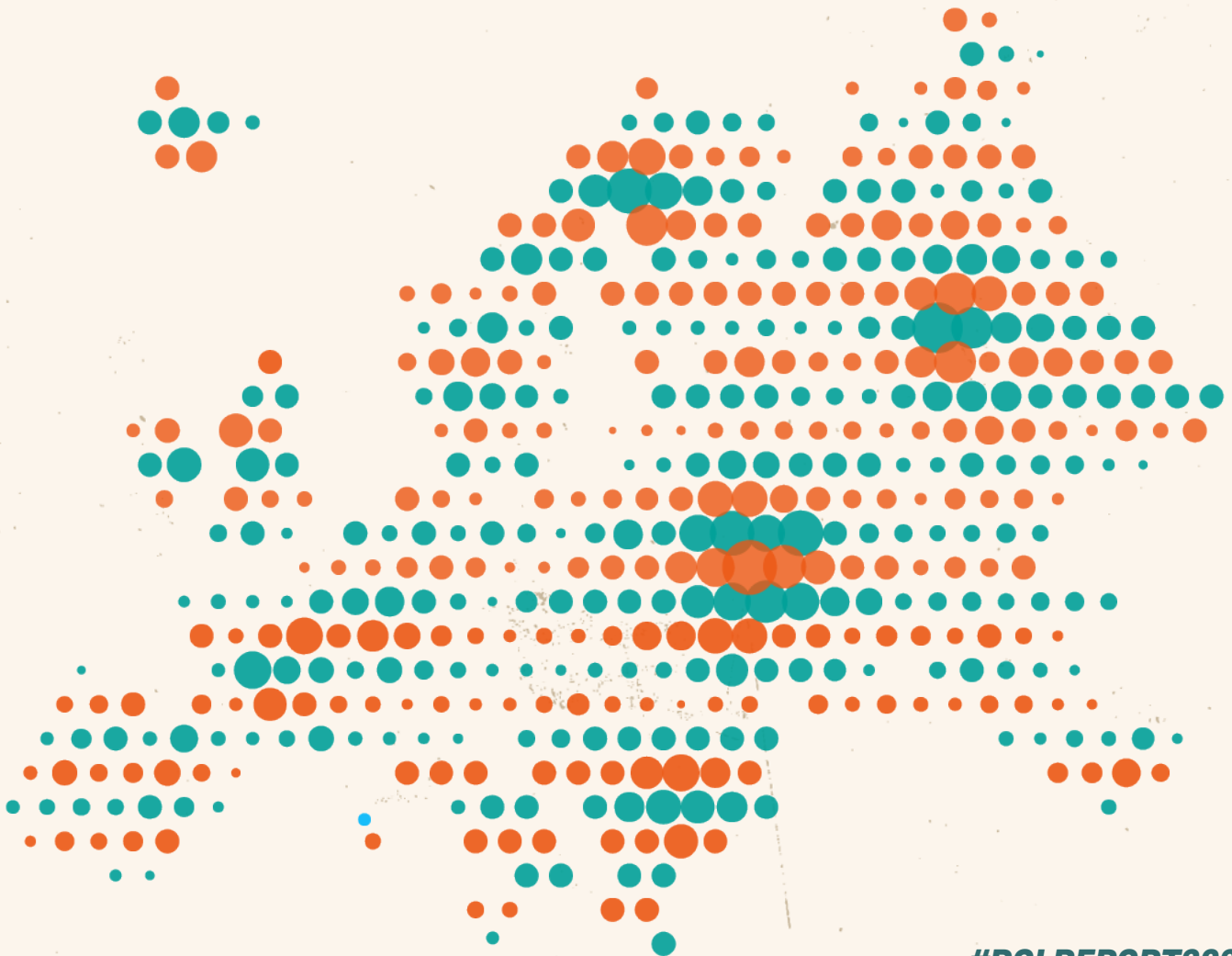


**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**POLAND**



**#ROLREPORT2023**

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## **FOREWORD**

This country report is part of the Liberties Rule of Law Report 2023, which is the fourth 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 gathers public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2023 Report was drafted by Liberties and its member and partner organisations, it and covers the situation during 2022. 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 2023 Report includes 18 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. Forty-five member and partner organisations across the EU contributed to the compilation of these country reports.

**[Download the full Liberties Rule of Law Report 2023 here](#)**

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# POLAND

## About the authors



**The Helsinki Foundation for Human Rights (HFHR)** is a non-governmental organisation established in 1989 and based in Warsaw, Poland. The 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, the HFHR has had a consultative status with the United Nations Economic and Social Council (ECOSOC). The HFHR's objective is the protection and promotion of human rights.

## Key concerns

On the one hand, Poland implemented some of the EU institutions' recommendations regarding the disciplinary system for judges, with further-reaching legislation underway. On the other hand, the wrongfully composed judiciary council continued to nominate judges, whereas suspension or transfer of judges were used as repressive measures.

Regarding the justice system, Poland implemented only one commitment made under the Recovery and Resilience Plan (RRP), namely that judges cannot be held liable for

submitting a request for a preliminary ruling. The Disciplinary Chamber - much criticised for its partiality - continued to adjudicate all disciplinary cases against judges, despite the 2021 CJEU interim measure. The same person continues to occupy the functions of the Minister of Justice and the Prosecutor General.

Concerning media freedom and pluralism, the composition and functioning of the media regulatory body raises concerns as to its independence from the government. Poland continues to lack provisions regulating fair allocation of public advertising. The number of SLAPPs is rising, whereas cases of use of excessive force against journalists are not investigated effectively. New legislation is underway that poses a threat to the protection of journalistic sources.

### State of play

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

### Legend (versus 2022)

- ⬇️ Regression
- ⚪ No progress
- ⬆️ Progress

## Justice system –

### Key recommendations

- The adoption of legislation fully implementing the “milestones” determined in the Recovery and Resilience Plan, as well as the CJEU’s judgement of 15 July 2021 (C-791/19), as regards the disciplinary regime for judges – in particular, by safeguarding that disciplinary cases are heard by an independent and impartial court established by law, exempting the content of judicial decisions from disciplinary liability and providing judges affected by the Disciplinary Chamber’s decisions with the possibility of having their cases reviewed by an independent court.
- The immediate cessation of the practice of using disciplinary proceedings or proceedings for the waiver of immunity, as well as suspensions or unjustified transfers of judges as repressive measures.
- The restoration of the National Council of the Judiciary in a form compatible with the Constitution, EU law and the ECHR – in particular, by guaranteeing that its judge-members are appointed by other judges, not politicians, so that in every procedure for judicial nominations that includes the participation of the NCJ, independence is safeguarded.

## Judicial independence

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

#### *Appointment of judges*

On 12 May 2022, the Sejm - Poland’s lower house - elected 15 judicial members of the National Council of Judiciary. From 12 May 2022 to 8 January 2023, the new National Council of Judiciary has appointed 175 judicial assessors and recommended the appointment of 274 judges. Overall, the National Council of Judiciary (the so-called new NCJ), the composition of which was constituted mostly by Parliament, appointed about 2,500 judges.

