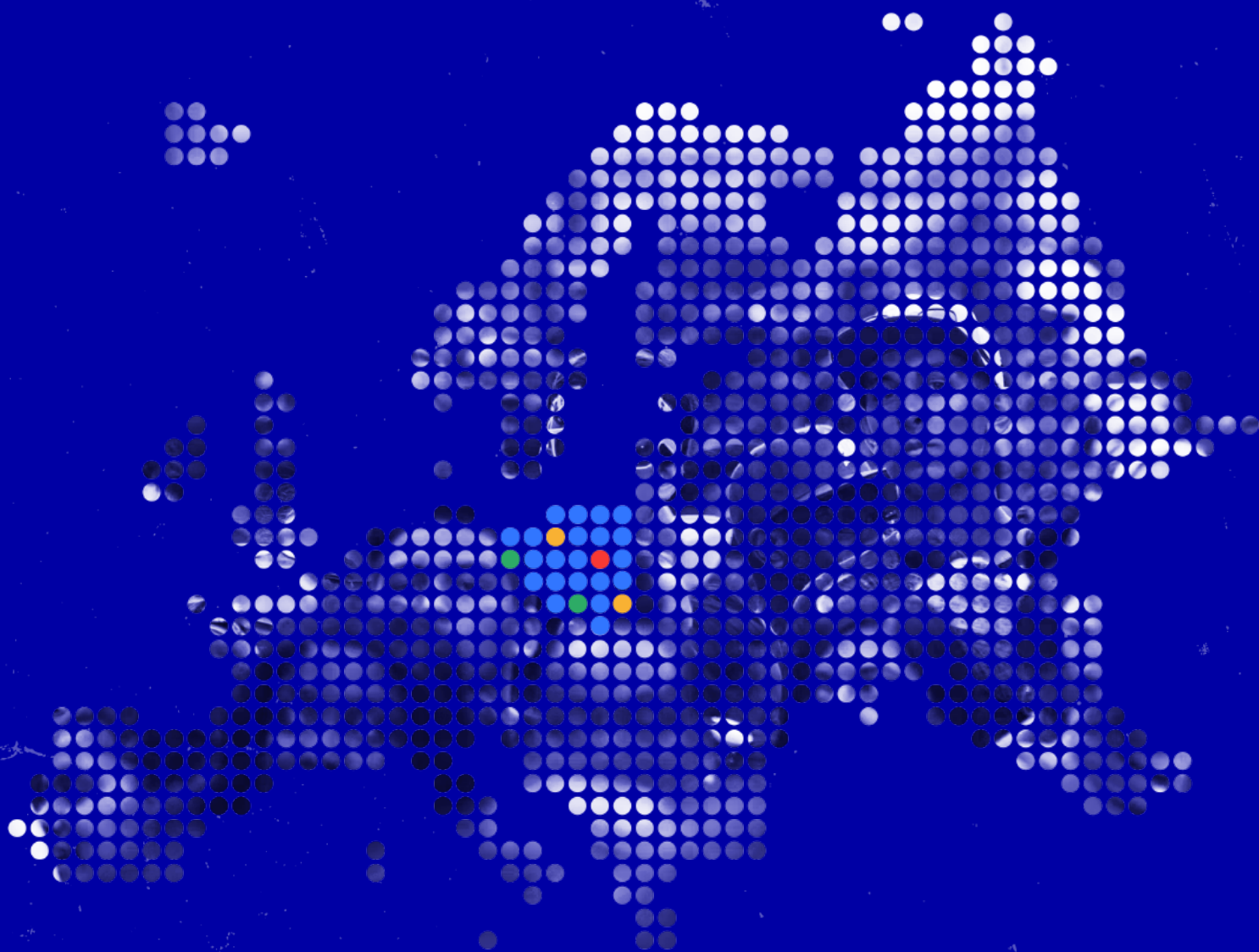


# **LIBERTIES RULE OF LAW REPORT 2022**

**POLAND**



## **Foreword**

This country report is part of the Liberties Rule of Law Report 2022, which is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2022 Report was drafted by Liberties and its member and partner organisations and covers the situation in 2021. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2022 Report includes 17 country reports that follow a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-two member and partner organisations across the EU contributed to the compilation of these country reports.

Building on the country findings, the 2022 Report offers an overview of general trends on the rule of law in the EU and compiles a series of recommendations to national and EU policy makers, which suggest concrete actions the EU institutions and national governments need to take to address identified shortcomings.

**[Download the full Liberties Rule of Law Report 2022 here](#)**

# ***Table of contents***

About the authors .....	4
Key concerns .....	4
Justice system .....	5
Media environment and freedom of expression and of information .....	14
Checks and balances .....	19
Enabling framework for civil society .....	21
Fostering a rule of law culture .....	22
Contacts .....	23

# Poland

## About the authors

### HR HELSINKI FOUNDATION FOR HUMAN RIGHTS

The **Helsinki Foundation for Human Rights (HFHR)** is a non-governmental organisation established in 1989 and based in Warsaw, Poland. HFHR is one of the largest and most experienced non-governmental organisations operating in the field of human rights in Eastern and Central Europe. Since 2007, HFHR has a consultative status with the United Nations Economic and Social Council (ECOSOC). HFHR's objective is the promotion and protection of human rights. Its main activity areas include: domestic education in the field of human rights, international activities and public interest activities aimed at increasing the standards of human rights protection in Poland. HFHR is also a member of the National Focal Point within the European Union Fundamental Rights Agency's research network FRANET.

## Key concerns

In the past year, Poland has seen further deterioration in its judicial system. The unlawfully constituted National Council of the Judiciary (NCJ) continued to appoint new judges, amid growing concerns regarding their

independence and the validity of their future decisions. Furthermore, despite the CJEU's rulings, the Disciplinary Chamber of the Supreme Court continued to suspend judges and waive their immunities.

