

Poland

Commissioner for Human Rights

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.

Impact of 2020 rule of law reporting

Follow-up by State authorities

No information as regards the application of the 2020 ENNHRI Rule of Law Report by other state authorities is available. This is due to the fact there has not been any positive developments in this area in Poland.

Impact on the Institution's work

The 2020 ENNHRI Rule of Law Report has been used by the CHR in his activities as an important point of reference.

Follow-up initiatives by the Institution

The CHR has undertaken different forms of action:

I. Strategic judicial litigation, proceedings before:

1. CJEU, 2. ECHR (amicus curiae briefs), 3. National courts (the Constitutional Court, the Supreme Court, common courts, administrative courts, specialized courts, e.g., competition court).

II. Presentation of CHR opinions:

1. Rule 9 submissions to Committee of Ministers of CoE, 2. Opinions for UN treaty bodies

III. Opinions on the legislative process directed to:

1. Parliament, 2. Council of Ministers, 3. Ministers, 4. Other public authorities and bodies.

IV. Publishing independent reports

V. Education and awareness raising 1. Series of online interviews and podcasts with lawyers engaged in rule of law protection, 2. Online seminars, 3. Social media events.

Independence and effectiveness of the NHRI

Changes in the regulatory framework applicable to the Institution

In September 2020, a group of deputies to the Sejm applied to the Constitutional Tribunal (K 20/20) to examine the compliance of Art. 3 sec. 6 of the Act of 15 July 1987 on the Commissioner for Human Rights with Art. 2 of the Constitution of the Republic of Poland, i.e., with the principle of a democratic state ruled by law and the resulting principle of citizens' trust in the state and the law it enacts, as well as with the principle of justice and Art. 209 paragraph. 1 of the Constitution, which defines the term of office of the Commissioner for Human Rights (CHR). The case concerns the performance of duties by the Commissioner for Human Rights, after the expiration of the five-year term of office, until the new Commissioner for Human Rights will take office. On 15 April 2021, the Constitutional Tribunal of Poland [delivered a judgement](#) declaring Article 3, paragraph 6 of the Act on the Commissioner for Human Rights of Poland, which provides that the Commissioner will remain in office until the new office-holder is appointed, unconstitutional. The Constitutional Tribunal also decided that the existing transitional provision shall cease to apply three months after 15 April 2021, the date when this decision was published in the Journal of Laws of the Republic of Poland.

References

- Application to the Constitutional Tribunal
<https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%2020/20>
- ENNHRI, Equinet, GANHRI, IOI, OSCE ODIHR, UN OHCHR Joint statement in support of the Office of the Polish Commissioner for Human Rights
- http://ennhri.org/wp-content/uploads/2021/05/Joint-Statement-in-Support-of-the-Polish-NHRI_ENG.pdf

Enabling space

The CHR gives opinions on bills important for civil rights and freedoms, regardless of whether the competent authorities ask him for his opinion. However, often the Commissioner's opinions are not taken into account by the government, even if there was a slight overall improvement in 2020.

The president of the Constitutional Tribunal – Mrs Julia Przyłębska started to set deadlines for the CHR's interventions before the Court that are inconsistent (shorter) with the provisions of the law for submitting a position in cases before the Tribunal. One of the examples is case No. K 6/20, concerning electoral law, where the CT president shortened the time for the CHR opinion from statutory 30 days to 22 hours.

It is worth to notice that on 9 September 2020, the term of the current Commissioner for Human Rights ended. However, no successor has yet been elected. The candidate and member of the ruling "Law and Justice" (PiS) party was rejected by the Senate, while a candidate supported by non-governmental organizations was rejected three times during a vote in the Sejm. The Marshall of Sejm set a new deadline for proposing candidates to 19 March 2021.

