

POLAND

By the National Federation of Polish NGOs (OFOP), with the support of Institute of Public Affairs

Summary:

*Since 2015, when the Law and Justice government took power, democracy and the rule of law have gravely backslided. As a consequence, the conditions for Polish civil society organisations have seriously deteriorated. However, civil society and social movement have demonstrated their crucial role in protecting the **rule of law and fundamental rights “from below”**. This was true also in 2021, a crisis year in which there was sustained pressure on democracy and the rule of law, linked with the further deterioration of media pluralism, the contested election of the Ombudsperson and the state of emergency on the borders with Belarus, in the context of systematic violations of the rights of migrants, LGBTI+ community and women. Civic organizations organised participatory public hearings on the National Recovery Plan and contributed to the election of an independent person as Ombudsperson, in accordance with the Constitution. In both cases, it was not certain whether the two actions would be successfully concluded, so the victories are significant.*

*In 2021, almost nothing happened in terms of guarantees for NGOs. On the contrary, the situation of independent NGOs in Poland and the general atmosphere in which they operate have continued to worsen. Particularly important in the last year has been the COVID-19 pandemic impact on the CSOs' operations. The number of **restrictive legislative proposals** initiated in 2021 affecting fundamental rights and burdening the sector require CSOs to remain constantly mobilised, draining their resources and capacities to focus on their core mandate. Among these, 'Lex Czarnek' would increase the government control on extracurricular educational activities of NGOs in schools; 'Stop LGBT+ bill' would further deteriorate LGBT+ rights and ban pride parades; the draft governmental Act on NGO Reporting would add additional reporting burden, including on foreign funding. Organisations working for the defence of the rule of law or fundamental rights also face a significant reduction in the possibility of **obtaining funds** in competitions organised by the governing party's subordinate institutions, including ministries or the National Freedom Institute. While new programmes supporting the activities and development of NGOs are established, these funding tends to be accessible only by those loyal to the ruling party.¹ **The gradual transformation of civil society** is a tremendous threat. Independent organisations find it increasingly difficult to operate due to a lack of resources. At the same time, pro-governmental organisations benefit from privileged access to policy-making, financial support and a favourable political climate for their activities. In the long-term, if the trends are not inverted, the Polish civil society and non-governmental organisations will be deprived of the basic characteristics of the sector, independence from those exercising power.*

*The constant pressure and threats, including judicial **harassment and intimidation tactics** by police authorities and ultraconservative groups is also a threat to the sustainability of democratic civic*

¹ <https://oko.press/dotacje-niw-fundacje-zych-ordo-iuris/>

organisations and movements, particularly those acting for the rights of migrants, LGBTI+ rights, and sexual and reproductive rights. As a result of the **state of emergency** implemented at the beginning of September and extended in December, civic space on the borders with Belarus was closed as CSOs, humanitarian workers, medics, media and independent observers have been denied access to the area. At the same time, journalists, activists and the local community engaged to help the migrants have been targeted by smear and intimidation campaigns and repressive actions, including threats, brutal stop and search operations. Following the 2020 protests against the practical ban on abortion, leaders of the Polish Women's Strike movement and supporting organisations have received death, rape and bomb threats. While there has been little to no response from the authorities in investigating these threats, escalating threats on Marta Lempart during October 2021 eventually resulted in police protection being assigned to her in public. These threats have been enabled by the violent rhetoric of the government and state-owned media against the movement. Additionally, WRHDs and people who have been protesting against the near-total abortion ban have faced **judicial harassment**. Lempart is facing over 90 criminal charges for her role in protests. LGBTQI+ activists continue to face persecution. Although three LGBT+ activists were acquitted for the crime of "offending religious beliefs" after displaying posters depicting the Virgin Mary with a rainbow halo symbolic of the LGBT+ flag around her head, in December 2021 the case was heard again after the prosecutor appealed the outcome. Others are facing legal actions from far-right religious groups. In July 2021 six lawsuits were opened against the founders of The Atlas of Hate, a website that maps local municipalities that passed anti-LGBT+ resolutions or adopted a charter written by the ultra-conservative Catholic organisation Ordo Iuris Institute, by the so-called "LGBT+-free" municipalities. The founders believe that the lawsuits are an attempt to silence them.

For the complete report of developments in 2021 by OFOP, see: <https://siecobywatelska.pl/rule-of-law-and-the-civil-society-watchdog-and-national-federation-of-polish-ngos-diagnosis-2021/?lang=en>

Institutional landscape and safe space (including state duty to protect and right to freedom from fear)

Election of the Ombudsperson

The term of the former Ombudsperson, prof. Adam Bodnar, expired on 9 September 2020. Before the end of his term of office, NGOs nominated the civic candidate Zuzanna Rudzińska-Bluszcz. While until the end of 2020, the ruling majority did not propose any candidates, it regularly rejected the civic candidate, supported by the opposition. She

resigned when her candidacy was rejected for the third time at the end of January 2021.

According to constitutional tradition, if a new Ombudsperson is not elected, the old one continues to hold office in order to ensure the constitutional principle of continuity of power. However, the ruling party's parliamentarians submitted a motion to the Constitutional Tribunal (controlled by the ruling party since 2016) challenging whether Bodnar should not remain in office after his term as, according to the Constitution, it lasts five years. This was considered by civil society as a move to put political pressure to promote the election of the ruling party's candidates, as without a new elected candidate, citizens would risk being left without an Ombudsperson. Indeed, in April 2021, the Constitutional Tribunal decided that the term

of office of the Ombudsperson must last only 5 years, and Bodnar was to definitively cease to hold office on 15 July 2021.