#### ***Appointment of court presidents***

On 10 March 2022, the Constitutional Tribunal issued a judgment concerning the constitutionality of Art. 6, which guarantees everyone the right to a fair and public hearing, of the European Convention of Human Rights. The case was initiated by the Public Prosecutor General directly after the European Court of Human Rights’ (ECtHR) ruling in the cases Broda and Bojara v. Poland (applications nos. 26691/18 and 27367/18).

The Constitutional Tribunal found the aforementioned provision of ECtHR in violation of Arts. 8, 89, and 176 of the Polish Constitution. The Tribunal recognised Art. 6 as unconstitutional to the extent that the ECtHR judgment recognises the concept of “civil rights and obligations” to include the subjective right of a judge to occupy an administrative function in

the structure of the common judiciary in the Polish legal system. In other words, the K 7/21 judgment has been used to assess the constitutionality of the ECtHR judgment in the cases Broda and Bojara v. Poland.

In the dialogue with the Council of Europe Committee of Ministers, public authorities indicated that no specific general measure is needed to implement the holdings of the Broda and Bojara cases, as the competence of the Minister of Justice to dismiss presidents of courts was temporary. Nevertheless, the Minister of Justice still enjoys significant discretion when deciding on managerial positions within the structure of common courts, while presidents of the courts who have been dismissed from their positions have no effective right to challenge the Minister's decision before a court.

#### *Appointment of prosecutors*

There are different, detailed prosecutorial appointment procedures for first-time appointments and promotions. In the former situation, candidates are usually selected through a competitive process. However, in particularly justified cases, the Prosecutor General may waive this requirement and simply appoint a candidate named at the request of the National Prosecutor. According to an HFHR report<sup>1</sup> the Prosecutor General has since 2016 provided notice of a vacancy or newly created position to be filled at district prosecutors' offices on more

than 650 occasions. The publicly available data does not indicate the number and locations of prosecutors' offices where the vacancies or new posts were filled without a competitive process. However, a review of the notices posted by the Prosecutor General shows that such competitions have not been organised at certain units of the prosecution service for the last six years. Two prosecutorial offices in central districts of Warsaw constitute examples of this situation. The vacancies in those offices have been filled at least several times in the last six years without any competitive process having been announced.

The non-compulsory competitive procedure notably applies only to first-time appointments for prosecutorial posts in district prosecutors' offices. Promotions to higher-level prosecutorial positions are wholly discretionary and guided by no criteria whatsoever. The appropriate professional experience of a candidate is generally a sufficient eligibility criterion. However, the law allows for waiving even this requirement "in particularly justified cases". This means that the promotion of prosecutors to higher-level units of the prosecution service can only take place through a discretionary procedure that sets no formal criteria and involves only the Prosecutor General and his senior deputy. As such, the Prosecutor General has unrestricted freedom to develop the cadres of the prosecution service, which includes the authority to take away promotion

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1 Accessible here: <https://hfhr.pl/en/news/a-state-of-accusation-polish-prosecution-service-2016-2022--a-new-report-of-the-helsinki>

opportunities from any prosecutors who do not prove loyal to the head of the prosecution service.

In 2022, the media published information concerning the appointment of two prosecutors in the Świdnica prosecution service units. According to the coverage, both candidates for the prosecutorial position had been unofficially discussed in e-mail communications between one of the Members of Parliament (MPs) of the ruling party and a local politician from the Lower Silesia region. Shortly thereafter, both candidates were appointed to the prosecutorial position in a non-competitive way.

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

Since 2021, suspension or transfer of judges to other court departments continues to be one of the forms of repression levied against Polish judges.

A judge's suspension may be ordered by the Disciplinary Court as part of disciplinary proceedings. Additionally, the Minister of Justice or the president of the court may suspend a judge for one month in the event a judge has committed a crime.

Until mid-2022, the former Disciplinary Chamber ordered several judicial suspensions. Some of these decisions were made in highly politicised procedures (e.g. the cases of judges Paweł Juszczyszyn and Igor Tuleya). Furthermore, since 2021 the Minister of Justice and some presidents of the courts have

cited contents of judicial decisions as reasons for possible suspensions of judges. The judicial decisions constituting grounds for suspension involved the status of judges appointed by the National Council of Judiciary in its current composition (e.g. the cases of judges Piotr Gąciarek, Maciej Ferek, Maciej Rutkiewicz, Adam Synakiewicz, Joanna Hetnarowicz-Sikora, Agnieszka Niklas-Bibik and Marzanna Piekarska-Drażek).

The former Disciplinary Chamber was dissolved in 2022, with its jurisdiction being transferred to the new Professional Accountability Chamber of the Supreme Court (PAC). According to the PAC president, cases involving judicial suspensions received priority in PAC proceedings. For instance, the Chamber lifted the suspensions of judges Igor Tuleya, Maciej Dutkiewicz and Krzysztof Chmielewski. In December 2022, the Voivod Administrative Court in Gdańsk ruled in the case concerning the suspension of Judge Agnieszka Niklas-Bibik, finding her suspension in violation of the law.

Other forms of repression concerning judges still persisted in 2022. These included transfer of judges to other court departments. For example, in 2022 the Disciplinary Chamber lifted the suspension of Judge Paweł Juszczyszyn. Judge Juszczyszyn returned to work, however the president of the court ordered his transfer to another court department. In 2022, Piotr Schab, president of the Appellate Court in Warsaw, decided to transfer three judges (Ewa Gregajtys, Ewa Leszczyńska-Furtak and Marzanna Piekarska-Drażek) to other court departments. The judges have adjudicated for



many years in the criminal department and, upon the decision of the court's president, were transferred to the department of labour law and social security. The ECtHR issued a decision on interim measures suspending the transfer in all three cases. Furthermore, in December 2022, Judge Dorota Lutostańska of the Regional Court in Olsztyn was transferred from the criminal department of the second instance to the criminal department of the first instance.

None of the above-mentioned transfers involved consent of the relevant judges.

### **Promotion of judges and prosecutors**

#### *The promotion of judges*

On 21 December 2022, the President of Poland promoted 11 judges to higher judicial positions. These included the promotion of the head of the National School of Judiciary and Prosecutorial Service (a former director in the Ministry of Justice and partner of the judge who heads the National Council of Judiciary) from the Kraków Regional Court to the Supreme Court. Moreover, the President decided to promote two members of the National Council of Judiciary. Both of them have been appointed as new judges of appellate courts, despite the fact that their experience concerned only adjudicating cases in district courts.

According to the 2022 HFHR report “The costs of the reform: Functioning of the judiciary system in years 2015–2022”,<sup>2</sup> members of the National Council of Judiciary (NCJ) have relatively often sought promotion to a higher court. In the course of the previous term of office, the NCJ recommended seven of its 15 judicial members for higher judicial positions. Secondly, persons closely linked to NCJ members – spouses, partners and siblings – also sought the Council's recommendation. According to media coverage, in 2018–2022 the NCJ appointed more family members or other associates of its judicial members to judgeships than it had during the past 27 years of the Council's functioning.

#### *Judicial review of NCJ decisions*

Applicants taking part in the competition for the judicial posts before the NCJ have the right to challenge the legality of the NCJ's decision at the Supreme Court. However, this does not apply to candidates seeking a judicial position on the Supreme Court.

However, it is the Chamber of Public Affairs and Extraordinary Appeal that reviews appeals from NCJ decisions. In 2021, in the case *Dolińska-Ficek and Ozimek v. Poland* (application no. 39650/18), the ECtHR once again indicated that said Chamber does not meet the criteria of an independent and impartial court.

