

Poland

Commissioner for Human Rights

Independence and effectiveness of the NHRI

International accreditation status and SCA recommendations

The Polish NHRI was re-accredited with A status in November 2017. The SCA encouraged the NHRI to advocate for amendments to its enabling legislation to require a pluralistic composition in its membership and staff, and for changes that would guarantee, for Deputy Commissioners and staff of the NHRI their protection from legal liability for actions undertaken in good faith in their official capacity. The SCA also underlined the need for the provision of adequate funding to enable the NHRI to effectively carry out its mandate.

Developments relevant for the independent and effective fulfilment of the NHRI's mandate

There have been no major changes in this respect within the national regulatory framework. Both the Constitution and the ordinary legislation ensure the Commissioner's independence from other state authorities. The Commissioner is not a government nominee, he is appointed by the bi-cameral Parliament, the nomination requires the consent of both the Sejm and the Senate. The legislation provides only for a limited accountability of the Commissioner to the Sejm. The Commissioner is obliged to present an annual information on his activities and the human rights situation in Poland. There are very limited grounds to dismiss the Commissioner before the expiry of his term of office. Apart from a voluntarily resignation, they are principally confined to medical reasons.

The political formation in power in Poland since 2015 remains disapproving of the Commissioner's work. The Commissioner is subject to **heavy criticism and pressure** from the ruling political majority and the pro-government media. The work of the Commissioner, his interventions, statements and opinions presented in the legislative process are frequently reported by the public media in a biased manner. For political reasons, the annual budget of the Commissioner's Office **does not safeguard the adequate funding**, corresponding to the scope of competences conferred on the Commissioner.

In this context, it is difficult for the Commissioner to carry out its duties and the impact of its work is very much restricted by the institutional and political environment in which it operates. Regional mechanisms such as the European Commission's monitoring on the rule of law, may be further built on to have a greater influence on domestic developments in Poland. The Commissioner recognized a constant, supportive interest of European partners in Polish issues. The Commissioner will be appreciative for **further monitoring of the situation in Poland**, ensuring prompt legal and political reactions in cases of subsequent violations of the rule of law and the European standards, making clear statements, analyses and reports, organizing visits to Poland when possible, and meeting both Polish representatives and members of the civil society.

References

- Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997, poz. 78, ze zm. (Constitution of the Republic of Poland od 2 April 1997, Official Journal 1997, No 78, Item 483)
- Ustawa z dnia 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich, tekst jednolity: Dz.U. 2020, poz. 627 (Act of 15 July 1987 on the Commissioner of Human Rights, consolidated text: Official Journal 2020, Item 627)
- <https://www.rpo.gov.pl/pl/content/budzet-rpo-vii-kadencji-informacja>

Human rights defenders and civil society space

The ruling party has taken measures which indeed **restrict the capacity of NGOs and civil society to operate**. NGOs have **limited access to financial resources**, the available public financing is allocated by the government in a non-transparent and discretionary manner. The politicization of the public sphere also results in a reduction in funding from private actors.

The polarization of the media, and the pro-government stance taken by the public broadcasters limit NGOs' access to the public debate. The pro-government media, which embrace both the public media and some private media report in a manipulative manner on the work of those civil society activists and NGOs whose actions do not correspond to the ruling party ethical, ideological or political attitude. It particularly affects persons and organisations engaged in tolerance issues, LGBT problems and education on human sexuality. **Smear campaigns** by politicians and pro-government media affect a number of other social groups: judges, prosecutors, journalists, teachers, or medical staff.

They are instances **public assemblies** being *de facto* discouraged, e.g. by means of checking by the police of the identity of those involved. There is legislation in force allowing for the bringing a private law action to protect the good name (reputation) of the Republic of Poland or the Polish Nation. These provisions are of concern from the perspective of the freedom of speech and could be used for political considerations; the action can be brought to court i.a. by a state body, the Institute of National Remembrance.

References

- <https://www.rpo.gov.pl/pl/content/rpo-o-wyzwaniach-dla-ngos>
- Ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, tekst jednolity: Dz.U. 2019, poz. 1882 (Act of 18 December 1998 on the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation; consolidated text: Official Journal 2019, Item 1882)

Checks and balances

The separation of powers has been **substantially disrupted**. The political authorities attempt to control the content of judicial decisions by taking **disciplinary and administrative measures against judges**. A number of cases concerning the Polish judiciary have been dealt with by the Court of Justice in the European Union, on the initiative of the courts themselves (references for a preliminary ruling) or of the European Commission (infringement proceedings). A case within the EU mechanism for the protection of Union values (Art. 7 TEU) is pending against Poland before the Council of the European Union.