Freedom of the press was severely restricted by the state of emergency introduced in September 2021 in the area adjacent to the Polish-Belarusian border, which practically excluded the zone from any media scrutiny. The new law on border protection de facto extended the situation until 1 March 2022.

The quality of the legislative process, as well as the quality of laws that have been adopted in the process, have continued to deteriorate, further jeopardising Poland's system of checks and balances. The actions of the Constitutional Tribunal have remained highly politicised, especially after the wrongful appointment of three new members to the Tribunal.

Civil society organisations in Poland continue to face lawsuits and SLAPPs. In particular, organisations defending LGBTQI+ people and women's rights are being increasingly targeted for their activism from religious groups and local communities.

In 2021, attacks by the Polish government to the rule of law principle intensified and confronted the EU legal order, too. Most notably, in October, the Constitutional Court ruled on a proceeding that had been initiated by

the government, claiming that the Court of Justice of the European Union does not have the authority to make decisions about the Polish Constitution and judicial system. The case was widely perceived a challenge to the primacy of EU law.

### State of play

- ↓ Justice system
- N/A Anti-corruption framework
- ↓ Media environment and freedom of expression and of information
- ↓ Checks and balances
- ↓ Enabling framework for civil society
- N/A Systemic human rights issues

#### Legend (versus 2020)

- Regression: ↓
- No progress: —
- Progress: ↑

## Justice system ↓

### Key recommendations

- The governing majority should immediately implement all decisions of the CJEU and ECtHR in relation to the functioning of the judiciary in Poland, especially when it comes to suspending the activities of the Disciplinary Chamber of the Supreme Court and restoring full independence to the National Council of the Judiciary.

- The governing majority should immediately cease any actions or legal changes imposing further pressure on judges, especially in the form of disciplinary proceedings and other kinds of harassment in the response to content of substantive decisions issued by judges.

## Judicial independence

### Appointment and selection of judges, prosecutors and court presidents

In 2021, the rule of law crisis in Poland continued, influencing key aspects of the functioning of the judiciary system, including the process of appointing the judges of common courts and the Supreme Court.

The National Council of the Judiciary (NCJ) continued its work of promoting and appointing judges of common courts. Due to the wrongful composition of the NCJ, there are growing doubts regarding the legality of the decisions made by the Council, including the legality of the appointment process for judges. Concerns about the current NCJ result from the fact that 15 judges who are members of the Council were elected, in accordance with the provisions adopted in 2018, by the Parliament (not by other judges, as it used to before the law changed).

In several cases, judges of common courts recognised and fought against this problem in the NCJ. For example, in October 2021, a judge of the Regional Court in Częstochowa, Adam

Synakiewicz, overruled a decision of the court of the first instance based on the fact that the ruling was passed by a judge appointed by the NCJ. Similar decisions were made by judges Maciej Ferek from the Regional Court in Kraków and Agnieszka Niklas-Bibik from the Regional Court in Słupsk. In response to these decisions, the judges faced disciplinary consequences.

In 2021, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) ruled in cases concerning the problem of judges' appointments. In the case *Reczkowicz v. Poland*, the ECtHR focused on the role of the NCJ in appointing judges and how its wrongful composition influenced one's right to have a case heard by a tribunal established by law. Furthermore, in the case *Dolińska-Ficek and Ozimek v. Poland*, the ECtHR found that the Chamber of Extraordinary Review and Public Affairs of the Supreme Court did not meet the criteria of the independent court established by law given the process of its composition.

In cases *A. B. and W. Ż.*, the CJEU concentrated on the problem of appointing judges to the Supreme Court by the new NCJ. None of these judgements, however, were implemented by the governing majority in Poland. Following the CJEU's judgment in case *A.B.*, the Supreme Administrative Court declared that the NCJ's resolutions to appoint judges were partially null and void. However, according to the Court, this does not influence the legality of the President's decisions to appoint the judges presented by the NCJ.

### ***Irremovability of judges, including transfers, dismissal and retirement regime of judges, court presidents and prosecutors***

Irremovability of judges remained threatened in 2021, in particular by attempts to waive their immunities and hold them criminally liable, as well as by suspending them in judicial activities or transferring them to other departments of courts without justification.

As concerns criminal proceedings, the most notable example is Igor Tuleya, who decided to allow the media to be present in the courtroom while he was delivering a decision in a politically sensitive case during an in-camera session in 2017. In 2020, the Disciplinary Chamber of the Supreme Court waived Judge Tuleya's immunity with regard to an alleged abuse of power and dissemination of information from the investigation, and suspended him. Based on the CJEU's decisions in July 2021, ordering Poland to suspend the functioning of the Disciplinary Chamber and declaring the disciplinary regime for judges to be incompatible with EU law, Tuleya filed a motion to the president of his court for reinstatement but was denied. Another judge suspended by the Disciplinary Chamber for ordering the disclosure of lists of supporters of NCJ candidates, Paweł Juszczyzyn, won a lawsuit in 2021, in which the resolution suspending him was declared to be a violation of his personal rights. In the final decision, the court reiterated that the Disciplinary Chamber had no formal grounds to suspend Judge Juszczyzyn. However, the president of Judge Juszczyzyn's court refused to reinstate him. Furthermore, in October 2021,

the CJEU delivered a judgement concerning the case of Judge Waldemar Żurek, who had been transferred to another court department by its president. In its ruling, the CJEU has declared that a transfer to another court or department made without the judge's consent might violate the principles of irremovability and independence.