Nevertheless, an independent candidate was chosen, prof. Marcin Wiącek from the University of Warsaw, proposed by the opposition. He went through the entire procedure and was elected to the post six days after Bodnar left.

There are at least two victories achieved by the civil society organisations. First, the participation and pressure of civic organizations ensured the independence of this position that was feared would have been hijacked by the governing majority. Second, this civic engagement led to an ongoing cooperation of organizations that now monitor what is happening with the Ombudsperson's budget, check how public institutions respond to the Ombudsperson's general comments and take action in this matter, and finally work out their demands and cooperate with the Ombudsperson's office in their implementation.²

The justice system

In 2021, the crisis of the judiciary has deepened. More and more judges are being removed from adjudication by the improperly composed Disciplinary Chamber in the Supreme Court and decisions of court presidents appointed by the Minister of Justice. Even if courts rule that the removal was unlawful, in practice, for those appointed by the authorities to act, such a ruling means nothing. The court may reinstate a judge, but the president of the court will not allow him or her to rule. Another problem is that an increasing number of judges are being appointed by the new National Council of the Judiciary, the constitutional authority responsible for monitoring and appointing judges of the common courts. This body was appointed after the constitutional term of office of the previous

Council was terminated and it was elected almost entirely by the ruling majority. On the one hand, court verdicts are sometimes not enforced; on the other hand, many verdicts are issued by courts that are not correctly appointed. Thus, these ruling cannot be recognised as judgments rendered by an independent and legally established court, as confirmed by decisions of the CJEU and the Polish Supreme Court. As such, they can be challenged. This makes future judicial reforms very difficult to implement. Two values will struggle against each other – the right to an independent judgment and legal certainty.

On the other hand, when Polish authorities do not want to comply with the judgments of international courts, they apply to the Constitutional Tribunal. The Tribunal decides accordingly, and such decisions are used for internal propaganda. The most shocking examples are two decisions.

- According to K 6/21, the Constitutional Tribunal (whose composition was challenged by the European Court of Human Rights in the case Xero Flor sp. z o.o. vs Poland 4907/18) cannot be assessed under Article 6 of the European Convention on Human Rights because it is not a court within the meaning of that article and does not have to comply with its requirements. Thus, the Tribunal held that it does not have to be independent and impartial, hear the case within a reasonable time period, or be properly constituted.
- Decision number K 3/21 states that the CJEU cannot rule on the appointment of judges in Poland and the possibility of adjudicating on the basis of European law. The CJEU can only deal with European affairs and appointing judges

² More about the initiative can be found at <https://naszrzecznik.pl/>. The initiative is affiliated with

the National Federation of Non-Governmental Organizations (OFOP).

in Poland, according to the above mentioned decision, is not.

However, a case is also pending following an appeal by Małgorzata Manowska, appointed contrary to the existing procedure as the First President of the Supreme Court, to the Constitutional Tribunal for a declaration of non-compliance with the Constitution of a wide range of provisions of the Act on Access to Public Information.³ The Act has been in force for 20 years and its provisions are based on a wealth of case law. This case accelerated at the end of 2021 and will probably be concluded in early 2022. The acceleration is connected with an attempt to protect the authority's favourite, father Tadeusz Rydzyk (the owner of influential Catholic media channels – TV Trwam and Radio Maryja), from criminal consequences of not disclosing expenses from public funds by the Lux Veritatis Foundation,⁴ where he is a member of the board. And there is a significant amount of funds flowing to him. One of the provisions challenged by Manowska is the criminal provision on the basis of which the Lux Veritatis Foundation case is pending. If the Tribunal decides that the criminal provision in the Act on Access to Public Information is unconstitutional, there will be no grounds for issuing a judgment by a common court.

The hearing to consider this case has already been scheduled twice and cancelled twice. The formation of the Court has changed three times, with the third time unexpectedly the entire formation is to try the case. This will probably open the way to the European Court of Human Rights, as it will be an improperly appointed

formation (in the Constitutional Court there are so-called 'double judges', i.e., judges appointed to seats already occupied).⁵

In short, we can observe that legal certainty in the country is diminishing, although the spectre of a lack of response from the institutions does not appear in every political issue. When the courts rule on the unlawfulness of an arrest or the imposition of sanctions for participation in an assembly, repressions do not continue. However, when a case involves high-ranking people in power, the institutions most dependent on the ruling majority, namely the prosecutor's office and the Constitutional Tribunal, are activated. At the end of the year, the media reported ⁶ that employees of the Government Protection Bureau (since 2018 replaced with State Protection Service), who in 2016 were driving a car with Prime Minister Beata Szydło inside and had an accident with a civilian car, falsely testified under pressure. The consequences were borne by a young man – the driver of a civil car.