Law-making in Poland has been distorted. Politically sensitive issues, including those relating to the justice system, are adopted without a proper legislative process and raise serious constitutional concerns. Legislation is often enacted in an unnecessarily expeditious manner, with no proper consultations and without taking into account critical opinions presented by numerous institutions and actors. In such cases, the rights of parliamentary opposition are frequently compromised. The ruling majority hinders the proper analyses of draft legislation, limits parliamentary debate, restricts the possibility of providing sufficient explanation for legislative amendments.

There is **no functioning genuine constitutional review**. The Constitutional Tribunal has been politicized; part of its composition has been established contrary to the Constitution

as some members of the Tribunal were appointed to positions to which other judges were lawfully appointed before. Only persons associated with the ruling party are appointed to the Tribunal, including the prominent politicians, who have been actively participating in the introduction of unconstitutional changes in Poland. The Constitutional Tribunal is used instrumentally to validate unconstitutional legislation (e.g. the Act on the National Council of the Judiciary) and to challenge the rulings of the Supreme Court and the Court of Justice of the European Union.

The political **accountability** as well as criminal responsibility of those in power have become illusory. A government-subordinate prosecutor's office does not take up or discontinue cases that are inconvenient for the ruling party.

Another key issue which relate to the very core of the democratic system of checks and balances and which emerged in recent weeks has been the **organisation of presidential elections**. The ruling majority, contrary to the clear medical reports and opinions, ignoring the threats to the health of voters and members of the electoral commissions, is determined to hold the elections at the original date by universal postal voting, amidst the COVID-19 pandemic, taking into account only its own political interest. There is currently no proper? nor proper legislation in place to hold elections that meet constitutional standards of universal, equal and direct elections, conducted by secret ballot. The freedom of assembly is de facto suspended, which makes electoral campaigning close to impossible. Conducting the elections in the current situation would **violate the right to free and fair elections**, threaten democracy in Poland, and undermine the democratic legitimacy of the person elected in such a defective electoral process.

The Commissioner has been constantly pointing out the above-mentioned problems in numbers submissions to national authorities, including letters to the executive bodies and opinions presented in the legislative process.

References

- Wojciech Sadurski, Poland's Constitutional Breakdown, Oxford 2019
- Laurent Pech, Patryk Wachowiec: 1460 Days Later: Rule of Law in Poland R.I.P. (Part I and II), <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/>, <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii/>
- Paweł Filipek, Challenges to the Rule of Law in the European Union: the Distressing Case of Poland; Revista do Instituto Brasileiro de Direitos Humanos, No 17/18 (2018)
- Concerning presidential elections: <https://www.rpo.gov.pl/pl/kategoria-tematyczna/wybory>

Functioning of justice systems

The **threat to judicial independence** is the most serious issue for the Polish judiciary. Since gaining power in autumn 2015, the ruling party have been taking legislative, administrative and de facto actions to take control over the judiciary and, at the same time, to disable effective judicial control over its own activities. The political leadership has placed the **Constitutional Tribunal** and the **National Council of the Judiciary** under its de facto control. The **Supreme Court** was partly taken over by way creation of two new chambers, fully staffed with new members, from those associated with or supported by the ruling party, and nominated by the new National Council of the Judiciary.

The **judges of ordinary courts** are under constant pressure. They are criticized for making judicial decisions that does not meet the expectations of the government, pro-government media are conducting negative campaigns against them, the regime of disciplinary responsibility is activated for political reasons, as well as some administrative measures are put into place, e.g. suspension of a judge, transfer to another judicial department, etc.

Judicial associations and the civil society regularly protest opposes measures taken against judges. A number of initiatives in this area have also been carried out by the Commissioner for Human Rights, who has presented numerous opinions in the legislative process, addressed interventions to the executive bodies, in particular to the Minister of Justice, requested explanations from the disciplinary officers for judges.