With regard to public prosecutors, the practice of delegating them to other organisational units of the prosecution, often located in distant cities, continued to be noticeable also in 2021. Although the law authorises the National Prosecutor to temporarily transfer any prosecutor to another place of service for a period of no longer than 12 months without their consent, in some cases such decisions are issued as a form of reprisal for prosecutors' activities, in particular for being members of independent associations, for making certain public statements or for taking certain procedural actions.

In January 2021, the media reported on 20 new cases of questionable transfers, including the President of the Association for Public Prosecutors "Lex Super Omnia", Katarzyna Kwiatkowska, who was delegated to a city 181 km away, its member Ewa Wrzosek, who had initiated an investigation into the cancelled presidential elections of 2020 (263 km), and Jarosław Onyszczyk, member of Lex Super Omnia's board (311 km). In December 2021, the proceedings before a labour court began with regard to Kwiatkowska's lawsuit demanding compensation for discrimination and unequal treatment. Another member of the association and a vocal critic of the current

prosecution's authorities, Mariusz Krasoń, who was first seconded to a unit located almost 300 km away from his place of living for a half-year period in 2019, also filed a lawsuit against his superiors in a labour court. In the judgement from June 2021, the court declared his delegation illegal and unjustified, stating also that decisions of the National Prosecutor were discriminatory.

### *Promotion of judges and prosecutors*

Judges in Poland are promoted by the President of Poland upon a motion from the NCJ. Since the 2017 amendment aimed at reforming the National Council of Judiciary, the independence of the Polish NCJ is in serious doubt. This has resulted in several landmark judgements by the ECtHR and CJEU, as well as in the decision of the European Network of Judicial Councils to exclude the Polish NCJ from the network.

The NCJ's dependence on the ruling majority has also had specific consequences in the area of judicial promotion. It led all judicial self-government bodies to cease participating in the judicial appointment and promotion procedures. This resulted in the 2018 amendment to reform the common courts, which presumed that the lack of judicial self-government bodies' opinion on candidates to the judicial positions has to be understood as a positive opinion.

At the beginning of 2021, the media revealed that, since 2018, the NCJ has promoted its members and their relatives to higher judicial positions more than a dozen times. The same

applies to judges (and their relatives) who have a close connection with the executive branch of power. To give an example, former deputy Minister of Justice Judge Łukasz Piebiak, who, according to the media, played an active role in the hate campaign against other judges, was promoted from the district court (the lowest level in the system of courts) to Supreme Administrative Court. Moreover, Rafał Puchalski, a judicial member of NCJ and the judge of a district court, was promoted to the Disciplinary Chamber of the Supreme Court.

To sum up, the NCJ's decision on the appointment of judges and their promotion raises considerable doubts as to their independence. It is significantly questionable whether the decisions of the Council were based only on substantive criteria.

The NCJ's decision might be challenged in the Supreme Court. The appeal from NCJ's decisions is recognised by the Chamber of Extraordinary Review and Public Affairs. On 8 November 2021 the European Court of Human Rights delivered a judgment in the case *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19). In that case, it found a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. These irregularities in the appointment process compromised the legitimacy of the Chamber to the extent that it did lack the attributes of a "lawful tribunal".

The prosecutors of provincial, regional and national prosecutors' offices are appointed by the Public Prosecutor General upon a motion from the National Prosecutor (1st deputy of PPG). The Act on the Public Prosecutor's Office does not specify any criteria that have to be taken into account in order to promote a prosecutor. It only indicates minimal experience in acting as a prosecutor or practicing other legal professions. Whenever there are more than two candidates for the vacancy, the Public Prosecution General does not have to initiate a formal competition.

Before appointing the prosecutor to the prosecutorial position, the Public Prosecutor General is not obliged to ask the appropriate board of prosecution service to issue an opinion about the candidate. As a result, the procedure for appointing public prosecutors to higher positions currently does not guarantee that the decision in that field will be based on substantive criteria.

The Act on Prosecution does not make it possible to challenge the Public Prosecution General's decision on promotion or lack of promotion of a prosecutor.

### *Allocation of cases in courts*

In April 2021, the Ministry of Justice lost a case before the Supreme Administrative Court against the ePaństwo Foundation over the transparency of the Random Case Allocation System algorithm. The system is an IT tool that engages judges for specific cases before the ordinary courts.



In September, the Ministry published a document of more than 40 pages with a description of the algorithm, but, according to experts, this is an insufficient step in examining whether the system actually works in a random way. It is not possible to make such an assessment without making the full source code available. The information released does not therefore dispel doubts as to whether the system is working properly and is free from human interference.

***Independence and powers of the body tasked with safeguarding the independence of the judiciary***

In 2021, the European Network of Judiciary Councils decided to expel the Polish National Judiciary Council. The decision was preceded by a two-year period of suspension for the Polish NCJ in the network. The ENCJ stated that the NCJ does not safeguard the independence of the judiciary and does not defend the judiciary nor individual judges.

Despite the growing legal concerns regarding the legality of its operations, the NCJ continued as before. In 2021, the NCJ nominated the highest number of judges since 2017 – altogether 829 candidates for judges' positions were presented to the President by the NCJ (compared to 88 candidates in 2018 and 409 in 2020).

In December 2021, the Speaker of the Sejm started the process of screening candidates for the 15 positions of judges-members in the NCJ, as the term of office of the incumbent 15 judges-members expires in 2022. The biggest

judges association, IUSTITIA, already called upon its members to boycott the process of selecting candidates (the judges can apply either for the position of a member or support one's candidacy).

The issues regarding the NCJ's composition and functioning were the subject of several decisions of both the European Court of Human Rights and the Court of Justice of the European Union. None of these decisions were implemented by the Polish authorities.

***Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges***

As a result of the infringement proceedings launched by the European Commission in 2019, pertaining to the regime of disciplinary liability for judges (which, in the opinion of the EC, does not guarantee sufficient protection for judges from political control), the Court of Justice of the European Union delivered a judgement in July 2021 finding the disciplinary regime incompatible with EU law. In particular, the Court has emphasised that Polish judges are exposed to the risk of disciplinary proceedings for the decisions they make (especially for requests for preliminary rulings to the CJEU). Moreover, with regard to another infringement proceeding concerning the “muzzle law” of 2020, which, according to the EC, prevents Polish courts from directly applying certain provisions of EU law to protect judicial independence, the CJEU ordered Poland to suspend the application of the provisions regulating the work

of the Disciplinary Chamber of the Supreme Court in disciplinary and immunity proceedings concerning judges. As the decision was not implemented, in October 2021, the CJEU imposed a financial penalty on Poland.

In August 2021, the First President of the Supreme Court ordered that case files concerning disciplinary liability of judges and immunity proceedings against them should be directed to the Supreme Court's registrar and stored there, unless the adjudicating bench had already been appointed to hear the case. These orders will remain in force until 31 January 2022, which means that the Disciplinary Chamber's functioning is effectively suspended by two separate institutions.

Despite the CJEU's judgements and the First President's orders, since July 2021, the Disciplinary Chamber has heard several disciplinary cases against judges. In November 2021, it suspended Judge Maciej Ferek, who was charged with questioning the status of other judges appointed with the participation of the new National Council of the Judiciary. A similar decision was issued with regard to Judge Piotr Gąciarek, who also questioned the status of another judge, as well as to Judge Maciej Rutkiewicz for disregarding the Disciplinary Chamber's decision to waive the immunity of a public prosecutor.

In October 2021, the Disciplinary Commissioner for Common Courts Judges announced that they would initiate disciplinary proceedings against two vocal critics of the changes implemented in the judiciary, Judges Olimpia Barańska-Matuszek and

Beata Morawiec. With regard to the latter, the charges also concern activities that might trigger criminal liability.

In 2021, public prosecutors who were active in public debate or who issued certain procedural decisions were also held liable in disciplinary proceedings (the suspension of hearing disciplinary and immunity cases by the Disciplinary Chamber of the Supreme Court does not apply to prosecutors). The most notable example is the case against Ewa Wrzosek, who initiated an investigation concerning the government's preparations to hold presidential elections during the pandemic in 2020. Despite earlier statements from the National Prosecutor on their intention to launch only disciplinary proceedings against her, she will face criminal charges for the alleged abuse of power. Moreover, in December 2021, the media, using the information from Canada-based Citizen Lab institute, reported that deep surveillance software Pegasus had been used at least six times with regard to Wrzosek's mobile phone.

### *Independence/autonomy of the prosecution service*

The Act on Prosecution adopted by the Sejm at the beginning of 2016 remerged the positions of the Minister of Justice and the Prosecutor General, leading to a situation in which an acting politician is also acting as the Prosecutor General. The Prosecutor General and National Prosecutor are superior prosecutors to all public prosecutors in Poland.

Under the 2016 Act on Prosecution, public prosecutors are independent, with the exception of a specific provision of the act requiring public prosecutors to enforce dispositions, guidelines and orders of superior prosecutors, even if they are considered specific prosecutorial decisions, e.g. not bringing an indictment to the court. Such orders generally have to be in writing, and only have to include a statement of reasons if requested. However, since the orders are kept in internal prosecutors' case files, the parties of the proceedings do not have any procedural possibility of acquainting themselves with the content of the orders issued in their case.

Moreover, superior public prosecutors have a right to change or revoke any decision made by subordinates. Such decisions have to be made in writing but do not require a statement of reasons. Last but not least, superior prosecutors also have the power to take over cases handled by subordinate prosecutors.

To sum up, the public prosecution system in Poland does not guarantee public prosecutors' internal independence in the decision-making process. Superior prosecutors can influence the content of certain decisions made by prosecutors.

In 2017, the Sejm, upon a motion submitted by the Ministry of Justice/Public Prosecutor General, amended the Code of Criminal Proceedings by adopting measures allowing the prosecution service to withdraw indictments that were already brought to the court. In 2021, the media revealed that such a tool was used in the case of Daniel Obajtek, a

prominent politician of the ruling party and the head of the state oil company, Orlen. The prosecution decided to discontinue the proceedings concerning Obajtek's alleged corruption.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

In 2021, the prosecution continued an investigation concerning a series of smear campaigns against judges. According to the media reports, some top rank officials of the Ministry of Justice were allegedly engaged in this process. In 2021, the investigation was transferred from the prosecution office in Lublin to a prosecution office in Świdnica.

In January 2022, the media reported on an email correspondence between the members of the Prime Minister's team and his consultants. In this correspondence, the Prime Minister's co-workers were supposed to ask the chief of the Public Television to prepare materials attacking judges of appellate court in Warsaw in response to the judgements they had served a couple of days earlier.

## ***Quality of justice***

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### ***Resources of the judiciary***

The difficult situation for the administrative staff in courts and prosecution units has long been an issue in Poland and remained one in 2021.

According to trade unions' representatives, the average salary of non-judicial personnel (i.e. excluding judges) in courts in 2021 was approximately PLN 3,300 (EUR 733) after tax. Their low earnings are hardly commensurate with the amount of work done by the administrative staff, in particular given the increase in the number of cases relating to COVID-19 lockdown procedures this past year compared to the relatively stable total number of non-judicial employees. The inadequate remuneration has resulted in the growing frustration among courts' administrative staff, leading to low levels of employee retention and lack of stability in employment. Moreover, the lack of sufficient support for qualified court clerks affects the work of judges and contributes to the gradual increase in the length of proceedings.