Media pluralism

There were several issues concerning the media pluralism in Poland. In 2021, the largest network of regional media, Polska Press, was purchased by Orlen, a company in which the state treasury has the decisive vote, de facto falling into the political control of the governing majority. Although, at the request of the Ombudsperson, the court suspended the decision of the President of the Office of Competition and Consumer Protection regarding PKN Orlen's acquisition of Polska Press, Orlen did not cease its activities. On the contrary, people connected

³ EN More on the Małgorzata Manowska's motion to the Constitutional Tribunal

<https://siecobywatelska.pl/explanatory-memorandum-on-polish-foia-constitutional-case-k1-21/?lang=en>

⁴ EN More on Lux Veritatis case:

<https://siecobywatelska.pl/the-lux-veritatis-case-a-measure-of-the-state-capture-and-the-absence-of-rule-of-law/?lang=en>

⁵ You can read more about the application and the situation surrounding it in a memorandum of prof. Michał Bernaczyk addressed to a foreign audience, in English

⁶ PL one of articles describing the situation <https://wiadomosci.onet.pl/kraj/wypadek-beaty-szydlo-byly-oficer-bor-przerywa-milczenie-oskarzony-komentuje/h75z3mx>

to the authorities were appointed to head the company and the then editor-in-chief was dismissed. Journalists began to gradually quit on their own when they discovered that they were now to be instructed by politicians. Civic organizations took an interest in the matter and the Ombudsperson took action.⁷

The second issue concerning freedom of speech was the so-called LexTVN. TVN is the largest private television station. Its owner is the American company Discovery. In 2021, the National Broadcasting Council, state media regulator controlled by the ruling party, delayed extending the license for broadcasting (although one extension was finally granted, for TVN24, there is still no extension for TVN 7 – another channel belonging to the same owner). Then, at the end of the year, breaking its own rules of procedure, the Sejm (lower chamber of the Parliament) passed a law that would force the American owner to quickly sell the station (at least partially), because companies from outside the European Economic Area, according to the new law, could not own more than 49% of shares. Finally, the bill was vetoed by the President of Poland as a result of enormous pressure from the United States.

The limited media pluralism affects the democratic and civic space greatly. The public media (such as TVP) often amplifies government propaganda and smear campaigns against opposition parties and democratic CSOs. Leaked emails from one of the ministers (Michał Dworczyk), on the website poufnarozmowa.pl, showcased the mechanism. The leaked email showed the political pressure on a journalist to attack the representatives of the opposition the judiciary following a verdict requiring the Prime

Minister to retract false information regarding the opposition party Civic Platform.⁸

Emergency on the Polish-Belarusian Border

Since August 2021, an important issue stirring public debate in Poland and involving many civil society organisations and activists is the humanitarian crisis caused by the actions of the Belarusian authorities and the reaction of the Polish authorities at the border between the two countries. On 2 September 2021, President Andrzej Duda issued a decree imposing a 30-day state of emergency in parts of Podlaskie and Lubelskie Voivodeships (in the cross-border zone), at the request of the Council of Ministers. The decision was later extended to the maximum time allowed by the Constitution - 90 days. During the state of emergency and on the basis of new law adopted afterwards (see below), access to the border strip was practically prohibited to all entities that do not belong to the state services or are not residents. Access was, and largely remains, prohibited to the media and humanitarian and social organisations. In late August, the Sejm also received a government draft amendment to the Act on foreigners. The proposed changes enable the local chief of border guards to issue a decision regarding foreigners crossing the border illegally, on the basis of which they will have to leave the territory of Poland immediately. This legalises the practice of push-backs, contrary to international law obligations. For this reason, the Act was explicitly criticised by the Ombudsperson, the Helsinki Foundation for Human Rights and aid organisations. Nevertheless, the law was adopted by Parliament at the end of October.

⁷ PL the Ombudsperson appeal and the organizations' requests

https://www.rpo.gov.pl/sites/default/files/Odwolanie_UOKiK_Orlen_PolskaPresse_5.03.2021.pdf ;
<https://www.hfhr.pl/czy-decyzja-prezesa-uokik-dotyczaca-koncentracji-pkn-orken-i-polska-press-jest-zgodna-z-prawem-pismo-hfpc-do-rpo/>;

https://bip.siecobywatelska.pl/userfiles/file/Opinie/Wniosek_do_RPO_Orlen.pdf

⁸ PL More on that topic

<https://www.press.pl/tresc/68818,wspolpracownik-premiera-prosil-kurskiego-i-olechowskiego-by-tvp-bardzo-ladnie-zaatakowalo>

Pressure on civil society

The only actors providing humanitarian help are the civil society activists and volunteers outside the emergency zone and the residents of the restricted area inside it. They bring basic humanitarian aid to the migrants (food, drink, warm clothes, sleeping bags, we work with independent medics and hospitals) and support them with access to administrative procedures. In order to respond to the systematic human rights violations enabled by this context, civic organisations present at the border increased exponentially their activities, with huge psychophysical consequences of the staff and volunteers involved. At least two spontaneous movements – Medics on the Border (Medycy na Granicy) and Families without Borders (Rodziny bez Granic) sprung to provide assistance. A joint civic campaign entitled Save the People on the Border calls for immediate admission of medical and humanitarian aid to the emergency state zone.⁹

Both the activists and local residents have been often facing threats or even repression for their relief work, including brutal stop and search operations, smear and intimidation campaigns against activists speaking up in the media. For example, the Crisis Intervention Post run by the Club of Catholic Intelligentsia reported that on 15 December 2021, volunteers on duty were detained by the Police and were held in a police car for several hours. Dozen police officers armed with automatic weapons conducted a search, questioned the volunteers until five in the morning and confiscated all computers and phones used for work as well as volunteers' private phones, other electronic equipment, and all documentation.¹⁰

⁹ PL <https://publicystyka.ngo.pl/ratujmy-ludzi-na-granicy>

¹⁰ PL <https://publicystyka.ngo.pl/oswiadczenie-dzialania-policji-w-punkcie-interwencji-kryzysowej-kik>

¹¹ PL <http://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=1512>

Restrictions to access of information and freedom of expression

The state of emergency resulted in a ban on recording of the area using technical means. Access to public information on the activities carried out in the areas covered by the state of emergency was also restricted. In short, citizens were cut off from access to information.

