

Legal environment and space of civil society organisations in supporting fundamental rights

Poland

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1 Five most significant civic space developments in 2020

Since the start of the constitutional crisis in Poland in 2015, civil society organizations work in a hostile legal and policy environment. Many reports and analyses have indicated the influence of changes in the state and judiciary system on organizations' freedom of work.¹

In 2020, civil society organizations faced numerous challenges regarding freedom of peaceful assembly and social consultations with the state's authorities. Some of civil society organizations and civil society activists (especially LGBTQI activists) were attacked by either smear campaigns or legal actions that aimed at intimidating the activists and limiting their work. Furthermore, one of the most worrying developments concerned the draft legislation introducing certain new obligations for civil society organizations receiving foreign financing. Even though the works on this project has not been continued, it still serves as an example of state's authorities' approach towards some of the civil society organizations.

1.1 Freedom of peaceful assembly

In Poland, both the Constitution and the Act on public assemblies regulate the freedom of peaceful assembly. In 2016, the Parliament amended the Act by introducing the new category of assemblies so-called cyclical assemblies. A cyclical assembly is an assembly organized either on the same date every year or in a specific period to commemorate important events from Polish history or tradition. Whereas the regular assemblies are subjected to a notification to the local authorities, the voivods (the governmental representatives in the regions) register the cyclical assemblies. If an assembly is granted a special status of cyclical assembly, it has a priority over any other assembly organized in the same place and time.

In 2020, the freedom of assembly became one of the issues regulated by the governmental regulations concerning the prevention of the spread of pandemic of COVID-10. Since the beginning of the pandemic in Poland in March 2020, the assemblies (in any form) were first limited only to 50 participants and then, as of the end of March until the end of May, forbidden. At the end of May, with the lowering number of new infections and the peak of the presidential elections campaign, the ban on assemblies was slightly relaxed and the maximum number

¹ See e.g. Pazderski F., 2019 Civil Society Organization Sustainability Index Poland, USAID, available at: <https://www.isp.org.pl/en/publications/2019-civil-society-organization-sustainability-index-poland>, Helsinki Foundation for Human Rights, Ruled by law, available at: <https://www.hfhr.pl/wp-content/uploads/2020/01/EN-Rz%C4%85dy-prawem-web-FIN.pdf>, Human Rights First, Poland's New Front: A government's war against civil society, available at: <https://www.humanrightsfirst.org/sites/default/files/Poland-Report-August-2017.pdf>

of allowed participants was raised to 150.² With the second wave of the pandemic in autumn 2020, the limitations on the freedom of assemblies were re-introduced and as of October 2020, only assemblies of a maximum of 5 participants could be organized.³

The introduced restrictions raised serious legal concerns regarding both the way in which the restrictions were introduced as well as their proportionality. According to the Constitution each limitation of rights and freedoms should be introduced by a statute (adopted by the Parliament) whereas all the limitations imposed on the freedom of assemblies were introduced by the governmental regulations.

In 2020, civil society organizations mobilized and protested against the law and policies adopted by the governing majority or the state authorities. For example, in May 2020, the entrepreneurs protested against the restrictions related to combating pandemic imposed on the business sector. In August 2020, the LGBT community organized a spontaneous protest in solidarity with the arrested activist Margot. Finally, in October and November 2020, there were massive protests against the Constitutional Tribunal nearly banning access to an abortion. Each of these protests took place despite the binding restrictions.

In 2020, the media report on numerous cases in which participants of the peaceful protests were fined for violating the pandemic restrictions. In several cases, the courts that heard an appeal in these cases stated, however, that these sanctions were illegal and not proportional and acquitted the protesters.⁴

In 2020, the Ombudsman's office and civil society organizations documented a growing number of incidents of Police brutality and excessive use of force towards the participants of the assemblies.⁵ For instance, in August 2020, after the LGBT demonstration in solidarity with the arrested activist Margot, the Police apprehended 48 persons (including random persons who did not participate in the protests). According to the report of the National Mechanism of Torture Prevention, the procedural rights of apprehended persons were violated in many