This judgment has not been implemented either in a general or individual way. In 2022,

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<sup>2</sup> <https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf>



the Ministry of Foreign Affairs (MFA) refused to pay compensation to both applicants in that case. In the reasoning for its decision, the MFA cited the Constitutional Tribunal judgment of 10 March 2022 (case no. K 7/21), which found Art. 6 of the ECHR to be in partial violation of the Constitution of Poland.

### **Allocation of cases in courts**

In May 2022, the Supreme Administrative Court ruled that<sup>3</sup> the source code of the Random Case Allocation System, or RCAS (*System Losowego Przydziału Spraw*), constitutes public information and, therefore, should be disclosed by the Minister of Justice.

RCAS is a network application based on a number generator used to designate members of adjudicating benches in common courts (in criminal and civil cases). It was introduced in 2017 to eliminate the possibility that a particular judge be allocated to a case arbitrarily. It was also supposed to guarantee an equal distribution of workload among judges.

Reports from NGOs<sup>4</sup> and the Supreme Audit Chamber<sup>5</sup> cite numerous irregularities in RCAS functioning (e.g. lack of transparency, risk of manipulation, and unequal workload distribution).

The judgment stemmed from actions taken by the Citizens Network Watchdog Poland (*Sieć Obywatelska Watchdog Polska*). In 2017, the Network successfully petitioned the Ministry of Justice via a public information request for the source code's disclosure. The NGO complained about the Minister of Justice's failure to act before the Provincial Administrative Court in Warsaw. However, the court agreed with the Minister's position (stating that the code constitutes information of a technical character and, as such, does not fall under the scope of the Freedom of Information Act) and dismissed the motion.<sup>6</sup> The Network appealed against this judgment to the Supreme Administrative Court.

In its judgment of May 2022, the Supreme Administrative Court ruled that RCAS was not merely ancillary to the functioning of courts (like, e.g., office programs).<sup>7</sup> In the

3 Poland, Judgement of the Supreme Administrative Court of 26 May 2022, case no. III OSK 1189/21: [https://siecobywatelska.pl/wp-content/uploads/2022/05/orzeczenie\\_kod\\_zrodlowy.pdf](https://siecobywatelska.pl/wp-content/uploads/2022/05/orzeczenie_kod_zrodlowy.pdf)

4 Fundacja Moje Państwo, Algorytm Losowego Systemu Przydziału Spraw: <https://mojepanstwo.pl/postepowania/7>

5 Supreme Audit Chamber, Post-Inspection no. P/19/038, 23 February 2019: <https://siecobywatelska.pl/wp-content/uploads/2021/09/P-19-038-LWR-410.023.02.2019-01.pdf>

6 Poland, Judgement of the Provincial Administrative Court in Warsaw of 11 December 2018, case no. II SAB/Wa 502/18: <https://orzeczenia.nsa.gov.pl/doc/C712B83438>

7 D. Gajos-Kaniewska, NSA: kod źródłowy sądolotka jest informacją publiczną, Rp.pl, 29 May 2022: <https://www.rp.pl/sady-i-trybunaly/art36393531-nsa-kod-zrodlowy-sadolotka-jest-informacja-publiczna>

court's opinion, RCAS in practice replaces people in the task of allocating judges to cases, the outcome of which is an irreversible decision – therefore, RCAS performs a public function and the information about its source code should be disclosed.

In a decision issued in August 2022,<sup>8</sup> the Minister of Justice refused to publish the source code of the RCAS.

In April 2021, in another case, initiated by e-State Foundation (*Fundacja ePaństwo*), the Supreme Administrative Court ordered the disclosure of the RCAS algorithm.<sup>9</sup> The Minister of Justice published the algorithm. However, based only on the algorithm it is impossible to assess if the entire system functions properly.<sup>10</sup>

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

On 15 July 2022, an amendment to the Act on the Supreme Court and certain other

acts<sup>11</sup> came into force. The key points of the amendment included the dissolution of the Disciplinary Chamber of the Supreme Court and the establishment of the Chamber of Professional Responsibility to replace it. The law also introduced certain changes concerning the disciplinary liability of judges.

The amendment was adopted in relation to a ruling of the CJEU, issued in July 2021,<sup>12</sup> in which the court confirmed that the Disciplinary Chamber's lack of independence results from the participation of the NCJ in nominating its judges.

The new chamber consists of judges appointed by the President of Poland from among Supreme Court judges. The chamber's jurisdiction remains almost the same as that of its predecessor and includes hearing disciplinary cases of judges as a court of second instance and waiving judicial and prosecutorial immunity. The law does not proscribe the NCJ, in its present form, from appointing judges, which does not guarantee the chamber's independence.

8 Minister of Justice, Decision no. BK-IV.082.270.2022, 4 August 2022: [https://small-eod.siecobywatelska.pl/media/BK-IV.082.270.2022\\_Minister\\_Sprawiedliwo%C5%9Bci\\_algorytm\\_losowania\\_s%C4%99dzi%C3%B3w\\_-\\_Decyzja\\_odmowna\\_epuap10.08.2022.pdf](https://small-eod.siecobywatelska.pl/media/BK-IV.082.270.2022_Minister_Sprawiedliwo%C5%9Bci_algorytm_losowania_s%C4%99dzi%C3%B3w_-_Decyzja_odmowna_epuap10.08.2022.pdf)

9 Poland, Judgement of the Supreme Administrative Court of 19 April 2021, case no. III OSK 836/21: <https://orzeczenia.nsa.gov.pl/doc/1F39F17D6C>

10 K. Batko-Tołuć, *Losowanie sędziów a zaufanie społeczne*, 22 September 2021.

11 Poland, Act amending the Act on the Supreme Court and certain other acts, 9 June 2022: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001259/O/D20221259.pdf>

12 Judgment of the CJEU of 15 July 2021, case no. C-791/19: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244185&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=135187>

With respect to judicial disciplinary liability, the amendment on the one hand stipulated that submitting a request for a preliminary ruling in the CJEU should not entail disciplinary liability. However, the amendment also introduced a new type of disciplinary offence, the “refusal to administer justice”, which may be intended to suppress the practice of judges refusing to participate in panels together with peers nominated by the new NCJ.

In 2022, several major developments occurred involving politically motivated disciplinary and criminal proceedings against judges in Poland. In May 2022, the former Disciplinary Chamber lifted the suspension of Judge Paweł Juszczyszyn, whose disciplinary proceedings for requesting lists of persons supporting candidates to the NCJ is pending.<sup>13</sup> In November 2022, the Chamber of Professional Responsibility made a similar decision in the case of Judge Igor Tuleya, whose immunity was waived in 2020 as the prosecution intends to charge him with disclosing information from an ongoing investigation.<sup>14</sup>

On the other hand, in December 2022 a special disciplinary officer appointed by the President of Poland brought charges against the former president of the Supreme Court, Małgorzata Gersdorf.<sup>15</sup> The charge concerns

a resolution adopted by the joint chambers of the Supreme Court in January 2020, in which the court implemented the CJEU’s judgment of 19 November 2019 (related to the status of the NCJ).