The reasons provided for the restriction of access to information were "*numerous, intensified attempts to illegally cross the border*" and "*the scale and nature of the actions undertaken by the Republic of Belarus*". In addition, there were arguments about the threat to national security posed by people providing humanitarian aid who supposedly made it difficult for Border Guard officers and Armed Forces soldiers to perform their duties. It was also argued that providing access to information would have reduced their efficiency, which in turn would be a danger for citizens.¹¹ Even before that, although without any legal basis, journalists were not allowed to observe the border.¹²

On 17 November 2021, in view of the passing of the maximum constitutional deadline for the duration of the state of emergency, the Sejm adopted amendments to the Act on State Border Protection and introduced the possibility of further cutting off journalists from the possibility of observing the situation on the border. It de facto extended the state of emergency. From that moment on, the Minister of Internal Affairs and Administration can, by ordinary decree, without additional procedures, introduce a ban on non-residents in a given area. Journalists can get special permission from the local Border Guard Commander (in justified cases, temporarily, under specific rules) to stay in the

¹² PL <https://drive.google.com/file/d/1HbPjS9HuFSaRpK1njbUI6mPzozK2bTg/view?usp=sharing>

area. NGOs cannot obtain such a permit.¹³ This greatly affected access to information for humanitarian organisations. For example, it was not possible to find out the orders intended to be the basis for the non-acceptance of requests for international protection and the ban on serving food.

These regulations on the state of emergency also concerned the *"suspension of the right to organize and hold assemblies in the area covered by the state of emergency."*

On 19 January 2022 the Supreme Court in Poland ruled that forbidding general access to the border was disproportionate. Freedom of Speech cannot be restricted to such an extent. This verdict was issued in the individual case of three journalists who were punished for entering the state of emergency zone.¹⁴

The regulatory environment for and implementation of civic freedoms

Freedom of association under pressure

The Act on Associations was significantly amended in 2015. It introduced new solutions to reduce conflicts of interest and facilitate the establishment of associations. Several regulations increasing the bureaucratic burden of NGOs were passed in 2021 or are underway.

Amendments to the regulations on education organizations (the Education Act), the so-called 'Lex Czarnek' are under discussion in the Parliament. In addition to questionable provisions on the organization of education itself (the role of superintendents, reduction of schools' autonomy), the draft included provisions directly regulating the operation of NGOs in

schools. These provisions introduce certain bureaucratic procedures that in practice will limit NGOs access to educational institutions. Additionally, schools' regional superintendent, representative of the Minister of Education on the regional level, will have the power to arbitrarily decide on such a permit, even against the parents' opinion. Over 100 organizations have come together to keep these laws as part of the Free School campaign.¹⁵ Civil society representatives are voicing concerns that this bill will in effect provide the government with a means to control and prevent extracurricular activities and/or educational workshops from taking place in schools, such as ones pertaining to anti-discrimination, gender equality, LGBT+ rights, or comprehensive sexuality education.

Provisions of the Act on Counteracting Money Laundering and Financing of Terrorism as amended in 2021 introduced an obligation for foundations and associations registered in the National Court Register to report their beneficial owners to the Central Register of Beneficial Owners. The obligation became effective in October 2021. Organisations covered by this obligation were indicated in an arbitrary and schematic manner (several types of CSOs were not included, e.g., Rural Housewives' Circles, ordinary associations, church organizations), which results in similar entities being treated differently. The obligation itself is troublesome, since identification of beneficial owners in associations and foundations is not easy, which makes this new obligation difficult to implement, and incorrect implementation may result in penalties. The anti-money laundering provisions themselves applied to NGOs are disproportionate to the real threat that the Act is trying to combat.

¹³ PL

<https://sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=8F2FCA4F3477BB7C125878E0064B115>

¹⁴

<https://siecobywatelska.pl/whyombudsmanrighttoknow/?lang=en>

¹⁵ PL <https://www.wolnaskola.org/>

Draft governmental Act on NGO Reporting was made public in July 2021 and work on the draft is ongoing. This act is officially aimed at gathering in one place the rules of reporting by NGOs and simplify the reporting obligations. However, the document was prepared without any prior discussions with CSOs. The National Federation of NGOs and other CSOs networks pointed out the inadequacy of the timing and method of consultation¹⁶ as the consultation period for the act was short and in the middle of the summer holidays. Contrary to the aim of the law, the drafted regulations proved to be complicated, flawed and their enactment would not simplify the obligations. In addition, the draft imposed on NGOs obligations that they had not had before, such as the obligation to disclose the data of individual donors (natural persons). Some of the new measures that this act proposes to establish includes also obliging all CSOs to report to one governmental entity all funding coming from all foreign entities (individual and private persons, as well as public entities). Organisations are also concerned about comments made by the Ministry of Justice during the consultation suggesting to provide a definition of a foreign-funded organisation that: *"shall be understood as a non-governmental organisation, referred to in Article 3 of the Act of 24 April 2003 on Public Benefit Activity and Volunteerism (Journal of Laws of 2020, item 1057, and of 2021, item 1038) that receives foreign funding and other support in the amount referred to in section 6 from:*

- (a) foreign states or their authorities;*
- (b) international or foreign organisations regardless of their legal form;*
- (c) citizens of foreign countries;*
- (d) stateless persons;*

(e) Polish legal entities with foreign capital participation and their subsidiaries in which the foreign participation exceeds 1/3;

(f) Polish non-governmental organisations, whose revenues in the tax year in at least 10%, but not less than 6 times the minimum wage for work within the meaning of the provisions of the Act of 10 October 2002 on the Minimum Wage (Journal of Laws of 2020, item 2207), come from abroad."¹⁷

The Act on Employee Capital Plans (PPK) imposes on organizations employing employees (even very incidentally and temporarily) the obligation to apply the Act – at least to conclude an agreement with a financial institution (but also to introduce appropriate procedures within the organization, create regulations, etc.). Most NGOs started to apply the regulations at the turn of April and May 2021. Most of the NGOs do not meet the eligibility criteria for exemption from the obligation to apply the Act. Organizations have been burdened with difficult to implement and in most cases (due to the lack of popularity of PPK – resignation of employees) unnecessary obligations.