In June 2021, the government announced the freezing of salaries in the public sector in 2022, including non-judicial personnel of courts and prosecution offices, which resulted in administrative employees engaging in a protest. The protest is still ongoing as of the moment of preparing this report. Among other things, the protesters demand a 12% increase in salaries for court employees and a levelling out of the differences in remuneration between different prosecution units, as well as a linking of the salaries for both groups to the national average wage.

### **Digitalisation**

The COVID-19 pandemic forced Polish authorities to adopt solutions enabling courts to conduct judicial proceedings remotely. The

practice of using such measures was assessed in the Helsinki Foundation for Human Rights report "E-hearings in Polish Courts".

According to the report, Polish courts lack a uniform approach to conducting hearings remotely. The courts differ in the software they use, the amount and quality of training provided to the judges and courts' employees, as well as the publicity of the e-hearings. Some of the courts reported technical problems during remote hearings, which resulted in some of the hearings having to be delayed or cancelled. The report also indicates that in four out of nine surveyed courts, the training for judges and employees was either not held or was held in an ad hoc form. Finally, the research indicated specific problems with the publicity of the e-hearings. More than ten circuit courts (out of 49) declared that the e-hearings are closed to the public.

### ***Geographical distribution and number of courts/jurisdictions and their specialisation***

At the end of 2020, the Minister of Justice announced the idea of flattening the structure of the judiciary in Poland. The plans of the Minister were combined with Art. 180 (5) of the Constitution of Poland, which allows public authorities to relocate specific judges or force them to retire whenever a reorganisation of the court system or a change to the boundaries of court districts happens. Until today, the Minister has not revealed detailed plans of the amendment. However, the idea of flattening the court system has to be recognised as a constant threat to the independence of Polish

judges. Every single judge is at risk of being targeted by the mechanism indicated in Art. 180 (5) of the Constitution.

At the end of 2016, the Sejm passed a law allowing the Minister of Interior Affairs to lower retirement and disability pensions for persons who had served in years 1944-1989 as officers of uniformed services (in particular, the police) during the communist regime of Polish People's Republic. The act, however, only allowed this decision to be challenged by making a complaint to the Circuit Court in Warsaw. As a result, only this one court was able to take on this type of judicial case. This undermined the Circuit Court's ability to recognise the cases in a reasonable time and hindered the possibility for Polish people living outside of Warsaw to access the courts.

As of 28 February 2021, more than 25,000 cases concerning the lowering of pensions were registered in the Circuit Court in Warsaw. The court decided to refer 7,000 of these to other circuit courts. A significant number of the remaining cases were suspended due to the question concerning the constitutionality of the aforementioned amendment.

On 9 March 2021, the ECtHR passed down to the Polish authorities their decision in the case of *Bieliński and 22 others v. Poland*, concerning the Warsaw Circuit Court's accessibility to people whose pensions had been lowered as a consequence of the act. The applicants

made their case under Article 6 § 1 of the Convention regarding the excessive length of their proceedings. In their opinion, they were effectively denied access to the court.

## ***Fairness and efficiency of the justice system***

### ***Length of proceedings***

There is no available data showing the length of proceedings in 2021.

The year 2020 was the fifth consecutive year in which the average length of proceedings increased; from 4.2 months in 2015 to 7 months in 2020.

According to the research findings of civil society (including a report by the HFHR),<sup>1</sup> the causes of judicial backlog include, among other things, the growing number of new cases brought to the courts (ca. 15 million cases in 2018), the system of appointing expert witnesses, case management and the overall management of the courts' work. The HFHR report has also shown that the available remedies to compensate for the excessive length of the proceedings are not fully efficient. Since 2016, the number of complaints for the excessive length of the proceedings has been rising, yet the average value of awarded compensation remained relatively low – from 2,752 PLN to 3,324 PLN. According to the HFHR research, the relatively low compensation rate remains

1 M. Szuleka, M. Wolny, M. Kalisz, *The Time of Trial. How do changes in justice system affect Polish judges?*, Warsaw, 2019.

one of the reasons why parties in the proceedings are discouraged from seeking relief.

### ***Execution of judgements***

Poland has a disappointing ECtHR judgement implementation record. In 2021, there were 35 judgements pending implementation, including key decisions related to the changes in the judiciary system, such as *Xero Flor v. Poland* or *Reczkowicz v. Poland*. According to the statistical data of the European Implementation Network, the average length of judgement implementation in Poland is six years and four months, which is significantly more than in neighbouring European Union states Germany, Lithuania or Slovakia. Furthermore, in future the implementation of some of ECtHR judgements may be further complicated due to the jurisprudence of the Constitutional Tribunal. In November 2021, the Tribunal ruled that Article 6(1) of the ECHR (the right to a fair trial), insofar as it applies to the Constitutional Tribunal, is inconsistent with the Polish Constitution. This judgement will probably serve as a justification for the governing majority not to implement the judgement of *Xero Flor v. Poland*. Additionally, in 2022, a similar case is pending before the Constitutional Tribunal, concerning the constitutionality of Article 6 of the ECHR in so far as this provision provided the basis for the judgements in a series of other key rule of law cases.

Similarly, in 2021, there were no further developments in implementing the judgements of the CJEU in relation to rule of law cases. Neither the governing majority nor the

relevant states' authorities have undertaken any steps to address the key problems such as functioning of the Disciplinary Chamber of the Supreme Court or the National Council of Judiciary.

## ***Media environment and freedom of expression and of information*** ↓

### **Key recommendations**

- Media reporters must be allowed to enter the area adjacent to the Polish-Belarusian border. The President of Poland should amend his order from 30 November 2021 (in effect until 1 March 2022), which extended the prohibition of entering the emergency zone, by excluding media workers from this prohibition or introducing an accreditation system.
- Steps must be made to reintroduce and secure the independence of the National Broadcasting Council.
- A secure and fair framework of operation for all media outlets must be provided.

