Chamber of Control of the Supreme Court will not be recognised from the perspective of EU law.<sup>251</sup>

A few days earlier, on 18<sup>th</sup> June, 2019, a hearing was held before the Court of Justice of the European Union on joint questions referred for a preliminary ruling by district courts in Łódź and Warsaw concerning the new model of disciplinary liability of judges. The opinion of the Advocate General in this case will be published on 24<sup>th</sup> September, 2019.<sup>252</sup>

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251 Krzysztof Sobczak, *Spokesperson of the CJEU: The Disciplinary Chamber of the Supreme Court is not an independent court*, *Prawo.pl*, available at: <https://www.prawo.pl/prawnicy-sady/izba-dyscyplinarzna-sn-nie-jest-niezawislym-sadem-opinia,437467.html> (accessed: 16/9/2019).

252 *Questions from Polish courts before the CJEU. "The decision will be a precedent judgement"*, *tvn24.pl*, <https://www.tvn24.pl/wiadomosci-z-kraju,3/rozprawa-przed-tsue-w-sprawie-pytan-polskich-sadow,945938.html> (accessed: 16/9/2019).

# SUMMARY

In the years 2015-2019, the Sejm adopted over 20 laws on the administration of justice, independent institutions and protection of fundamental rights and freedoms. As never before, the law has served primarily to expand political power at the expense of the judiciary, independent institutions and civil rights and freedoms.

Over the last four years, the following trends in the area of human rights protection have been observed:

■ **Attempts to expand political influence on the judiciary** – starting with changes in the Constitutional Court, through partial changes in the Supreme Court, followed by changes in the National Council of the Judiciary and the common courts – have consistently strengthened the political influence on the operation of the courts. Despite the fact that courts are not currently politicised, the mechanisms through which politicians can influence the work of courts are clearly outlined – this concerns mainly the system for electing new judges, conducting disciplinary proceedings, as well as deciding on the management of courts;

■ **Failure to respect binding court rulings** – attempts to extend political influence on the judiciary included not only legislative changes, but also the practice of ignoring final court rulings, such as the failure to recognise and publish final court rulings of the Constitutional Tribunal for almost two years, the failure to recognise the final ruling of the Supreme Administrative Court on lists of candidates for membership of the National Council of the Judiciary and finally, the swearing in of new Supreme Court judges contrary to the protective measure issued by the Supreme Administrative



Court. These examples show that the principle of the three pillars of power is violated by the actions of the ruling majority unrestricted by decisions and control of the courts;

■ **Attacks on independent institutions** – the progressive erosion of the principles of the three pillars of government and democratic rule of law have also been accompanied by attacks on other independent institutions. In this respect, the weakening of the Commissioner for Human Rights' position (by limiting funding and ignoring the recommendations and reservations of the Commissioner for Human Rights by the ruling majority) and the takeover of the public media, which in its current form is heavily influenced by politicians, are particularly evident. The changes in the distribution of public funds for the activities of social organisations and the attacks on individual NGOs and their representatives are also worrying;

■ **The undermining of human rights guarantees** – changes in the law on assemblies, criminal proceedings (a weakening of the procedural rights for defendants), attacks on journalists, a weakening of women's rights and changes in the protection of the rights of foreign nationals mean a regression in the area of human rights protection. Together with the further weakening of the systemic position of the judiciary and the undermining of the guarantees of judicial independence, fundamental human rights and freedoms may be deprived of essential protection;

■ **Attacks on minorities exposed to discrimination and the progressive polarisation of society** – the changes observed over the last four years have also taken place in an atmosphere of attacks (often inspired by public media, some private media and representatives of the ruling majority) on specific groups exposed to discrimination, including foreign nationals and LGBTQI persons. Particularly worrying in this respect are the examples of, inter alia, the adoption by some local government authorities of resolutions on "LGBT-free zones" or presenting foreign nationals and refugees in a negative light in electoral campaign material. The language of intolerance and aggression is appearing more and more frequently in public debate and the lack of a strong reaction on the part of representatives of the authorities and law enforcement agencies is conducive to its expansion;

■ **The failure to respect the recommendations of international organisations and, consequently, the deteriorating position of Poland in the international arena** – none of the recommendations of international institutions, including the European Commission, the Venice Commission or the United Nations, concerning the protection of the rule of law in Poland, formulated over the last four years have been fully implemented. Failure to implement these recommendations not only undermines Poland's position as a leader in democratic change in the region of Central and Eastern Europe, but also exposes the Polish state to liability for violations of European Union law and the European Convention on Human Rights.