Amendments to the Act on Public Benefit and Volunteer Activity were prepared by the Ministry of Foreign Affairs (work on the draft has not been completed in 2021). It assumed the introduction of regulations allowing the Ministry to transfer resources to a designated organization (state treasury foundation) without organizing a tender – the provision meant in practice assigning activities and resources to a specific organization without allowing other NGOs operating in this field to do so. Additionally, such an exception can be an incentive for other ministries or institutions to include "their" selected organizations in the act in a similar way, which would completely negate the principle of transferring public funds to NGOs based on

¹⁶ PL <https://ofop.eu/stanowisko-organizacji-pozarzadowych-w-kwestii-projektu-ustawy-o-sprawozdawczosci-organizacji-pozarzadowych/>

¹⁷ PL <https://publicystyka.ngo.pl/projekt-o-sprawozdawczosci-ngo-ministerstwo-sprawiedliwosci-proponuje-przepisy-o-finansowaniu-z-zagranicy>

public tender procedures (or without tenders, but with a wide range of organizations allowed to implement tasks).

Restrictive law on freedom of assembly is still in place. 'Stop LGBT+ bill' threatens LGBTI rights and pride parades

The Act on Assemblies, adopted in 2015, met all modern requirements. In 2016, the ruling majority made a criticized amendment. It introduced provisions on cyclical assemblies, which raise objections. Among other things, they are vague and favour one type of assembly.

On 9 August 2021, a civic legislative initiative to amend the Act on Assemblies was submitted to the Sejm. The bill called 'Stop LGBT+' was signed by 140,000 citizens.

According to the draft, during the assemblies the following activities would be prohibited:

- possession and use of any materials whose content refers to questioning marriage as a union between a woman and a man,
- promoting the extension of marriage to persons of the same sex,
- promoting same-sex unions or unions of more than two people,
- promoting the privileged treatment of same-sex unions or unions of more than two people,
- promoting legal solutions aimed at privileging same-sex unions,
- promoting the possibility of adopting children by persons of the same sex,
- promoting sexual orientations other than heterosexuality,
- promoting gender as an entity independent of biological conditions,
- promoting the sexual activity of children and adolescents before the age of 18.

Promoting was defined as *"all forms of disseminating, agitating, lobbying, making statements, expectations, demands, recommending, or promoting."* The bill would ban LGBT+ Pride events in the context of systemic deterioration of LGBT+ rights. On 29 October 2021, the bill was sent for further work in the Sejm's Administration and Internal Affairs Committee. Although to date legislative works did not progress¹⁸ such laws tend to return to the public debate.

The 2020 protests against the ban on abortion have beneficial impact on society but the movement remains under pressure

In 2020, a general mass mobilisation erupted throughout Poland, both in large and small towns, in workplaces, at universities against the ruling of the Constitutional Court of 2020 which led to the practical ban on abortion. The huge protests has had positive impact on the Polish society:¹⁹ conversations about abortion, violence against women, about gender have become part of the experience of a large section of the society and individuals confronted with the topics for the first time in their life have become acquainted with or involved in feminism and women rights.

Nevertheless, pressures on the movements have increased. Leaders the Polish Women's Strike movement and organisations supporting them have received death, rape and bomb threats. These threats have been enabled by the violent rhetoric of the government and state-owned media against the movement. While there has been little to no response from the authorities in investigating these threats, escalating threats on Marta Lempart during October 2021 eventually resulted in police protection being assigned to her in public. Additionally, Women rights defenders and people who have been protesting against the near-total abortion ban have faced

¹⁸ PL <https://orka.sejm.gov.pl/proc9.nsf/0/7510F178D30F38AAC12584B7003F9693?Open>

¹⁹ PL <https://publicystyka.ngo.pl/ponad-rok-od-protestow-po-wyroku-tk-komentarz-malgorzaty-leszko>

judicial harassment. Lempart is facing over 90 criminal charges for her role in protests.

Unlawful restrictions of the right to assembly during Covid-19

Throughout the pandemic, restrictions on the number of people at gatherings were enacted. The government treated peaceful public demonstrations, like any other gathering. They created subsequent amendments to the regulation issued on the basis of the Act on Prevention and Control of Infections and Infectious Diseases in Humans. This law allows to regulate by decrees "the prohibition of holding spectacles and other assemblies of people." On this basis, during the pandemic, depending on its severity, from 5 to 150 people were allowed at an assembly. A distance of 100 meters was to be maintained between two neighbouring assemblies. Based on the wording of assemblies, spontaneous assemblies were not allowed, and counter-manifestations were much more difficult to organize. Meanwhile, during the largest protests, mainly related to the demonstrations after the October 2020 Constitutional Tribunal ruling on the virtually total ban on abortion, most assemblies were spontaneous. Over time, the authorities began not only to prohibit such gatherings, but also participation in them (without even a questionable legal basis).