In December 2022, the governing majority presented draft legislation introducing further changes in the disciplinary regime. The draft law provides for disciplinary proceedings against judges to be transferred from jurisdiction of the Supreme Court to the Supreme Administrative Court. Yet again, the draft proposal does not prevent the judges appointed by the NCJ in its current composition from adjudicating in disciplinary cases.

### ***Remuneration/bonuses for judges and prosecutors***

In 2022, the Polish Parliament changed the rate used to calculate the salaries of judges and prosecutors. Until 2022, the reference rate was the average salary in the second quarter of the previous year. In 2022, the Parliament changed the regulation and introduced the fixed rate of 5,444.42 PLN (lower than the 2021 average salary of 6,156.24 PLN).

The Association of Polish Judges (IUSTITIA) and the Trade Union of Prosecutors and

13 HFHR, Izba Dyscyplinarna Sądu Najwyższego uchyla zawieszenie sędziego Juszczyszyna, 24 May 2022:

<https://hfhr.pl/aktualnosci/izba-dyscyplinarna-sedzia-juszczyszyn>

14 K. Żączkiewicz-Zborska, SN: Sędzia Tuleya odwieszony, nie będzie też doprowadzenia do prokuratury, 29 November 2022.

15 M. Jałoszewski, Skandaliczne represje wobec byłej prezes SN Gersdorf. Człowiek Ziobry ściga ją za historyczną uchwałę SN, 7 December 2022.

Prosecutorial Employees strongly criticised the changes. According to IUSTITIA's estimations, in practice, judicial salaries will shrink by 5% in 2023 in comparison to 2022 and by 16% in comparison to 2020.

On the other hand, there were several developments in 2022 concerning the disclosure of Constitutional Tribunal judges' assets. In 2022, the President of the Constitutional Tribunal ruled that the asset declarations of five judges should not be published. Former MP Krystyna Pawłowicz was among this group of five judges. The President of the Constitutional Tribunal based the decision on provisions of the Act on Common Courts, which provides that the declaration of assets may not be published upon a judge's request. The Act on the Status of Judges of the Constitutional Court, however, states that declarations of Constitutional Tribunal judges shall be published.

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

In 2022, there have been no legal changes reinforcing prosecutorial independence. All the concerns regarding the unrestricted competences of the Prosecutor General indicated in the 2021 Rule of Law Report persisted.

In 2022, the media reported that spyware was installed on the phone of Warsaw District Office Prosecutor Ewa Wrzosek. In 2020,

Ms. Wrzosek opened an investigation into the preparation of mail-in voting for presidential elections. Her supervisors took over the case and soon discontinued it. In 2022, media reports indicated that prosecutors were pursuing disciplinary proceedings against Ms. Wrzosek, and planned a motion to lift her immunity and charge her with disclosing information from an ongoing investigation. Prosecutor Wrzosek was suspended in the course of the disciplinary proceedings.

The HFHR report "The state of accusation: Functioning of the prosecution service in years 2016-2022"<sup>16</sup> indicated the rising number of disciplinary proceedings against prosecutors, especially against those prosecutors who publicly criticise changes in the prosecution service or speak publicly in defence of the rule of law. For example, in 2022, the media reported on new disciplinary proceedings against Prosecutor Katarzyna Kwiatkowska. Ms. Kwiatkowska was disciplined for giving a media interview in which she commented on the National Prosecutor's decision to delegate her to another city. The National Prosecution also sued her for defamation and claimed PLN 250,000 in damages (the lawsuit was filed in 2021).

### ***Independence of the Bar (chamber/association of lawyers) and of lawyers***

In April 2022, a group of the governing majority's MPs filed a motion to the Constitutional

16 <https://hfhr.pl/upload/2022/12/a-state-of-accusation-report-eng.pdf>

Court,<sup>17</sup> requesting the review of Article 38 of the Law on the Profession of the Advocate (*Prawo o adwokaturze*), as well as Articles 49(1) and 49(3) of the Law on Legal Advisers (*Ustawa o radcach prawnych*). These provisions govern the membership of advocates and legal advisers, respectively, in local bar associations (*izby adwokackie* in the case of advocates and *okręgowe izby radców prawnych* in the case of legal advisers). The provisions make affiliation to a particular local bar association dependent on the place of performance of the profession (advocates) or the place of residence (legal advisers). At the same time, the national bars of both legal professions (*Naczelna Rada Adwokacka* for advocates and *Krajowa Rada Radców Prawnych* for legal advisers) have exclusive competence to determine the number and territorial jurisdiction of the local bars.

As the applicants argued in their pleading,<sup>18</sup> the current provisions grant the national bars of advocates and legal advisers the exclusive power to shape the territorial (local) structures of their self-governments, but, on the other hand, make membership in a particular local bar association dependent solely on the

geographical criterion. These violate Article 17(1) of the Constitution, among others. The applicants put forth that, according to Article 17(1), which allows for the establishment of self-governments within professions of public trust, it is possible to establish more than one self-government for each profession. Such self-governments could differ in terms of, e.g., worldview.

The motion was considered an attempt by the governing majority to limit the independence of advocates and legal advisers, who often are at odds with the government when defending the rule of law in Poland, and to reshape the structure of the Bar in future.<sup>19</sup> In reaction to the MPs' motion, national bar associations of advocates<sup>20</sup> and legal advisers<sup>21</sup> adopted resolutions emphasising that the Bar's autonomy and independence serve the right to defence and the right to a fair trial.

In May 2022, the Commissioner for Human Rights informed the Constitutional Court it was joining the relevant proceedings and requested their discontinuation.<sup>22</sup>

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17 Motion of a group of MPs of 22 April 2022: [https://ipo.trybunal.gov.pl/ipo/dok?dok=3827d368-76e1-43e0-bca1-e2bc23fe0386%2FK\\_6\\_22\\_wns\\_2022\\_04\\_22\\_ADO.pdf](https://ipo.trybunal.gov.pl/ipo/dok?dok=3827d368-76e1-43e0-bca1-e2bc23fe0386%2FK_6_22_wns_2022_04_22_ADO.pdf)

18 Ibid, p. 18.

19 P. Rojek-Socha, A. Partyk, *Wyrok TK w sprawie samorządów może uderzyć w prawnicze dyscyplinarki*, Prawo.pl, 16 May 2022.

20 National Bar Association, Resolution no. 63/2022, 4 July 2022: [https://www.adwokatura.pl/admin/wgrane\\_pliki/file-uchwala-nra-nr-63-2022-002-34218.pdf](https://www.adwokatura.pl/admin/wgrane_pliki/file-uchwala-nra-nr-63-2022-002-34218.pdf)

21 National Chamber of Legal Advisers, Statement, 4 July 2022: [https://www.adwokatura.pl/admin/wgrane\\_pliki/file-krrp-stanowisko-tk-34217.pdf](https://www.adwokatura.pl/admin/wgrane_pliki/file-krrp-stanowisko-tk-34217.pdf)

22 Pleading of the Commissioner for Human Rights of 24 May 2022: [https://ipo.trybunal.gov.pl/ipo/dok?dok=225acd1a-7450-4a93-b663-8e1950c80f0f%2FK\\_6\\_22\\_rpo\\_2022\\_05\\_24\\_ADO.pdf](https://ipo.trybunal.gov.pl/ipo/dok?dok=225acd1a-7450-4a93-b663-8e1950c80f0f%2FK_6_22_rpo_2022_05_24_ADO.pdf)

As of January 2023,<sup>23</sup> the case before the Constitutional Court is pending (with no hearings scheduled or any new pleadings filed).