The undermining of the independence and impartiality of judges **infringes the very essence of the right to a fair trial** guaranteed by the Polish Constitution, Union law and the European Convention on Human Rights. Thus the **effective judicial protection is at risk** in Poland. The fair trial guarantees of access to an independent and impartial court

established by law are the subject of cases considered or pending before the Supreme Court, the Court of Justice of the EU, the European Court of Human Rights. The Commissioner intervenes in these proceedings, in particular by submitting written observations.

References

- “Muzzle Law” – Ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw, Dz.U. 2020, poz. 190

Media pluralism

Political authorities are trying to **control public access to information** and especially the extent of information available to journalists, e.g. by prohibiting judges from providing information in court building, or currently forbidding medical staff from informing about aspects of the COVID-19 epidemic.

Journalists of **government-friendly media are treated more favourably** than other journalists, e.g. as regards accreditation for certain political events, access to information, access to political leadership for comments and interviews.

The **public media** do not respect journalists' standards, present information selectively, in one-sided, unreliable manner, mix information with political commentary, constantly promote politicians of the ruling majority, and present the opposition in an negative way.

The pro-government media are running **defamatory campaigns** against some private media.

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- <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-czemu-rzad-pomija-gazete-wyborcza-w-kampanii-informacyjnej>
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Corruption

Poland scored 58/100 (annual increase by 2 points) and was ranked 41 among 180 countries in 2019 International Transparency index. The **prosecution's lack of independence** from the executive and political power makes it difficult to investigate and prosecute corruption, especially when the suspected person is linked to the ruling government. A recent example is the investigation into the organisation of the presidential elections during the pandemic and endangering the life and health of many people, initiated by Public Prosecutor Ewa Wrzosek. It was discontinued immediately by the superior prosecutor, only after 2 hours since its launching. The discontinuance was unsubstantiated and decided without any genuine investigative actions being taken in the case (case no. PR 3 Ds. 589.2020, District Prosecutor's Office Warszawa-Mokotów). Another example is the case of prosecutor Mariusz Krasoń of the District Prosecution Office in Kraków. He was transferred to a different department and then suddenly seconded to the Wrocław District Prosecution Office in relation to him pointing to threats to the independence of the prosecutor's office and indicating the pressure exerted on prosecutors.

References

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- <http://lexso.org.pl/2019/07/07/open-letter-of-the-lex-super-omnia-association-of-prosecutors-to-the-national-prosecutor-on-the-harassment-of-prosecutor-mariusz-krason/>
- <http://lexso.org.pl/2020/04/24/stanowisko-stowarzyszenia-prokuratorow-lex-super-omnia-w-sprawie-naruszania-niezaleznosci-prokuratorow/>
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In-focus section on COVID-19 measures

Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law in the country

The Polish government has adopted **radical measures** to combat the threat of an epidemic, deeply interfering with individual rights and freedoms, including freedom of movement and home restrictions; temporary bans on staying in parks, entering forests, etc. Access to health care for other illnesses has been drastically reduced, access to physicians has been very difficult, numerous planned operations and medical procedures have been cancelled. In general, assembling is not allowed; freedom to religious worship is restricted; right to a fair trial within a reasonable time is limited; private and family life is interfered with; the protection of personal data becomes a problem when collecting information on geo-location of persons; access to education is restricted especially for children who do not have technical means to participate fully in on-line class activities. The Commissioner has made numerous interventions in this area. The lawfulness of some measures was called into question, e.g. the prohibition of movement except for urgent living needs, a complete prohibition of unaccompanied movement of persons under 18 years of age, or quarantine for persons returning from abroad. No adequate legal basis was indicated for them. The procedure for their adoption was questionable, e.g. adopted by a body other than the one with the authority to do so, introduced at the last minute.

The restrictions are being frequently changed. Many of the measures introduced were drafted in vague and imprecise terms. Many of these can be considered excessive, too

broad, unjustified by legitimate needs, disproportionate. They leave a large degree of discretion to the law enforcement officers.

Most important challenges due to COVID-19 for the NHRI's functioning

The Office of the Commissioner has adapted to the state of the epidemic. About 80% of employees work from home, or on-line, fully performing their tasks. Indeed, citizens' access to the Ombudsman has been made to some extent more difficult, since electronic means of communication, especially e-mail, have become the main form of contact.

References

- <https://www.rpo.gov.pl/pl/kategoria-tematyczna/koronawirus-i-epidemia-w-polsce>