From the first version of the regulation issued by the Council of Ministers concerning, among other things, assemblies, the existence of a legal basis for such restrictions of civil rights was the subject of public debate. The Ombudsperson also intervened.²⁰ In July 2021, the Supreme Court ruled that the government's ban on public assemblies introduced on 9 October 2020 was illegal. Despite this, the Council of Ministers

²⁰ PL <https://bip.brpo.gov.pl/pl/content/naruszono-istote-wolnosci-zgromadzen-rpo-do-tk-popiera-obywatela>

²¹ PL <https://bip.brpo.gov.pl/pl/content/rpo-kgp-zgromadzenia-spontaniczne-kontrmanifestacje-ochrona>

continues to issue regulations in this framework without introducing a state of natural disaster in contrast with what is foreseen by the Polish constitution. Unlawful arrests, provocations and police aggression have occurred repeatedly. At the end of November, the situation escalated so much that the Ombudsperson spoke out, writing to the police²¹ and pointing out that:

- Both spontaneous assemblies and counter-demonstrations are legally protected forms of public assembly, including in a state of emergency.
- State authorities have a duty to ensure the security of all demonstrating groups at the same time.
- It is illegal to completely prevent the organization or conduct of a counter-demonstration. A counter-demonstration cannot be dissolved if it is peaceful.
- The police should not take actions that indicate favouring or unconditional priority of one of the assemblies.
- The high point of physical attacks occurred on 18 November 2020 and in general in the last weeks of 2020.²²

Fines, checking ID, detentions, punishment for slogans, and visits to demonstrators' homes also occurred at other, later, assemblies. The brutality of the police response to the demonstrations organised in the Winter of 2021 continued. It was then that the locking of demonstrators in kettles, particularly dangerous during the next pandemic peak, criticised by the Polish Ombudsperson could be observed, demonstrators being taken to police stations dozens of kilometres away from their homes ostensibly to take statements from them, minors being held in detention overnight without their parents being informed of their children's whereabouts, and physical

²² PL <https://bip.siecobywatelska.pl/userfiles/file/Opinie/Przeciwko%20bezprawnym%20dzia%C5%82aniom%20policji.pdf>

violence being used against demonstrators, media representatives and even opposition members of parliament (having immunity) by the police.

Judicial harassment challenges freedom of expression

The law related to freedom of expression is regulated by the Act on Press. The entire Act dates back to 1984 and is sometimes amended. It is often criticized for being unsuited to modern media. It also includes several solutions criticized by journalists, such as the right to authorize statements by interlocutors.

In addition, civic organizations have been calling for decriminalization of Article 212 of the Criminal Code for years. This is a provision that exposes critics of the authorities to accusations of defamation. Mayors, councillors and other public officials sometimes establish criminal cases against citizens and journalists who point out irregularities.

Jakub Żulczyk writer accused to have insulted the head of state

On 5 January 2022, the hearing of the final speeches in the case brought by the prosecution against the writer Jakub Żulczyk took place. In November 2020, he reacted to the President's Twitter account congratulating Joe Biden on a "successful campaign" and not on winning the election, suggesting that he intended to wait with his congratulations until the President was nominated by the Electoral College. Four months later, an indictment was submitted by the prosecutor's office based on the Criminal Code regulation. The writer was accused of publicly insulting the President of the Republic of Poland. According to the majority of legal commentators, his opinion fell within the scope of legally permissible criticism of public office holders, acceptable in public debate. Such an assessment

was confirmed by the judgment of the court of first instance, delivered in early January, which redeemed the case. The attempt to hold this writer responsible, on the other hand, can be assessed as a politically motivated action of the prosecution office subordinate to the Minister of Justice. The prosecutor claims he is going to appeal.

Ewa Siedlecka, columnist of POLITYKA weekly, allegedly slandered two judges as a result of journalistic misconduct

On 24 November 2021, the District Court for Warsaw-Śródmieście, convicted Siedlecka, a journalist of Polityka, a weekly news magazine, of criminal defamation in the case brought by two judges, Konrad Wytrykowski and Maciej Nawacki, acting in their private capacity. As the ruling was delivered by a court of first instance, the journalist may appeal the guilty verdict. Siedlecka is one of the journalists who reported on a so-called 'hate campaign affair', a smear campaign against judges who resisted the reform to the judiciary that reduced its independence, that was revealed by a journalistic investigation in 2019. The digital media outlet Onet.pl revealed that the representatives of the Ministry of Justice, including deputy justice minister Lukasz Piebiak, orchestrated and coordinated a hate campaign aimed at several of them in which the media leaked information about their private lives. The source of the leak was alleged judges who supported the changes and were beneficiaries of them. The 'reforms' – in particular, creation of the disciplinary chamber – form an essential part of plans to "overhaul the judiciary" and were found incompatible with EU law by the European Court of Justice. International organizations also spoke out on the matter.²³

²³ PL <https://www.ecpmf.eu/poland-journalists-criminal-defamation-conviction-may-further-impair-freedom-of-expression/>

Three female activists accused of insulting religious feelings for reacting to hateful behaviour towards LGBT+ people

On Easter 2019, an installation appeared on a traditional representation of the Holy Sepulchre in a church in Płock, containing hateful messages against LGBT+ rights. Three LGBT+ activists responded by sticking stickers depicting the Virgin Mary in a rainbow halo around the church. This was considered by the prosecution (and the auxiliary prosecutors, including the priest who was the author of the installation) as an insult to religious feelings. In the first instance in March 2021, the court acquitted the activists. However, the prosecutor's office appealed the decision.