² Poland, Governmental Regulation on introducing certain restrictions, orders and bans in relations to the state of epidemic (Rozporządzenie Rady Ministrów z dnia 31 marca 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii), 31 March 2020, Governmental Regulation on introducing certain restrictions, orders and bans in relations to the state of epidemic (Rozporządzenie Rady Ministrów z dnia 29 maja 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii), 29 May 2020

³ Regulation on introducing certain restrictions, orders and bans in relations to the state of epidemic (Rozporządzenie Rady Ministrów z dnia 23 października 2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii), 23 October 2020

⁴ See e.g. decisions of the Appellate Court in Warsaw of 15 May 2020 (case no VI ACz 339/20), District Court in Warsaw (V W 1847/20) and District Court in Rzeszów (II W 539/20)

⁵ Ombudsman's office, Jak poprawić zachowania policji – raport KMPT z komisariatów po protestach Strajku Kobiet, available at: <https://www.rpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT>, SZPIL(A), Raport antyrepresyjny, available at: <https://www.facebook.com/kolektywuszpila/posts/113727750571100>

cases e. g. the persons did not receive information on their rights and were denied immediate access to a lawyer. Furthermore, in October and November 2020 the Ombudsman's office and civil society organizations reported on cases of apprehending the peaceful protestors, using tear gas and excessive force by the Police (including a case when a Police officer broke the arm of a 19-year-old girl arrested during the protest).⁶

1.2 Access to social consultations and participation in decision-making

Since 2015, the civil society access to public consultations and participation in decision-making has been gradually limited. According to the latest information analyzing the legislative process, in years 2015-2019, the average time of social consultations was 12 days, and the government directed to social consultations less than 2/3 of prepared draft legislation.⁷ In recent years, the requirement of public consultations was also bypassed by presenting the draft legislation by the members of the Parliament and not by the government. This practice was continued in 2020 when certain of the draft legislation, key from the perspective of civil society engagement such as e. g. changes to the Electoral Code were presented by the members of the parliament without proper consultations and adopted at an accelerated pace.

In March 2020, the Parliament amended the provisions of the Act on the Social Dialogue Council.⁸ The Council is a platform of cooperation between the representatives of the employers, employees, and the government. The Council prepares among others opinion on draft legislation concerning e. g. labor market and state's financial strategies. In the light of the changes, the Prime Minister gained the competence to dismiss any member of the Council in a case of "loss of trust in a relation to an information concerning member's work performance". This provision was strongly criticized as an attempt to widen the governmental control over the works of the Council. This provision was eventually abolished in December 2020.

Furthermore, according to the Act on public benefit and voluntary each Ministry should prepare a program of cooperation with the civil society organizations. In recent years, the practice of adopting such programs has, however, deteriorated. According to the information presented by the Polish Federation of Civil Society

⁶ Ombudsman's office, Jak poprawić zachowania policji – raport KMPT z komisariatów po protestach Strajku Kobiet, available at: <https://www.rpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT>

⁷ Poland, Fundacja Batorego, XIII raport Obywatelskiego Forum Legislacji przy Fundacji Batorego, available at: https://www.batory.org.pl/informacje_prasowe/xiii-raport-obywatelskiego-forum-legislacji-przy-fundacji-batorego/

⁸ Poland, Act on the Social Dialogue Council (Ustawa z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego) 24 July 2015

Organizations, in 2020, eight ministries (out of 16 Ministries in 2020) did not publish such a program.⁹

1.3. Equal treatment

In July 2020, the President of Poland presented a draft law amending the Act on education. In the light of the proposal, any organization carrying out additional classes for pupils in schools would be obliged to prepare special documentation regarding the plan of the classes (including “the upbringing ideas that the project will implement”) and the organization itself. Then, such documents would be verified by pupils’ parents who would vote to decide whether to grant the organization permission to carry out the additional classes. So far, the additional classes in schools were organized upon prior consent from the school’s headmaster and the parent’s council.¹⁰ Until January 2021, the Parliament has not completed the works on the draft law.