### **LIST OF THE MOST IMPORTANT LEGAL ACTS ADOPTED IN 2015-2019:**

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- The act of 19<sup>th</sup> November, 2015, amending the law on the Constitutional Tribunal (Journal of Laws item 1928).
- The act of 22<sup>nd</sup> December, 2015, amending the law on the Constitutional Tribunal (Journal of Laws item 2217).
- The act of 30<sup>th</sup> December, 2015, amending the law on Radio and Television Broadcasting (Journal of Laws from 2016, item 25, as amended).
- The act of 15<sup>th</sup> January, 2016, amending the law on the Police and certain other acts (Journal of Laws item 147).
- The act of 28<sup>th</sup> January, 2016, the law on the Public Prosecutor's Office (Journal of Laws item 740).
- The act of 14<sup>th</sup> April, 2016, on stopping the sale of real estate from the Agricultural Property Stock of the State Treasury and on amending certain acts (i.e. Journal of Laws from 2018, item 869).
- The act of 13<sup>th</sup> May, 2016, on counteracting threats of sexual crime (Journal of Laws from 2018, item 405, as amended).
- The act of 10<sup>th</sup> June, 2016, amending the Code of Criminal Procedure, the law on the Professions of Doctors and Dentists, the law on Patient's Rights and the Patients' Ombudsman.
- The act of 10<sup>th</sup> June, 2016, on anti-terrorist activities (Journal of Laws, item 904).
- The act of 22<sup>nd</sup> June, 2016, on the National Media Council (Journal of Laws, item 929).
- The act of 22<sup>nd</sup> July, 2016, on the Constitutional Tribunal (Journal of Laws item 1157).

- The act of 30<sup>th</sup> November, 2016, on the Status of Judges in the Constitutional Tribunal (Journal of Laws item 2073).
- The act of 30<sup>th</sup> November, 2016, on the organisation and procedure for proceedings before the Constitutional Tribunal (Journal of Laws item 2072).
- The act of 13<sup>th</sup> December, 2016, the Provisions introducing the act on the organisation and procedure for proceedings before the Constitutional Tribunal and the act on the status of judges in the Constitutional Tribunal (Journal of Laws, item 2074).
- The act of 13<sup>th</sup> December, 2016, amending the law on Assemblies (Journal of Laws from 2017, item 579).
- The act of 12<sup>th</sup> July, 2017, amending the law on the organisation of common courts and certain other acts (Journal of Laws item 1452).
- The act of 15<sup>th</sup> September, 2017, on the National Freedom Institute – Centre for the Development of a Civil Society (Journal of Laws item 1909).
- The act of 8<sup>th</sup> December, 2017, on the Supreme Court (Journal of Laws from 2018, item 5).
- The act of 8<sup>th</sup> December, 2017, amending the law on the National Council of the Judiciary and certain other acts (Journal of Laws from 2018, item 3).
- The act of 26<sup>th</sup> January, 2018, amending the law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the law on War Graves and Cemeteries, the law on Museums and the law on Liability of Collective Entities for Acts Prohibited under Criminal Proceedings (Journal of Laws, item 369).
- The act of 19<sup>th</sup> July, 2019 amending the Code of Criminal Procedure and certain other acts (Journal of Laws item 1694).

*The years 2015-2019 were a period in which the greatest rollback in human rights protection since 1989 has been recorded in Poland. The ruling majority, despite the lack of a sufficient number votes to amend the Constitution, has introduced a number of changes to the state system, thereby putting at risk the protection of the rule of law and the principle of tripartite governance. By aligning legislation with political objectives, the rule of law, which is at the heart of democratic systems, has been replaced by rule using the law.*

**An excerpt from the report**



HELSINKI FOUNDATION  
FOR HUMAN RIGHTS



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@TheHFHR

Helsinki Foundation  
for Human Rights

ul. Zgoda 11  
00-018 Warszawa

tel. (22) 556-44-40  
fax: (22) 556-44-50  
hfhr@hfhr.pl  
www.hfhr.pl/en