SLAPP suits against Atlas of Hate

In July 2021, six lawsuits were opened against the founders of The Atlas of Hate, a website that maps local municipalities that passed anti-LGBT+ resolutions or adopted a charter written by the fundamentalist religious organization Ordo Iuris Institute, by the so-called 'LGBT+-free' municipalities. The documents called for prohibiting targeted local government assistance to LGBT+ people in difficult life situations and banning the participation of LGBT+ organizations in the life of the local government community. The Atlas contributed to raise awareness about resolutions discriminating against LGBT people leading to international pressure, including the European Parliament and European Commission, on the Polish authorities to reverse the extremely homophobic course they have taken under the PiS government. Nine complaints against LGBT discriminatory resolutions were also filed to administrative courts by the Ombudsperson.²⁴ The lawsuits for violation of the good name of local government units are being filed by local governments supported by Ordo Iuris. On 29 December 2021, the first judgment acquitted the defenders and

charged the plaintiff with court costs in the amount of PLN 4337.

Wiretapping of the opposition raises concerns over the right to privacy

In late 2021, a major surveillance scandal occurred involving people perceived as opposition to those in power. The Citizen Lab group revealed that Roman Giertych, an attorney, and Ewa Wrzosek, a prosecutor, were both subject to surveillance using the Pegasus programme. This technology was also used during the 2019 election period (when European and national elections took place) against then Civic Platform chief election campaign officer and now Senator Krzysztof Brejza. The Polish secret services had access to calls, photos, e-mails, messages from messaging apps used by two active critics of the government. The case was reported by the Associated Press.

Oversight on wiretapping by security services is a concern in Poland. The courts accept 98-99% of wiretapping requests filed by secret services. Polish legislation also allows the Internal Security Agency to conduct wiretaps in certain situations without asking for court approval (2016 Anti-Terrorism Act). An expert group operating at the Ombudsperson's office consisting of former secret service officers and representatives of organizations protecting human rights calls for the establishment of an independent body to control the services and informing the persons subjected to surveillance about it after the control is completed.²⁵

²⁴ PL <https://kph.org.pl/atlas-nienawisci-przed-sadem/>

²⁵ <https://panoptikon.org/pegasus-giertych-wrzosek>

The framework for civic organisations' financial viability and sustainability

The economic and financial viability of the sector²⁶ has been negatively affected on the one hand, by the Covid-19 pandemic and the decrease of income of local governments (the main sources of financing), and, on the other hand, by the decreasing availability of public sources, which are increasingly flowing to new organizations established by people close to the authorities.

The regulations called the 'Polish Deal', prepared in the second half of 2021 and into force from January 2022 will further significantly decrease local government revenues. The effect of these changes will be visible at the turn of 2022 and 2023.

The impact of Covid-19

In March 2021, Klon Jawor published a report from research involving 850 organisations and associations.²⁷ It indicated that the pandemic deteriorated the situation of 65% of NGOs. The increased stress connected with work in an organisation was noted by 63% of respondents. The activity of 30% of NGOs has been suspended. The most negative assessment was expressed by civic organizations from smaller towns and medium size cities (over 70% of them claimed that pandemic had a negative impact on their

²⁶ Before the pandemic, the annual budget of an average organization was PLN 28,000. 6% of organizations had a budget of over 1 million PLN; 22% between 100 thousand and 1 million PLN; 43% between 10 thousand and 100 thousand PLN; 19% between 1 and 10 thousand PLN; 11% up to 1000 PLN. 39% of the income of organizations came from domestic public funds; 15% from foreign public funds; 15% from paid and business activities; 14% from individual and institutional philanthropy; 3% from 1% of taxes; 3% from membership fees; 3% from own property, 2% from

activities). 29% of the organizations felt a drop in funding from self-governments. Only 3% observed an increase of funding. The research also shows a significant drop in the percentage of organizations pointing out that self-government or its institutions were partnering with organizations during the pandemic. It is respectively 15% and 11% (as compared with 27% and 14% a year earlier).

A research prepared by the National Freedom Institute (public institution) assessing the impact of the pandemic on funding of NGOs by local administration showed a more positive picture. According to this research, on the municipal level, there was a slight increase of funding by local authorities of 1,4%. It is important to notice that this is an average and there were significant differences between different communes.²⁸

Regarding the recovery measures for the economy, the NGO sector was largely ignored, although they were included into the general schemes supporting employer organisations.²⁹

The right to participation and dialogue between the civic sector and governing bodies

Civil dialogue is institutionalised by the Public Benefit Activities Council, but the body is not representative of the sector

The Public Benefit Activities Council is the only body that institutionalises the principle of civic

other organizations; 6% other:

<https://api.ngo.pl/media/get/108227>

²⁷ <https://api.ngo.pl/media/get/160530>

²⁸

<https://docs.google.com/presentation/d/18mF9J0tjCi9ohjldLxDNNytGlo6GWhy9/edit?usp=sharing&oid=104066732155604650904&rtpof=true&sd=true>

²⁹ For an overview of the measures, refer to the full report: <https://siecobywatelska.pl/rule-of-law-and-the-civil-society-watchdog-and-national-federation-of-polish-ngos-diagnosis-2021/?lang=en>

dialogue and cooperation between the public sector and the third sector. It is a consultative and advisory body of the Minister called the Chairperson of the Public Benefit Committee and complements the institutions implementing the principle of social dialogue. However, this body is heavily overburdened and does not fully meet the requirement of being a place for dialogue between organizations and the government.