The media reports suggested that the President's draft law was a response to, among others, the Rainbow Friday initiative started by the Campaign Against Homophobia. The Rainbow Friday is an annual event in schools promoting tolerance and acceptance. In 2018, over 200 schools participated in the initiative. Rainbow Friday is strongly criticized by, among others, conservative and far-right organizations. For example, in 2019 the conservative think tank Ordo Iuris sent a letter to schools asking whether the school plans to participate in the initiative; in some cases, one of the schools withdrew their participation in the face of strong criticism and pressure received online.¹¹

In 2020, the units of local self-government continued to adopt the so-called “anti-LGBT resolutions” – by adopting these resolutions the municipalities declare themselves as unwelcoming of the alleged “LGBT ideology”. According to the Council of Europe Commissioner for Human Rights “far from being merely words on paper, these declarations and charters directly impact the lives of LGBTI people in Poland”.¹² These resolutions caused a lot of criticism coming from both national and international organisations and institutions. As part of the protest against these resolutions, Bart Staszewski, an LGBT activist, runs a photographic project within which he travels to the cities which adopted the resolutions and hangs a sign “LGBT-free zone” along roads leading into them. He then took photographs of LGBT people who live in those places, before taking down the sign. In response

⁹ Ogólnopolska Federacja Organizacji Pozarządowych, Problemy z programami współpracy, available at: <https://repozytorium.ofop.eu/problemy-z-programami-wspolpracy/>

¹⁰ Sejm, Przedstawiony przez Prezydenta Rzeczypospolitej Polskiej projekt ustawy o zmianie ustawy - Prawo oświatowe, available at: <http://sejm.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=458>

¹¹ Glanc M. Środowiska prawicowe atakują Tęczowy Piątek. Po groźbach jedna szkoła musiała się wycofać, Onet.pl, available at: https://wiadomosci.onet.pl/tylko-w-onecie/teczowy-piatek-srodowiska-prawicowe-atakują/rmqse75?utm_source=kobieta.onet.pl_viasg_wiadomosci&utm_medium=referral&utm_campaign=leo_automatic&srcc=ucs&utm_v=2

¹² Council of Europe, Commissioner for Human Rights, Memorandum on the stigmatization of LGBTI people in Poland, available at: <https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e>

to this project, Bart Staszewski faced numerous legal actions that could be classified as SLAPPs. For example, in 2020 two MPs from the ruling coalition have submitted a request to prosecutors for him to be investigated.¹³ Furthermore, a conservative think tank Ordo Iuris submitted a request to the police to start an investigation on the basis of the provisions of the Misdemeanor Code against Bart Staszewski. However, the Police refused to launch the investigation.¹⁴

1.4 Financing of civil society work

In August 2020, the Minister of Justice together with the Minister of Environment presented a draft law on transparency of NGO financing. According to the draft legislation, each NGO that receives more than 30% of its annual budget from foreign funding will have to register in an official registry of foreign funded NGOs. Additionally, such an NGO should inform about the foreign funding in all of its prepared and published materials (including the printed materials but also on the organisation's website etc.). In the light of the proposal, if an NGO fails to register, then it could be subject to financial penalties ranging from 3 up to 50 thousand PLN (7.5 up to 12.5 thousand EUR). If an NGO receives less than 30% of its funding from foreign sources, then it would be obliged only to inform about it in its materials. The draft law was strongly criticized by the civil society organizations who claim that adoption of this law would significantly limit the scope of work of the CSOs. Furthermore, the deputy prime minister who is responsible for supervising the Public Benefit Committee announced that the government does not plan to implement such a law. Since the day the draft law was presented, there have been no further legislative works in this regard.¹⁵

In 2020, the media also reported on the works of the National Institute of Freedom – the Centre of Civil Society Development. The Institute was established in 2017 as a governmental agency responsible for distributing some part of the public financing for civil society organizations. According to the media reports, the vast majority of the organization that receives financing from the National Institute of Freedom are the catholic, conservative or even in some cases nationalistic organizations. The media reports also documented examples of cases that remain loyal to the governing majority or have some personal ties with the representatives of the government administration. Furthermore, the media report