Human rights defenders and civil society space

The year of the pandemic has significantly influenced the work of human rights defenders and the space for civil society is constantly shrinking in Poland. The biggest changes noticed concern the right to peaceful assembly. This right was gradually limited by introducing a limit on participants in assemblies, and then – temporarily – assemblies were completely banned. Changes to the legal framework for the exercise of this freedom were introduced contrary to the constitution – regulations (*rozporządzenia*, government executive acts) were issued exceeding the statutory law. A complete ban on assemblies was also unconstitutional as limitations are possible only under the constitution, proportional and by virtue of parliamentary legislation only. Spontaneous assemblies were also banned during the pandemic.

In practice the limitations affected the protesters (mainly women) taking part in manifestations of entrepreneurs, protesting against COVID-19 business restrictions, and in particular those protesting against Constitutional Court judgment of 22 October 2020 in case No. K 1/20, declaring the embryo pathological reasons for abortion unconstitutional (assemblies have been organized by Women's Strike). The participation in the manifestations, treated by police as illegal, ended for many with financial fines (reaching up 10.000 PLN) or police actions (like temporary

halt, custody in distant police stations, refusal to contact legal attorneys etc.). The irregularities of police actions were reported by the CHR within the NPM report.

In addition, a significant increase in police brutality towards demonstrators was noticed; in particular, there was a widespread use of direct coercive measures against demonstrators (gas, 'kettling', stopping). Journalists who reported about the protests were arrested, a journalist was shot by the police, and three journalists were beaten up by participants of protests. Protesters were detained en masse – their access to a lawyer was impeded and they were taken to police stations located several dozen kilometres from their place of residence (outside Warsaw).

The state of the epidemic and the limitations of fundamental rights and freedoms increased the importance of citizens' access to reliable information about the activities of the authorities. The pandemic act made it impossible to apply the provisions on inactivity of authorities upon request for public information. In practice, this meant depriving citizens of the possibility to challenge the inactivity of an authority in a situation where information is not provided. In Spring 2020, the "Covid" act (art 15zys para. 10 point 1) deprived citizens of the possibility to effectively pursue the information obligation of public institutions.

The CHR joined the proceedings before the Administrative Court in Warsaw on a complaint of a citizen against the Ministry of State Assets for disclosure of public information. The case concerns information on the costs of election packages prepared in connection with the planned organization of postal elections on May 10, 2020.

The CHR constantly supports and cooperates with non-governmental organizations. In 2020, together with the STABILO Foundation, he dealt with the topic of professional burnout of activists. Two conferences were organized, scientific research conducted by the SWPS University was commissioned, and activists collaborated in working groups.

Due to the pandemic, the Ombudsman could not continue the program of Regional Meetings during which for four years he met local activists throughout Poland to talk about their problems and the human rights situation in the region.

References

- <https://www.rpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT>

Checks and balances

The influence of the legislative and executive powers over the judiciary has been growing steadily since the end of 2015. These authorities are trying to influence independent courts. Disciplinary proceedings are initiated against independent judges and prosecutors. A number of proceedings have been conducted in this matter before the CJUE and the ECHR.

Since 2015, there has also been a decline in public consultations of laws. At present, consultation in sensitive issues is practically possible only in the Senate, where the opposition has a majority.

The CHR intervened in March 2020 in the case of early and supplementary elections in nine towns in Poland. He noted, inter alia, that quarantined persons will not be able to vote.

Despite the announcement of the pandemic, the authorities did not give up holding the presidential election on the previously set date of May 10, 2020. The CHR pointed to the related dangers for citizens, the election process and the unconstitutionality of changes in the election law during the ongoing campaign. In many countries, citizens residing abroad could only vote by correspondence, because the local pandemic regulations did not allow voting at polling stations.