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## **Media and telecommunications authorities and bodies**

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### ***Independence, enforcement powers and adequacy of resources of media and tele- communication authorities and bodies***

According to civil society reports (e.g. the analysis of Stefan Batory Foundation),<sup>2</sup> the National Broadcasting Council (NBC) in its current composition does not meet the criteria of a fully independent body. The NBC is composed of persons appointed by the governing majority and some of them have close political ties to the governing party. According to the reports, the close political ties influence the functioning of the NBC. In recent years, the Council has not undertaken any steps in relation to the work produced by e.g. public media, which, on many accounts, presented biased and discriminatory media content, especially during the election campaigns. The NBC's bias was also visible in its business decisions from 2021 while deciding on extending the licence for channel TVN24, part of the Discovery televisions network. During the Council meetings on the matter, members of the Council demonstrated their biased approach to the TV station and stated that the Council was deliberately postponing its decision on the licence renewal due to the ongoing parliamentary procedure concerning the amendments to the Broadcasting Act (i.e. Lex TVN).

### ***Conditions and procedures for the appoint- ment and dismissal of the head / members of the collegiate body of media and tele- communication authorities and bodies***

In August 2021, the Parliament adopted changes to the Act on the National Broadcasting Council (NBC). The amendments changed the process of appointing members to the Council, granting the President of Poland more powers in the process. The law, however, did not enter into effect, as in December 2021 the President of Poland vetoed the act.

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## **Pluralism and concentration**

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### ***Fairness and transparency of licencing procedures***

Throughout 2021, TVN24, a TVN-owned 24-hour news channel, was awaiting a decision from the NBC on the renewal of its 10-year broadcasting licence, which was set to expire on September 26. Even though the station had applied for the renewal in February 2020, the regulator did not issue any decision for 18 months. Such a length of the proceeding was unprecedented and particularly excessive for the renewal of a licence, for which the Broadcasting Act envisages a simplified examination of applications. According to the NBC's chairman, the Council continued to analyse whether the ownership structure of TVN group complied with non-EEA ownership restrictions laid out in the Broadcasting

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2 S. Ananicz, [The politicisation of the Polish National Broadcasting Council \(KRRiT\): a new front in Poland's rule-of-law conflict with the European Union?](#) Commentary, Warsaw, 2021.

Act, specifically given that the direct shareholder of TVN group is a company situated outside the European Economic Area and the controlling shareholder is a US company. As indicated by other members of the NBC, however, the reasons for not renewing the licence for TVN24 were also related to the content of the channel's programs, which were perceived as not compliant with the duties of journalistic diligence. As reported, on the day when the last two votes for the renewal took place, a governing majority MP representing the sponsors of the amendment to the Broadcasting Act visited the NBC's headquarters and met with one of its members (he denied, however, exerting political pressure on the NBC). Eventually, the Council renewed TVN24's licence on 26 September 2021.

At the same time, from July to December 2021, the Parliament worked on a draft legislation amending the Broadcasting Act. The legislation would effectively ban non-European companies from owning Polish broadcast media, and was directed at the US-owned TVN group in Poland. The lack of transparency in the legislative process raised significant concerns, and is but one example of the secrecy surrounding the opinion of the State Treasury Solicitors' Office on the parliamentary bill, often referred to as Lex TVN.

The opinion was not published on the website of the Sejm, and the Office refused the request for access to information on the grounds of "secrecy". Reference was made to Article 38(1)

of the Act on the State Treasury Solicitors' Office. However, it is difficult to argue from this provision that the content of opinions submitted in the course of the legislative process can be kept secret.

## ***Transparency of media ownership***

### ***Allocation of state advertising***

In 2021, there were neither legal nor policy developments aiming at a fair and equal regulation of the state's allocated funds for advertising in media outlets.

In 2021, the research centre Kantar Media published a report<sup>3</sup> summarising the money spent by the state's companies on the paid advertisement in media outlets in years 2015 to 2020. According to these findings, the state's companies spent altogether over 5 billion PLN (approx. 111 million EUR) on advertisement. The state companies' chose mostly private media outlets loyal to the government rather than private media outlets known for their critical approach to the government (such as Gazeta Wyborcza or TVN TV station).

Furthermore, in 2021, the government announced a legislative proposal introducing the media tax, which would introduce a levy on the advertising revenue of media outlets (including print outlets, radio and television, as well as internet media companies). If introduced, the tax would be most burdensome for independent media outlets such as Agora (the

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3 T. Kowalski, Report. [Advertising expenditures of state-owned companies. Poland 2015-2020](#), Warsaw, 2021.



publisher of *Gazeta Wyborcza*), the private TV station TVN or Ringier Axel Springer Polska (the publisher of several of print outlets and information website Onet.pl). Eventually, the government dropped any further attempts at this proposal after massive protests from the media and civil society.

### ***Safety and protection of journalists and other media activists***

#### ***Attacks on journalists and media activists***

Since 2016, the media has been reporting on the growing number of incidents of physical and verbal violence against journalists covering, among other things, public protests. Despite this growing trend, the state authorities have not developed any specific measures aimed at combating this practice. The attacks on journalists are the subject of criminal investigations and, depending on the case, may be subject to the prosecution's discretionary decisions.

In 2021, the prosecution pressed the indictment against a perpetrator who beat up a TV operator working for the Polish Public Television. The proceeding was, however, discontinued by the court. The prosecution also pressed an indictment against a protester who attacked *Gazeta Wyborcza* journalists in Wrocław in October 2020. In 2021, there was no progress in similar cases, such as the attack on a journalist during the far-right Independence March in November 2020. According to media reports, the prosecution

plans to hear hundreds of witnesses as a part of the investigation.