The composition on the non-governmental side is ultimately decided by the Minister, although organizations themselves propose candidates who must prove being strongly supported by other NGOs or their coalitions. The current term of the Council began at the end of 2021. Despite the huge mobilisation by civic organisations, the Minister responsible for the selection chose the Council members at his own discretion.³⁰ As a result, the Council did not include people who have been working in the NGO sector for years and, among others, the person who won the most votes of support from various NGOs. Due to the lack of elections, the Council does not represent the NGO sector in Poland.

Civic Dialogue Council

Work is underway on a new Act on the Civic Dialogue Council. This will be a new body for dialogue which is to replace the Council for Public Benefit Activity existing for nearly 20 years. The new Council is to be composed of representatives of the government administration, local government and mostly NGOs, who will have a majority, but most importantly will be democratically elected. In addition, the new Council will gain the power of legislative initiative and the ability to obtain binding interpretations from various state bodies.

³⁰ PL <https://publicystyka.ngo.pl/na-profilu-rdpp-na-fb-opublikowano-liste-pozarzadowych-kandydatow-do-rady>

Convention of Voivodeship Councils of Public Benefit Activity

Another form of dialogue, although not formally established, is the Convention of Voivodeship Councils for Public Benefit Activity. It is a voluntary agreement of Voivodeship Councils of Public Benefit Activity and has no legal personality. It is not included in any regulations, which the Convention members strongly defend. The reason for this is so that it does not become dependent on any administration. It was established to:

- provide a platform of cooperation and exchange of information for representatives of voivodeship benefit councils,
- expressing common opinions on matters relevant to the functioning of the voivodeship benefit councils in their sphere of interest,
- as well as in the scope of cooperation between public administration and NGOs.

It consists of representatives of NGOs, voivodeship local administration and voivodeship councillors.

National Recovery and Resilience Plan

In February 2021, the Polish National NGO Federation (OFOP), composed of over 1000 organisations, presented a demand concerning the extension of the consultation process regarding the National Recovery Plan and including the civil society in that process. The government assured there would be broader consultations. This led to public hearings and later reversed hearings,³¹ coordinated by OFOP and the Stocznia Foundation in coordination with the Ministry. The hearings were participated by representatives of various entities – civil society organisations, local government organisations,

³¹ PL <https://www.wysluchanieplanodbudowy.pl/>

employers and entrepreneurs, local government officials, and citizens. There were over 400 speakers, transcriptions of the hearings were sent to the Ministry. In the meantime, problems appeared with the information on whether and how the proposals had been accepted by the government, with further inclusion of all the parties in the work on the National Recovery Plan, and even publication of the latest version of the Plan (that has not been presented to CSOs until the end of 2021). However, in the course of the consultations, the Monitoring Committee was successfully introduced – it is to be composed among other things of representatives of local governments and non-governmental organisations.

Right to access information

The right to participation is also affected by the access to information. The biggest challenge in this regard is linked to the state of emergency on the borders with Belarus as described above. In addition, Polish institutions also adopt practices that are inconsistent with the law or use undefined legal provisions. These include:

1. Failure to document their own actions, among other things, so that they do not have to respond to requests. For example, the Medical Council at the Prime Minister of the Republic of Poland does not document its work and how it influences decisions made in connection with the Covid-19 pandemic.³²

2. The argument about processing of information (such a provision exists in the Polish Act on Access to Public Information) is often used. Processed information is one that requires effort to analyse various information to create qualitatively new information. In this case, applicants must demonstrate a particularly compelling public interest. However, whether such an interest exists is determined by those

obliged to provide the information. At the end of 2021, a ruling by the Supreme Administrative Court regarding information about what the President activities. According to his Office, preparing information regarding his activities would require undue effort on the part of the President's staff. The court agreed with that explanation.

3. Another argument used by public institutions is the recognition that the requested document is an "*internal document*." Such a provision does not exist in Polish law but has been introduced by judicial decisions. According to the judicial decisions, such an internal document is the calendar of a person holding high public office. In 2021, the European Court of Human Rights has communicated to Poland the case on the calendar of Julia Przyłębska, the President of the Constitutional Tribunal.³³

4. It often happens that, in local activities, active people and organisations are accused of abusing the right to information. Citizens, according to their critics, ask too many questions and for the wrong purpose. Such a concept does not exist in Polish law, but it has been introduced by obliged entities and judicial decisions. This constitutes a huge problem for civic participation.

5. In addition, there are many situations when obliged institutions simply do not respond and groundlessly invoke the protection of other rights, which significantly delays access to information.

Additionally, 2021 was dominated by the case of the First President of the Supreme Court, Małgorzata Manowska's application to the Constitutional Tribunal to declare a number of provisions of the Act on Access to Public Information unconstitutional (see above).

32

33 <https://siecobywatelska.pl/watchdog-polska-v-poland-access-to-public-figures-calendars-and-the-rule-of-law/?lang=en>

Recommendations

The EU institutions should constantly monitor the situation, in constant contact with Polish NGOs. In addition, they should make even greater use of the position of federations, network organisations or larger groups of the non-governmental sector, including them in the process of systematic assessments of the situation in the country. Strengthening the capacity of independent organisations becomes crucial, which means preparing funds available from the level of individual EU institutions so that they are directed not only to projects, but also to

the development and building of organisational stability of Polish organisations.

It is also essential to emphasise the need to respect EU law and the principles set out in, inter alia, the Charter of Fundamental Rights by each Member State. It would be advisable for the European Commission not only to carry out its own monitoring of Charter violations and actively encourage Member States to apply the Charter, but also to establish a permanent point or body to which civil society organisations can report violations of fundamental rights in individual Member States on a permanent basis.