Trust in state authorities

The trust is eroded by the rule of law problems and more currently by the low quality of "pandemic legislation". Many human rights and liberties (e.g., freedom of assembly, freedom of movement, freedom of religion) have been limited (in some cases completely banned, like freedom of assembly) with a violation of the Constitution. The Constitution provides that in a situation of a natural disaster (like COVID-19 pandemic) a state of a natural disaster may be introduced. The Constitution provides which rights and liberties may be then limited and to what extent. In practice the government decided to rule by executive acts, based on a law on the prevention and counteraction against infectious diseases, which cannot legally limit fundamental rights. Such a conclusion was confirmed by the Supreme Court in citizens' cases resolved on 17th March 2021.

NHRI's role in the system of checks and balances

On 29th April 2020, the CHR requested the court to annul a decision of the Prime Minister ordering the Polish Post Office to implement certain measures to prepare for the presidential elections of the Republic of Poland in 2020 by correspondence in view of the COVID-19 pandemic. On this basis, the Post asked local authorities to provide it with the lists of voters. The administrative court upheld the complaint.

The Commissioner for Human Rights complained to the Provincial Administrative Court of the decision of the Minister of Digitization to transfer the PESEL register (personal data of voters) to Polish Post Office.

The CHR regularly presents his positions on key issues for citizens before the Constitutional Tribunal, but his position is not taken into account by a politicized tribunal.

Since taking office, the Commissioner for Human Rights has encountered difficulties in cooperation with state authorities. These include the authorities' refusal to react on general statements and to take CHR's comments and recommendations into account and the CHR's inability to obtain information on planned bills. Public trust in institutions remains at a very low level.

The CHR budget has been limited for a couple of last years, limiting its ability to act effectively for the protection of fundamental rights. In addition, by the force of the Law of 8 December 2017 on the Supreme Court, the CHR mandate was broadened by adding a new competence of filing extraordinary complaints to the Supreme Court against all final judgments of common courts dated back up to April 1997. The CHR has received by now around five thousand requests to file such a complaint and the trend is rising since the final date for the oldest cases elapses in April 2021. The CHR did not receive any financial resources for this purpose, as mentioned above, the budget of the CHR was cut.

References

- <https://www.rpo.gov.pl/sprawy-generalne/pdf/2020/4/VII.6060.19.2020/1972686.pdf>
- SC Resolution of 23.01.2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, BSA I-4110-1/20.
<https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=U%202/20>
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<https://www.rpo.gov.pl/sites/default/files/Do%20Prezesa%20Rady%20Ministr%C3%B3w%2C%2024.03.2020.pdf>

Functioning of justice systems

Since 2015, the situation related to the independence of the judiciary and the independence of judges has been deteriorating as a result of changes introduced by the ruling party. The situation has not improved since the last report. Despite the judgments issued by the EU Court of Justice and the European Court of Human Rights, as well as numerous concerns raised by national and international institutions, the legislative and executive authorities have not withdrawn from the changes.

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 Polish courts themselves (references for a preliminary ruling) or of the European Commission (infringement proceedings) and also before the ECtHR. The Commissioner for Human Rights presents his position on matters relating to the independence of the judiciary before both tribunals. Additionally, 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.

The CJEU judgment in the case of *A.K. and others*, concerning the respect for the right to effective judicial protection of Supreme Court judges unduly removed from office based on unlawful rules changing the retirement age, in the light of the competence attributed to the newly created Disciplinary Chamber to hear those cases, has been deprived of a genuine significance in Poland. Likewise, the Supreme Court resolution of 23 January 2020 implementing the *A.K.* (C-585/18) ruling in domestic procedural law. In the judgment on 20th April 2020, the Constitutional Tribunal stated that the Supreme Court resolution was inconsistent with the constitution (U2/20). In the opinion of the CHR this ruling circumvents the decision of CJEU.

The so-called muzzle law had a significant impact on judges, who, fearing reprisals, stopped adopting resolutions on changes imposed to the functioning of the judiciary. During the legislative process to enact the muzzle law, the CHR presented his comments to both the Marshal of the Sejm and the Marshal of the Senate.