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

In 2022, an investigation continued into the so-called hatred scandal in the Ministry of Justice. The scandal refers to the series of incidents when either the media loyal to the governing majority or anonymous social media accounts spread defamatory content targeting specific judges or judicial associations. In 2019, the media reported that former Deputy Minister Justice Łukasz Piebiak, among others, inspired some of the incidents. The prosecution has been investigating the case since 2019, however no one has been charged.

In 2022, the media reported on the cases of two judges who shared, along with a group of other judges, information used in the smear campaigns. Interviews with both judges confirmed the information reported by the media three years earlier.

In 2022, the appellate court discontinued proceedings against one of the journalists, Ewa Siedlecka, who reported on the scandal.

Furthermore, public attacks on the judicial community continued in 2022. For example, in public statements Deputy Minister of

Justice Marcin Romanowski referred to some judges as an “extraordinary caste” and compared some of their activities to treason.

## ***Quality of justice***

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

Besides the excessive length of judicial proceedings, the 2022 HFHR report<sup>24</sup> also highlights the long-running problem of the declining number of professional judges. According to the report, there were 901 fewer judges in 2020 than in 2016. The highest number of judges (over 600) left district courts, which examine the largest portion of cases submitted to all common courts. These negative developments were not even partially mitigated by the appointment of associate judges; in 2020, there were 434 associate judges.

The secondment of judges to posts in the government administration and higher-instance courts also influenced the staffing situation in the courts. According to information obtained by HFHR on 31 March 2022, a total of 153 judges were seconded to the Ministry of Justice and the organisational units subordinated to or supervised by the Ministry, whereas 221 judges were seconded to higher courts.

Furthermore, it is difficult to ignore the negative situation of court support staff (including judicial clerks) and the stability of their employment. Both administrative staff and

23 Poland, Constitutional Court, [case no. K 6/22](#).

24 <https://hfhr.pl/upload/2022/12/cost-of-a-reform-report.pdf>



judicial clerks are among the lowest-earning justice system employees. Their salaries have long been uncompetitive, especially when compared to the responsibilities and the pressure associated with these roles. This, in turn, translates into staff shortages and the necessity to often repeat the onboarding process for newly recruited employees, reducing overall court efficiency.

As of 31 December 2021, the justice system included 28,693 administrative employees and 3,855 judicial clerks (compared to 27,045 administrative employees and 2,749 judicial clerks ten years ago).

Each year the Polish justice system processes between 13 to 17.5 million cases.

### ***Digitalisation***

The digitization of the judiciary remains a problem in Poland. The COVID-19 pandemic accelerated some reforms in this realm. These included, inter alia, introduction of an electronic information delivery system from courts to advocates and legal advisers. However, the hasty adoption of the new tools resulted in various problems with their functioning.

In the context of digitalisation of the justice system, Poland lacks solutions that maintain case files in electronic form. The court case files are generally kept in paper form with the exception of administrative courts and some higher-level prosecutorial offices. This significantly extends the communication between the courts and the parties, thus lengthening the duration of Polish court proceedings.

In 2022 the Commissioner for Human Rights urged the Minister of Justice to use the Electronic Platform of Public Administration Services (ePUAP) for processing communication of citizens with courts and prosecutors' offices. The Minister of Justice has not yet responded to the Commissioner's statement.

### ***Geographical distribution and number of courts/jurisdictions ("judicial map") and their specialisation***

On 21 July 2022, the ECtHR delivered its judgment in the case *Bieliński v. Poland* (case no. 48762/19). The case originated from the 2016 amendment to the Act on old-age pensions of Punctionaries of the Police, the Internal Security Agency, the Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families. It significantly decreased the amount of retirement pension received by people serving in those entities during the communist era in Poland. The applicant in the case *Bieliński v. Poland* challenged the decision of the Director of the Board for Pensions that decreased his pension. Due to statutory requirements, all appeals challenging the decision of the Director of the Board for pensions must be lodged at the Warsaw Regional Court. Moreover, in the beginning, the proceedings in the case of the applicant have been stalled, since in a similar case pending before the same court, the court referred a legal question to the Constitutional Tribunal regarding the



constitutionality of the provisions introducing new calculation methods for old-age pensions.

In its judgment, the ECtHR noted that the Warsaw Regional Court had to deal with an exceptionally heavy workload following the reduction of social benefits for thousands of former functionaries of the uniformed services. It referred to data provided by HFHR, which indicated that the vast majority of cases challenging the decisions of the Director of the Board of Pensions have still not been reviewed. According to HFHR, only 2,100 appeals out of 26,000 lodged to the court have been reviewed.

The ECtHR found such a situation to be in violation of Article 6 and Article 13 of the Convention. It pointed out that it is a state's duty to organise its judicial system in such a way that its courts can meet the obligation to hear cases within a reasonable time.

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

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

Excessive length of judicial proceedings remains the burning issue of the Polish justice system. Among 1,027 ECtHR rulings in which the Court found Poland to violate the European Convention of Human Rights, 445 included excessive length of the proceedings.

The 2022 reports by HFHR indicate the average duration of proceedings before Polish courts increased between 2015 and 2021. In 2021, the duration of judicial proceedings was, on average, 7.1 months. This means it increased by about 66 percent since 2015.

Although no comprehensive data showing the length of the proceedings in Poland in 2022 is available as of this writing, the situation is not likely to deviate significantly from the trend visible throughout preceding years. As indicated in the 2022 HFHR report "Cost of a reform",<sup>25</sup> except for 2018, the average duration of proceedings has been increasing year-on-year since 2015. In 2021, the duration of judicial proceedings was, on average, 7.1 months, which means that it has increased by about 66 percent since 2015. This resulted mainly from the ongoing changes in the judiciary (including the significant number of judicial vacancies occurring in 2015-2017), lack of improvements in the organisation of judicial work, and, for the last two years, the limitations on the work of the courts related to the COVID-19 pandemic.

Against the background of the increasing length of proceedings, the Ministry of Justice made an effort to artificially understate the problem. At the beginning of 2022, the Ministry changed the rules of work of court registries<sup>26</sup> and ordered that proceedings for the declaration of enforceability of a judgment

25 M. Wolny, M. Kalisz, M. Szuleka, *The cost of a reform: The work of the justice system, 2015-2022*, July 2022.

26 *The ordinance of the Minister of Justice of 30 December 2021 amending the ordinance on the organisation and scope of operation of court secretariats and other judicial administration departments* (Journal of Laws of 2021, item 328).

or a court-approved settlement be treated as a separate category of proceedings. As the process of granting the enforceability clause is brief, this will lead to a reduction in the average duration of all civil proceedings.<sup>27</sup>

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

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

#### **Independence and enforcement powers of media and telecommunication authorities and bodies**

The functioning of the media regulatory bodies indicate that Poland has failed to effectively implement the EU Audiovisual Media Services Directive 2018/1808. One of the indicators is their biased approach, e.g. differences between the way in which the National Broadcasting Council (KRRiT) exercises its oversight powers over the public service media (PSM) and over the private broadcasters. Despite the strong pro-government bias of the PSM, incompatible with their statutory obligations, the KRRiT does not react to such irregularities. The attitude towards the private media is different. In December 2022, the

KRRiT Chairman initiated an examination about whether a documentary broadcasted by TVN24 had “propagated false information and activities contrary to the Polish *raison d’état* and endangering public security” and “to what extent, if any, the dissemination of untrue and unreliable information breaches the terms of TVN S.A.’s licence”.<sup>28</sup> The broadcaster risks a fine of up to 986,010 PLN. Moreover, should the examination lead KRRiT to a conclusion that the broadcaster is ‘in flagrant breach’ of the conditions set out in the Broadcasting Act or in the terms of the licence, KRRiT would be legally obliged to withdraw the broadcaster’s licence; KRRiT may also withdraw the licence if the dissemination of the programme endangers security. The proceedings can therefore be seen as an attempt to create legal uncertainty around the licences granted to TVN S.A.