In November 2021, three photojournalists – Maciej Nabrdalik, Maciej Moskwa and Martin Divíšek – were brutally apprehended while performing their duties near the emergency zone near the Polish-Belarusian border. They were dragged out of their cars, handcuffed and kept for an hour without their jackets, while Border Guard officers searched the cars, looked at the photographs stored on their cameras and read through text messages from their phones. Two of the men filed a formal complaint concerning their apprehension.

Moreover, during an annual event organised by the governing majority's officials in Warsaw in October 2021 to commemorate the victims of the tragic 2010 plane crash in Smolensk, representatives of OKO.press (an independent online journalistic entity) were not allowed to enter the premises by the State Security Service officers. Another independent journalist, Krzysztof Boczek, revealed that he had been pushed away and intentionally hit by police officers several times after the event.

#### ***Lawsuits and prosecutions against journalists including SLAPPs and safeguards against abuse***

In 2021, the media reported on several instances of proceedings launched against journalists and civil society activists in relation to their work.

The chief of the Polish state petrol company, Daniel Obajtek, sued *Gazeta Wyborcza* in

response to the number of articles concerning his private property and career path. According to Gazeta Wyborcza's journalists, this was the 63rd lawsuit issued by a person with close ties to the ruling party Law and Justice. Similarly, according to Onet.pl data, media outlets run by Ringier Axel Springer were sued 79 times and were faced with 17 criminal cases launched by people or institutions with close ties to the ruling Law and Justice since 2015.

Proceedings that have elements of SLAPP have also been launched against, among others, prosecutors. In 2021, the National Prosecution Office sued prosecutor Katarzyna Kwiatkowska in response to her media statements concerning the situation in the prosecution office. The financial demands presented by the lawsuit (i.e. the costs of a public apology in the media and a payment for a community purpose indicated by the plaintiff) are estimated at 2 million PLN.

### ***Confidentiality and protection of journalistic sources (including whistleblower protection)***

In October 2021, the media reported that the police entered the house and seized a laptop, a mobile phone, and a router that belonged to journalist Piotr Bakselereowicz without a court's order. The police had decided to seize his electronic devices by force after Bakselereowicz invoked journalistic privilege to protect his sources and refused to comply with the request voluntarily. They justified their actions as lawful by connecting them to an ongoing investigation concerning threatening e-mails allegedly sent to an MP of the

governing majority from Bakselereowicz's IP address.

Another reporter, Katarzyna Włodkowska, was questioned in October 2021 about a source in her investigation into the murder of the Gdańsk mayor Paweł Adamowicz in 2019. In 2020, the journalist wrote a report for Gazeta Wyborcza, in which she disclosed parts of a letter written by the alleged murderer, which was supposed to be sent to the imprisoned suspect's brother. Although the perpetrator had been considered mentally ill, the content of the letter indicated rather that the act was conscious and premeditated. Consequently, an investigation was launched by the Gdańsk prosecution office and the journalist was asked about her source, yet she continuously refused to disclose the source's identity, invoking journalistic privilege. Therefore, Włodkowska was charged with a fine, which she refused to pay.

### ***Access to information and public documents***

On 2 September 2021, a state of emergency in the area adjacent to the Polish-Belarusian border was introduced. The restrictions put in place practically excluded this area from any media scrutiny. Journalists were not listed as a group exempted from the prohibition of entry. In particular, no system of accreditation was introduced that would grant journalists limited access to the zone. Journalistic work was also directly hindered (if not prevented) by a ban on recording and the restriction of the right to obtain public information. On 3 September 2021, two media workers were informed by the police that they would face criminal

charges for reporting from the emergency zone (specifically, for staying in the prohibited area and for allegedly filming the border infrastructure). Another journalist was fined on 27 September 2021 while following a Border Guard bus transporting migrants towards the border, presumably in order to push the group back into the territory of Belarus.

## Checks and balances

### Key recommendations

- The three people who were appointed to the already taken seats in the Constitutional Tribunal must be replaced with legally elected judges.
- The process of enacting laws must be improved, in particular by refraining from the use of fast-track procedure where it is not justified.

### Process for preparing and enacting laws

#### *Framework, policy and use of impact assessments and public consultations*

Like in previous years, the Parliament hastily adopted new laws without conducting public consultation and guaranteeing appropriate *vacatio legis*. This practice by Parliament members of by-passing public consultation by submitting governmental draft acts has not changed in 2021.

Since 2019, the Sejm only once decided to organise a public hearing concerning specific draft laws recognised by the Sejm. The hearings are facultative measures aimed at providing citizens with a space to take the floor and present their opinions on submitted draft laws. The only public hearing, which took place on 5 January 2022, considered COVID-19 regulations allowing employers to check their employees' vaccination status.

#### *Rules and use of fast-track procedures and emergency procedures*

The most striking example of rush legislation concerned the amendment to the Act on the Protection of the State's Border. Despite the ongoing crisis on the Polish-Belarusian border and the impending constitutional deadline for the state of emergency, the Council of Ministers proposed the amendment at the last possible moment. The amendment was not consulted publicly, despite the fact that it largely affected media freedom and prevented CSO representatives from providing humanitarian aid to all people crossing the Polish-Belarusian border. Moreover, it was illegally recognised as "urgent" which, *inter alia*, effectively limited the President and Senate's maximum period for deliberation. Finally, the Sejm adopted the new act in just three days, leaving practically no space for effective public consultations.