There is a noticeable decline in referring questions for a preliminary ruling to the CJEU and ceasing to examine the correctness of appointment of judges.

Both disciplinary and criminal proceedings brought against judges for criticizing changes in the judiciary and judicial activity are pending. Cases for the waiver of immunity are examined by the Disciplinary Chamber of the Supreme Court, although this body should not take any action as established by the interim ruling issued by the CJEU on 8th April 2020 (C-791/19 R).

However, changes in the judiciary did not contribute to the speed of hearing cases. Courts deal with bureaucracy and the number of incoming cases. During the epidemic, there was a problem with access to court and the openness of proceedings. The CHR noted numerous problems related to this.

The CHR presents its position on these matters before CJEU and the ECtHR. He also deals in key cases in the constitutional tribunal and before national courts.

During the legislative process on the muzzle act, the CHR presented his comments to both the Marshal of the Sejm and the Marshal of the Senate.

The CHR appealed to the Minister of Justice for a proper reform of the judiciary, which would actually improve the situation in the courts. The CHR also drew attention to the problems that arose in the functioning of the judiciary during the pandemic.

The CHR also presented his comments to the authorities conducting disciplinary proceedings against judges.

References

- <https://www.rpo.gov.pl/pl/content/ustawa-kagancowa-do-odrzucenia-adam-bodnar-pisze-do-marsza%C5%82ka-senatu>
- <https://www.rpo.gov.pl/sites/default/files/WG%20do%20MS%20w%20sprawie%20konieczno%C5%9Bci%20elektronizacji%20s%C4%85downictwa%2C%208.06.2020.pdf>

Media pluralism and freedom of expression

The situation of journalists who cover public demonstrations must be noted, as explained in the section above on human rights defenders. This has included attacks, brutality of police, journalists stopped in 'kettles' and they were not allowed to do their reporting job on the spot by police.

For the last few years, the ruling party has pledged to "re-Polishize" the domestic media. One big step in that direction was made in December 2020, with an announcement that Poland's state-controlled oil refiner PKN Orlen was buying the local media group Polska Press from Germany's Verlagsgruppe Passau. This decision reignited a debate about press freedom in the country. The

decision, although controversial for many, was accepted by the Office of Competition and Consumer Protection. In its opinion on this decision, the CHR raised concerns that, as a result of it, public authorities will be able to take a dominant position on the regional media market. Just few weeks later another development triggered public discussion. The Polish government announced plans to introduce a new tax on the media levied on income from advertisements. Major private outlets unitedly protested against this measure with an unprecedented 24-hour blackout. The tax will drastically influence the condition of small media companies.

The Ombudsman also reacted on the violent attack to the editorial office of the Fakty magazine. This attack, where the office was raided and severely damaged, was covered by public media which attacked private media (labelling them as foreign entities and personally attacking journalists, such as by claiming publicly that the parents of one journalist had collaborated with the communist regime).

Moreover, the situation in the public media sector has worsened, with an increase of politically motivated dismissals being reported. The case of the Third Program of Polish Radio (Trójka) is particularly worth mentioning. In the song '*Twój ból jest lepszy niż mój*' ('Your Pain is Better than Mine'), the Polish artist Kazik criticised the actions of Jarosław Kaczyński, the head of the ruling PiS party in Poland. His song won the listeners' vote on Poland's Trójka radio station and topped the charts on 15 May 2020. Immediately afterwards, the Trójka management annulled the vote and removed the information from the station's website. In protest, many employees left the station, including the host of the chart show. Internal regulations in public media were introduced in order to limit social media activities of journalists which manifest opposition to the government's line.

NHRI's actions

The CHR has taken many actions in relation to media. Especially worth noticing is the strategic judicial litigation of the CHR, e.g.:

1. Independence of public radio and television – on request of the CHR the Constitutional Court issued a judgment in case K 13/16 declaring unconstitutionality of a reform of public media management and supervisory body nomination process (the CC ruled out provisions allowing the Minister of Treasury to nominate them directly, also criticising similar competences of the newly established National Media Council (RMN), as bodies circumventing constitutional powers of the National Broadcasting Council (KRRiT)). However, the CC judgment of 2016 has not been implemented yet.