There are also doubts whether the law provides for an effective and independent appeal mechanism against the KRRiT Chairman’s decisions. Such an appeal would be eventually examined by the Chamber of Extraordinary Control and Public Affairs in the Supreme Court, which, according to the ECtHR case-law, is not a ‘court established by law’ within the meaning of the European Convention on Human Rights.

Another example raising concerns about media authorities’ impartiality was the way in which a new broadcasting system for

27 Konkret24, Ziobro: “sądy przyspieszyły”. A co pokazują dane ministerstwa? Analiza, 17 May 2022.

28 <https://www.gov.pl/web/krrit/postepowanie-w-sprawie-ukarania-nadawcy-tvn-sa-w-trybie-okreslonym-w-art-53-ust-1-urt>

terrestrial television was introduced (i.e. how the decision of the European Parliament and the EU Council 2017/899 was implemented). The change of the broadcasting standard meant that older models of TV sets and tuners that are not adapted lost access to television. In March 2022, the Minister of Interior Affairs requested the President of the Electronic Communication Office (UKE) to grant an exception to public television, so it would reach households with old receivers until the end of 2023. According to the Minister, continued access to public television is needed to, among other things, “boost the morale of the population and counter disinformation”. After receiving an approval from the KRRiT, the UKE granted the requested exception, amending the frequency reservation decision. According to the latest estimates published on 25 October 2022 by the state National Institute of Media, almost one million households still haven’t changed their old receivers – and therefore receive only public television.

***Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media and telecommunication authorities and bodies***

The conditions and procedures for the appointment of the members of the regulatory authorities do not provide sufficient guarantees for their functional independence and impartiality. In 2022, the full composition of the five-member National Broadcasting Council changed, but past activities of the majority of newly elected members cast doubt on whether they would exercise their powers in accordance with requirements provided in Article 30 of

the EU Audiovisual Media Services Directive (AVMSD).

The current chairman, Maciej Świrski, is well known for his harsh criticism of TVN, one of the biggest private TV stations in Poland. In 2018, he called on ruling party politicians to boycott the station and, referring to TVN, wrote “Down with the FakeNewsMedia” on his Twitter account. Between 2016 and 2018, he was a vice-president of the Polish National Foundation (Polska Fundacja Narodowa, PFN), which was set up and funded by state-owned companies to promote Poland abroad. In 2017, PFN organised the campaign “Fair courts”, which was supposed to be an answer to the massive protests which took place in July 2017 (the protests were organised under the slogan “Free Courts”). The campaign’s aim was to explain the necessity to reform the justice system by presenting cases where judges had made alleged wrongdoings (most of the information presented turned out to be either misinterpreted or simply false). Maciej Świrski was also the initiator of the “Polish League Against Defamation”, which he headed until December 2022. The organisation, supported by government funding, aims to “defend Poland’s good name”. It is known, among other things, for its involvement in the court case initiated against two renowned holocaust historians, Barbara Engelking and Jan Grabowski (the League supported the plaintiff).

Hanna Karp, another newly elected member, authored an analysis that was the basis for imposing in 2017 an exceptionally high fine on TVN by the previous Chairman of the

National Broadcasting Council. The penalty was imposed because of the manner in which TVN 24 covered the events in and outside the Polish Parliament in December 2016 (including demonstrations), which the KRRiT considered as endangering the state security and being contrary to the Polish *raison d'état*.

Marzena Paczuska, another new member, headed the public television main news programme, *Wiadomości*, from January 2016 to August 2017. During this period, *Wiadomości* among others ran a smear campaign against several NGOs and harshly criticised the Commissioner for Human Rights (the Ombudsman) for cooperating with international organisations, including the UN Human Rights Committee.

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

### ***The transparent allocation of state advertising***

There are no rules ensuring fair allocation of public advertising. Advertisements by the government, local government units, state-owned (SOEs) and municipal companies, as well as other public institutions, can freely target selected media, regardless of their circulation and how this circulation is bought.

An example of this are the advertisements SOEs targeted at dailies. *Gazeta Wyborcza*, the third largest title in Poland in terms of

reach, is consistently misused by the SOEs as a means of advertising. In 2021, the number of digital subscribers to *Gazeta Wyborcza* reached over 280,000, so it is an important channel to reach a wide range of readers. At the same time, the niche daily *Gazeta Polska Codziennie*, whose pro-government position is unquestionable and whose sales results were withdrawn from the survey in mid-2021 (which usually indicates that circulation is very low and sales results are getting worse) has an increasing public advertising market share. The level of advertising spent by SOEs in this title is more than 30 times higher than in 2015.<sup>29</sup>

There is a lack of regular studies at the local government level, and the central register contracts concluded by local governmental units are not yet in place. The following cases can be used to exemplify that the lack of rules regarding allocation of advertisement allow for “punishing” media which are not supportive to those in power and to favour those who support them.

The example of *Dziennik Wschodni*, an independent daily based in Lublin, illustrates well how state advertising can be used as a tool to exert pressure on the media. In 2019, when a battle began in the city to build facilities on one of the green spaces, the *Górki Czechowskie*, the newspaper reported about the resistance of citizens. Suddenly, the inflow of advertisements stopped. While in 2019, the

29 [https://www.researchgate.net/publication/359603356\\_OKRES\\_RZADOW\\_ZJEDNOCZONEJ\\_PRAWICY\\_Analiza\\_wydatkow\\_reklamowych\\_spolek\\_skarbu\\_panstwa\\_SSP\\_w\\_latach\\_2016-2021\\_Aneks\\_Wydatki\\_reklamowe\\_ministerstw\\_i\\_centralnych\\_urzedow\\_w\\_2021\\_roku\\_na\\_podstawie\\_monitorin](https://www.researchgate.net/publication/359603356_OKRES_RZADOW_ZJEDNOCZONEJ_PRAWICY_Analiza_wydatkow_reklamowych_spolek_skarbu_panstwa_SSP_w_latach_2016-2021_Aneks_Wydatki_reklamowe_ministerstw_i_centralnych_urzedow_w_2021_roku_na_podstawie_monitorin)

newspaper received orders from the city hall totalling PLN 58,000, it dropped to less than PLN 25,000 in 2021.<sup>30</sup>

In Wrocław, municipal companies outright buy media to use them for political purposes. In November 2022, a year and a half before the local government elections, the little-known (less than 3,000 followers on Facebook) portal TuDolnySlask.info from the Lower Silesian region, run by a company registered in May 2022, was supported financially by two municipal companies. At the same time, it published a text about Akcja Miasto, a Wrocław-based urban movement that is often critical of the actions of the Mayor of Wrocław. It suggested that the movement had fraudulently obtained funding and had ties to Poland's ruling party, Law and Justice. The portal promoted the text on social media.<sup>31</sup> Apart from that, the portal did not write about anything relevant.