#### *Regime for constitutional review of laws*

The ongoing constitutional crisis has brought into question the ability of the Constitutional Tribunal to conduct independent reviews of

the constitutionality of the law. Specific problems in that field concerned the composition of the Court (and the fact that its three members were elected to seats that were already taken), the legality of the appointment of the President of the Tribunal, and the President's actions concerning the composition of the Tribunal in certain cases. In October 2015, the then governing majority elected five new judges to the Tribunal (instead of just three whose tenures were about to expire on 6 November 2015). After the new governing majority's coming to power at the end of October 2015, during its first session, the Parliament adopted resolutions pronouncing the election of all five judges null and void, and elected another five judges based on a provision which was not yet in force. As a result, three of the newly elected judges were elected to the seats still taken by persons who were supposed to end their terms of office on 6 November 2015. Furthermore, with regard to the Court's President, when presented to the President of Poland, her candidacy for this function was not confirmed by an affirmative resolution of the Court's General Assembly (i.e. all of its judges), which is required by law.

In its judgement of 2021 (case *Xero Flor v. Poland*), the ECtHR confirmed that the flaws in the appointment process of the three judges of the Polish Constitutional Court can lead to a violation of the parties' right to have their case heard by an independent body established by law.

In 2021, the HFHR issued a report on the Constitutional Court,<sup>4</sup> in which it indicated that the Court is used by the ruling majority to rubber-stamp its most controversial changes to the legal system. Moreover, the HFHR called out the ruling majority's practice of resolving controversial and socially objectionable matters by initiating specific proceedings before the Constitutional Court instead of adopting amendments. This method was used, inter alia, to tighten the rules on access to abortion. Last but not least, the Constitutional Court is used in the rule of law crisis as a tool limiting the consequences of the CJEU and ECtHR judgments concerning Poland.

According to the conclusions in the report, the activities of the Constitutional Court demonstrate that it has ceased to be an independent institution upholding the Constitution and a cornerstone of the human rights protection system. Proceedings before the Constitutional Court in its current form are fraught with the risk of infringements of the individual's right to have their case heard by an independent body established by law.

#### ***Judicial review of emergency regimes and measures in the context of COVID-19 pandemic***

The legality of the emergency measures aimed at combating the COVID-19 pandemic still raises doubts, since not all measures have a clear statutory basis in the Act on Preventing

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4 M. Wolny, M. Szuleka, *A tool of the government. The functioning of the Polish Constitutional Court in 2016-2021*, Warsaw, 2021.

and Combating Infections and Infectious Diseases. These doubts have culminated in court rulings finding that specific restrictions violate constitutional principles concerning the limitation of human rights and freedoms. To give an example, in May 2021, the Voivodeship Court in Warsaw quashed the administrative sanction imposed on a woman who was demonstrating against the Constitutional Tribunal's decision regarding access to abortion. The administrative court found that the restrictions imposed by the Ministry of Health violated the Constitution and the Act on Preventing and Combating Infections and Infectious Diseases. Moreover, the court indicated that the proceedings conducted by the Sanitary Inspection Unit (a body tasked with, among others, monitoring of compliance with sanitary laws, e.g. related to combating infectious diseases, and authorised to impose financial penalties on individuals) was affected by various violations of the Code of Administrative Procedure. For instance, the Sanitary Inspection Unit failed to ensure the principle of effective involvement of the parties in the proceedings. Moreover, the court criticised the Inspection for basing its decision only on the memo sent by the police, without considering any other evidence. Finally, the court indicated that the sanitary inspection had imposed a financial sanction on the applicant without considering all of the circumstances of the case, especially the personal situation of the applicant.

## **Enabling framework for civil society** ↓

### **Attacks and harassment**

#### **Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors**

In 2021, a number of proceedings concerning civil society activists were pending. For example, one district court acquitted three civil society activists – Elżbieta Podleśna, Anna Prus and Joanna Gzdyra-Iskander – from charges of religious blasphemy by posting pictures of Virgin Mary in a rainbow halo. In 2021, the district court also acquitted activists running the “Atlas of hate” website, on which they published information on the local communities that adopted “anti-LGBT resolutions”. One of these local communities sued the activists, but the court dismissed the lawsuit. Still, there are six similar proceedings pending against them. Also in 2021, the regional court in Mielec acquitted activist Bart Staszewski, who placed a sign that read, “LGBT-free zone”, at the entry road to the city as a part of his photo project concerning the process of local governments adopting “anti-LGBT” resolutions.

## ***Fostering a rule of law culture***

### ***Efforts by state authorities***

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In general, it is difficult to identify public authorities' actions aimed at fostering rule of law culture. The representatives of the government of Poland do not usually take part in public debates, conferences and actions focusing on the rule of law issue. On the other hand, in 2021, they conducted several actions undermining the rule of law principle. To give an example, the government initiated proceedings before the Constitutional Tribunal indicating that specific provisions of the European Convention of Human Rights violated the Polish Constitution. The judgement delivered in that case helped the government limit the consequences of the ECtHR's judgement in the case of *Xero Flor v. Poland*.

However, it has to be underlined that opposition MPs in the Sejm and Senate have established two parliamentary assemblies aimed at protecting and fostering rule of law culture: the Sejm's assembly on the reform of justice system; and the parliamentary assembly on the protection of rule of law. Both of the assemblies have created an opportunity for the MPs, external experts, CSO representatives and other stakeholders to discuss specific actions aimed at restoring the rule of law principle. The assemblies discussed, inter alia, the model of appointing of judges, threats to judicial independence, and media freedom in Poland.

## **Contacts**

### ***Helsińska Fundacja Praw Człowieka*** *Polish Helsinki Foundation for Human Rights*

The Helsinki Foundation for Human Rights in Poland, based in Warsaw, was founded in 1989. Currently, the Helsinki Foundation for Human Rights is one of the most experienced and professionally active non-governmental organizations engaged in the field of human rights in Europe.

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### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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