2. The CHR challenged a UOKiK's decision (Polish regulator in the area of consumers' rights and competition) allowing a merge between Orlen (the biggest Polish oil company) and Polska Press (one of the biggest media company owning 20 regional newspapers and over 500 internet portals with a number of 17,4 million users). The merge in the opinion of the CHR goes beyond legal tasks of a public oil company and it will affect negatively pluralistic media market. The decision of the UOKiK has not analysed many factors regarding the media market and therefore shall be nullified by courts and then reconsidered.

References

- Merger case: <https://www.rpo.gov.pl/pl/content/wstrzymanie-wykonania-zakupu-polska-press-przez-pkn-ornlen-sad-przyjal-wniosek-rpo>

Corruption

The CHR pays great attention to transparency and access to public information as a prerequisite to ensure effective corruption prevention. The CHR fulfils in practice a role of extra-judicial independent body protecting fundamental rights in this area, mainly helping citizens with their individual cases. Therefore, the CHR critically assesses the complaint directed to the Constitutional Court by the First President of the Supreme Court (case K 1/21). In her complaint the First President challenged basis institutions of the Law of 2001 on access to public information, using citizens' motions for information directed to Supreme Court as an example of misuse of citizens' rights. The CHR joined proceedings before the Constitutional Court demanding a declaration of constitutionality of the challenged legislation.

Other relevant areas

The lack of independent Constitutional Courts limits the capacities of the CHR to challenge legislation violating fundamental rights as guaranteed by the Constitution and international and European law. During the pandemic, actions of the police violated human rights, however there is no effective accountability system to be applied. Generally speaking, the erosion of rule of law is developing and the fundamental rights protection system is becoming weaker due to system factors and gradual process of annihilation of the system checks and balances.

Impact of measures taken in response to COVID-19 on the national rule of law environment

Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law and human rights protection

The CHR has noted numerous irregularities in the functioning of the state and public authorities during the pandemic. The office has received numerous complaints from citizens and has tried to consider each case.

Courts have canceled hearings, and the parties have had problems with submitting their pleadings and entering the premises of courts and offices. The courts have also limited the number of proceedings and unfortunately, only a few had the resources to launch online hearings.

The authorities have taken advantage of the lack of a state of emergency to introduce numerous changes to the law by means of an ordinary act. There was a problem with the organisation of the presidential elections scheduled for May 2020, since until the last moment, citizens did not know if and in what form they would take place.

Access of citizens to public information has been limited. Difficulties in accessing primary care have been reported. The rules related to quarantine remain unclear. There was a huge problem with the availability of education. The schools cannot react to pathological situations and it is not possible to provide psychological help for students.

Amidst the pandemic, the Constitutional Tribunal restricted the right to abortion (case K 1/20). This has led to numerous protests that were, sometimes brutally, suppressed by the police.

When it comes to long-term implications of the pandemic, the limitations introduced during the pandemic may be prolonged and the limitation of fundamental rights by force of executive acts may be prolonged.

The CHR organized online meetings and conferences, gave and conducted interviews. During the winter break, the Commissioner organized meetings for young people on the protection of human rights.

References

- <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000374>
- <https://www.rpo.gov.pl/pl/kategoria-tematyczna/koronawirus-i-epidemia-w-polsce>

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

During the coronavirus pandemic, the office switched to remote work. The number of complaints directed to the office of CHR was 25% higher when compared to similar period in 2019. It was also necessary to undertake numerous interventions in connection with many ambiguities in the adopted regulations. NPM visits, however limited, were continued. The staffing of the office stayed the same, however the budget of the CHR was cut by the parliament.