### **Other**

An important risk for media pluralism is also related to the fact that the state-owned company PKN Orlen has bought not only the publisher of the majority of regional press, but also the second largest press distribution company in Poland, Ruch. While the acquisition of Ruch was completed in 2020, the later events indicate some concerning cases where potentially the vertical ties between the

press distribution company (Ruch) and the press publisher (Polska Press) could have been exploited to the detriment of the competitors on the media market.

For instance, Ruch refused to distribute the newly founded “Zawsze Pomorze” weekly (created by former journalists of the Polska Press “Dziennik Bałtycki”), explaining that the title “does not promise optimal sales” (the other major press distribution companies agreed to distribute it).

Moreover, in May 2022 Ruch started terminating press distribution contracts with several independent local media who did not respond to Ruch's offers on the additional distribution fee and announced further terminations with other media outlets. According to the magazine ‘Press’, “the publishers claim that Ruch's decision may be politically motivated. The issue may be that local titles - usually weeklies - compete with daily editions of regional titles owned by Polska Press”.<sup>32</sup>

The Chamber of Press Publishers (*Izba Wydawców Prasy*) assessed Ruch's offered additional distribution fees as unjustified and indicated that they could harm not only publishers, but also the distributor itself. According to the Chamber, the additional fees could only temporarily improve Ruch's financial condition while drastically worsening the situation

30 [https://drive.google.com/file/d/1blbj\\_CvTe1gxuCu-e4g9u16p4xVtMIW/view?usp=share\\_link](https://drive.google.com/file/d/1blbj_CvTe1gxuCu-e4g9u16p4xVtMIW/view?usp=share_link)

31 [https://drive.google.com/file/d/1NZEK2vmWLGJIIkolGfrv3CCcjdDYS6S3/view?usp=share\\_link](https://drive.google.com/file/d/1NZEK2vmWLGJIIkolGfrv3CCcjdDYS6S3/view?usp=share_link)

32 <https://www.press.pl/tresc/71063,ruch-sa-wypowiada-umowy-wydawcom-lokalnym-i-zada-dodatkow-ej-oplaty-za-dystrybucje>

of local publishers who are already working at the limit of their possibilities.<sup>33</sup> Eventually, new contracts with the local publishers were offered, but with higher fees – and follow-up negotiations were to follow.<sup>34</sup> In December 2022, Ruch again started terminating press distribution contracts with some independent local media.<sup>35</sup>

In December 2022, the lower chamber of the Parliament, the Sejm, adopted the government draft Electronic Communications Law – the so-called Lex Pilot. If the draft comes into force, TV operators will have to put public media channels in the first five places of the channel list. While the government explained that the regulation was intended to implement Article 7a of the revised AVMSD, the current state of the public media does not allow them to be classified as genuinely offering “media services of general interest”, referred to in Article 7a.

## **Public service media**

### **Independence of public service media from governmental interference**

The coverage of public media remains extremely biased. Opposition leaders are systemically demonised, including on EU-level politics, where, for instance, the European People’s Party was portrayed as “European Putin’s

Party” in March 2022. While the political interferences are mostly visible through their effects on screen, the alleged leaked email conversations involving M. Dworczyk, then Prime Minister’s Chief of Staff, might potentially provide behind-the-scenes insights. M. Dworczyk refused to comment on specific mails, but he claimed that some of the leaked emails are genuine, some are manipulated and some are fakes. In the alleged leaked emails published in January 2022, M. Chłopik, an advisor to the Prime Minister, turned to the then-head of the public television main news programme Wiadomości, J. Olechowski and, referring to a court judgement unfavourable to the Prime Minister, requested that “tomorrow TVP should beautifully attack those people who made this judgment and the Warsaw Court of Appeal in general”, adding some ideas for the “attack”. Once the email was published, J. Olechowski commented that he does not recall receiving it. At the same time, after the email was allegedly sent, the main edition of Wiadomości aired a piece on the judgement that used, among other things, the ideas provided in the alleged mail from Chłopik.

Cases of potentially politically inspired interference have also been identified within the regional media owned by Polska Press, bought in 2021 by state-owned PKN Orlen. For instance, in July 2022, an interview with a professor of economy criticising the government’s

33 *ibid.*

34 [https://www.press.pl/tresc/71698,ruch-wycofuje-sie-z-wypowiedzenia-umow-lokalnym-wydawcom\\_-renegocjacje-nowych---jesienia](https://www.press.pl/tresc/71698,ruch-wycofuje-sie-z-wypowiedzenia-umow-lokalnym-wydawcom_-renegocjacje-nowych---jesienia)

35 <https://www.press.pl/tresc/74188,ruch-znow-wypowiada-kolportaz-gazetom-lokalnym>



tax reform was withdrawn from the website of “Dziennik Polski”. According to the official comment of its editor-in-chief, the decision to remove the interview was only related to the fact that “the interview was unreported to the editorial board and published arbitrarily without consultation with the editorial management”.<sup>36</sup>

There has also been a case of interference with editorial independence with regard to a fully private outlet, “Dziennik Wschodni”, a regional daily published in Lublin. In December 2022, a new management board of the publisher blocked the online publication of an investigative article about a Lublin real estate developer accused of influence peddling. The article described, among other things, the real estate developer’s close contacts with the Mayor of Lublin, K. Żuk. The publisher explained that the publication was withheld because of legal risks (the real estate developer issued a pre-litigation letter). In response to the decision of the publisher, the deputy editor-in-chief P. Buczkowski resigned, explaining that “it is the editor-in-chief, or in his absence the deputy editor-in-chief, who decides which articles are published”. After that, the deputy editor-in-chief was dismissed for “statements in the media negatively assessing the work of the management board”.

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

### ***Law enforcement capacity to ensure journalists’ safety and to investigate attacks on journalists and media activists***

The last year provided new examples indicating problems with the effective investigation into cases of excessive force used by law enforcement officers against journalists.

In April 2022, the prosecutor’s office closed an investigation into police violence against journalists covering demonstrations on 11 November 2020 because of the failure to identify perpetrators. Video footage of the event showed police using truncheons to beat media workers despite them either wearing PRESS signs or being clearly identifiable as journalists. According to the prosecutor’s office, police officers on site were either wearing a mask or a helmet and this made it impossible to identify them. Moreover, police officers that were questioned (those who participated in the events and their supervisors) were also unable to identify anyone.

The prosecutor’s office has also refused to open an investigation into soldiers’ harassment of photojournalists Maciej Moskwa and Maciej Nabrdalik near the Polish-Belarusian border. The soldiers aggressively stopped, handcuffed and searched the photojournalists, as well

36 [https://www.press.pl/tresc/71695,\\_dziennik-polski,\\_usuwa-ze-strony-wywiad-z-prof\\_-mazu-rem-za-krytyke-polskiego-Ladu](https://www.press.pl/tresc/71695,_dziennik-polski,_usuwa-ze-strony-wywiad-z-prof_-mazu-rem-za-krytyke-polskiego-Ladu)



as examined photos stored in their cameras, despite their protests invoking journalistic secrecy. Even though the whole situation was voice recorded and the recording includes, among other things, officers discussing wiping their fingerprints off the searched cameras, the prosecutor's office considered that the actions did not amount to an abuse of authority. The photojournalists filed an appeal against the decision of the prosecutor's office; the case is pending.

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

The number of SLAPPs initiated against journalists has been constantly rising. From 2015 to June 2022, "Gazeta Wyborcza" alone was targeted with at least 100 legal actions, while many more legal actions have been initiated against several other outlets. Many of the lawsuits were brought by public institutions, state-owned companies and public officials. The problem of SLAPPs has also been particularly acute for local media, especially since they have fewer resources for long legal proceedings and, at the same time, their cases receive less attention from the public.

While civil and criminal defamation are the most often applied tools, sometimes more serious criminal charges are brought. This has been the case, for example, for Piotr Maślak, a journalist at the TOK FM radio, who has been charged in March 2022 by the military prosecutor's office of defaming and insulting the Polish Border Guard. The charges refer to a message posted by the journalist on Twitter,

in which he criticised the actions of the Polish Border Guard against a group of refugees at the Polish-Belarusian border. Reacting to the tweet, the interior minister and the vice-president of the ruling party, M. Kamiński, filed a notification to the prosecutor's office. The charges pressed against the journalist – criminal defamation through mass media and criminal insult of a public official – are both punishable by up to one year in prison.

The Ministry of Justice, responding to the HFHR request for public information, declared in July 2022 that "at this moment, the government has not set designated actions for the implementation of the European Commission's Recommendation [on SLAPPs]" and emphasised that "the Recommendation [(EU) 2022/758] has no binding force and aims to present the European Commission's point of view [...] without imposing any legal obligations on Member States".

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

The current legal regime governing secret surveillance does not envisage sufficient safeguards for the protection of journalistic sources and communications. With regard to the access of authorities to retained communications data, the law does not envisage a prior review carried by a court or any other independent body, contrary to the requirements of the EU Privacy and Electronic Communications Directive 2002/58/EC. Therefore, there are no effective safeguards that would prevent authorities from accessing communications data of

journalists. While surveillance of the content of communication in general requires a prior judicial authorisation, in practice it does not provide an effective protection – courts grant authorisation based only on very limited information provided by the requesting authorities. As a result, around 98-99 percent of requests filed by the authorities are accepted by courts. What is more, there is no independent oversight body that could later effectively review the legitimacy of the applied surveillance measures. In addition, the concerned persons will not receive any notification that they were surveilled, especially if the case does not lead to criminal proceedings. This is contrary to the requirements of the Privacy and Electronic Communications Directive. On top of that, even when journalists manage to learn that they were the subject of targeted surveillance, this might not lead to an effective examination of authorities' actions. This is the case for the investigative journalist Mariusz Gierszewski, whose communications data was accessed by the police in 2014. The prosecutor's office decided to discontinue the proceedings; the complaint against this decision is still pending.

Additionally, in December 2022, the government submitted a draft Electronic Communication Law,<sup>37</sup> which extends current rules on general and indiscriminate retention of traffic and location data to a new group of service providers and broadens the category of data that must be retained. Such regulation

would further deepen the incompatibility of the national electronic communication rules with the Privacy and Electronic Communications Directive – and increase the risks for journalists and their sources.

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

2022 was not as fraught with problems related to the right to information as 2021. However, it was a year in which Poland was subject to the Universal Periodic Review (UPR), which was conducive to a deeper analysis of the problems.<sup>38</sup>

The analysis identified that the right to information is not functioning. If public authorities “skilfully” use existing procedures to withhold information, there is a good chance they will succeed. And they face no real sanctions for doing so.

Court procedures for protecting the right to information are structured in such a way that it is possible to delay answering requests for years. First, the obligated entities can claim that the requests do not concern public information. When they lose in court, they can restrict the information on grounds such as the protection of other rights, like the right to privacy. Ultimately, the case may end up in court for several years. This is exemplified by the case mentioned in the discussion on

37 <https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?id=66C7F7C637867159C12589170035C136>

38 <https://siecobywatelska.pl/watchdog-polands-submission-in-the-4th-cycle-of-the-universal-periodic-review/?lang=en>

the allocation of cases in courts in the section “Justice System”. It took four and a half years to establish in the courts that the source code of RCAS is public information. After the court ruling, the Ministry of Justice did not provide this information and issued a decision to deny it on the grounds of system security and integrity. It will take another four or five years until the final judgment. During this time, it is not known whether the system is working well and whether it is indeed random. This is particularly relevant in view of the destruction of the justice system by the ruling coalition. Due to long and inefficient procedures, many journalists do not use the FOI Act at all, to which they are entitled to by Article 3a of the Press Law.<sup>39</sup>

The situation of multiple requests and changing reasons for withholding information is very common, and the only sanction is usually a small reimbursement of court costs to the winner, paid from the public budget anyway (if the public entity loses). Sometimes - extremely rarely - a fine can be enforced, which will also be paid from public money. A viable sanction may be the criminal provision of Article 23 of the FOI Act. But in the absence of the rule of law, it does not work either. The prosecution cannot be counted on to bring an indictment against institutions associated with those in power. With persistent efforts, private parties can become subsidiary prosecutors. But this route was also undermined by a judgment of the District Court in Warsaw (IX Ka 815/22). The court ruled that in cases

involving access to information, as concerning the general good of transparency in public life, neither a natural person nor a legal entity can have the status of a victim. And therefore cannot become a subsidiary accuser. A cassation appeal was filed to challenge the ruling. If the verdict is upheld, there is no sanction for failure to implement the right to information, nor is there any possibility for citizens to act on their own in the face of the inaction of a prosecution service dependent on the ruling coalition.<sup>40</sup>

### ***Freedom of expression and of information***

One of the parties of the ruling coalition, United Poland, has submitted a draft law that would tighten the existing blasphemy law. The draft law, supported by the Minister of Justice, would criminalise, among other things, insulting or ridiculing church or religious dogmas. The current regulations criminalises only an insult to “objects of religious worship or a place intended for the public performance of religious rites”. The blasphemy law in its current form has already been used to open proceedings against journalists, for instance with regard to a cartoon showing the Virgin Mary wearing a face mask with a lightning bolt on it – a symbol of women’s resistance against limitations on reproductive rights in Poland – published in “Wysokie Obcasy”. The new proposed form would significantly increase the risks of more criminal investigations being opened against journalists.

39 <https://siecobywatelska.pl/sadowa-ochrona-prawa-do-informacji-podsumowanie-seminarium-na-universytecie-wroclawskim/>

40 <https://siecobywatelska.pl/apelacja-w-sprawie-fundacji-lux-veritatis-ustne-uzasadnienie-wyroku/>

## **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.

Zgoda 11 Street  
00 – 018 Warsaw  
Poland  
hfhr@hfhrpol.waw.pl  
[www.hfhr.pl/en/](http://www.hfhr.pl/en/)

### ***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.

Ringbahnstrasse 16-18-20  
12099 Berlin  
Germany  
info@liberties.eu  
[www.liberties.eu](http://www.liberties.eu)