¹³ Notes from Poland, Activist signposts Polish towns as "LGBT-free zones" in protest against anti-LGBT resolutions, available at: <https://notesfrompoland.com/2020/01/25/activist-signposts-polish-towns-as-lgbt-free-zone-in-protest-against-anti-lgbt-resolutions/>

¹⁴ Ordo Iuris, Kolejna krzywdząca akcja Bartosza Staszewskiego. Ordo Iuris w obronie prorodzinnych samorządów, available at: <https://ordoiuris.pl/rodzina-i-malzenstwo/kolejna-krzywdzaca-akcja-bartosza-staszewskiego-ordo-iuris-w-obronie>

¹⁵ Poland, Ministry of Justice, Nowe prawo wzmocni przejrzystość finansowania organizacji pozarządowych, available at: <https://www.gov.pl/web/srodowisko/nowe-prawo-wzmocni--przejrzystosc-finansowania-organizacji-pozarządowych>

revealed information on granting substantial financing to organizations that were registered only a week before announcing the call for proposals.¹⁶

On the other hand, in 2020, the Active Citizens Fund – National program was launched. The 30 million EUR budget program is dedicated to supporting civil society organizations working “towards greater civic participation in public life, protection of human rights and equality, environmental protection, preventing climate change, and empowering vulnerable groups”. The program provides financing, including grants, to improve awareness of civic, equality, and discrimination issues. The financing offered within the program is dedicated to both thematic projects as well as projects aiming at strengthening the condition of the civil society sector in Poland.¹⁷

1.5 Smear campaigns

In 2020, the anti-LGBTI campaign has escalated. During the presidential campaign, the representatives of the governing majority, including the incumbent President Andrzej Duda, made numerous anti-LGBT statements describing LGBT persons as “a foreign ideology” and seeking “the ban on the LGBT ideology”.¹⁸ The attacks on the LGBT community were at the peak of an over 2-year campaign in which both public media as well as the state’s authorities participated (including the representatives of the local governmental institutions adopting the so-called anti-LGBT ideology resolution).

In 2020, one of the LGBT civil society organizations, the Campaign Against Homophobia won a civil lawsuit against the public media. In the civil proceeding, the organization sought remedies for the violation of its good reputation by one of the materials prepared by the public television. The material titled “Invasion” presented homophobic statements and formulated allegations regarding the transparency of financing and organizing pride marches in Poland. In June 2020, the court in Warsaw ordered public TV to remove the material from its YouTube channel.¹⁹

¹⁶ Helsinki Foundation for Human Rights, The situation of civil society organizations in Poland

Baczyński M., Miliony dla swoich. Tak PiS wspiera swoje organizacje, cz. 1., available at: <https://wiadomosci.onet.pl/tylko-w-onecie/pis-i-organizacje-pozarzadowe-partia-rzadzaca-przelewa-miliony-zl-dla-swoich/51d421f>;

Dafne – Donors and Foundations Networks in Europe, [Countering Shrinking Space in Poland - Dafne](#) (2019)

¹⁷ Active Citizens Fund, Official launch of Active Citizens Fund – National programme, available at: <https://aktywniobywatele.org.pl/en/official-launch-of-active-citizens-fund-national-programme/>

¹⁸ The Guardian, Polish president issues campaign pledge to fight 'LGBT ideology', available at: <https://www.theguardian.com/world/2020/jun/12/polish-president-issues-campaign-pledge-to-fight-lgbt-ideology>

¹⁹ Kampania Przeciw Homofobii, Sąd nakazał TVP usunięcie „Inwazji” z Youtube’a. To sukces KPH, które uruchamia zbiórkę na kolejne sprawy przeciw Telewizji, available at: <https://kph.org.pl/sad-nakazal-tvp-usuniecie-inwazji-z-youtubea-to-sukces-kph-ktore-uruchamia-zbiorke-na-kolejne-sprawy-przeciw-telewizji/>

2 Examples of promising practices

Despite the limiting space for civil society engagement in the decision-making process, civil society remains mobilized and seeks new forms of advocacy work. One of the examples of civil society's innovative work was the campaign for support of the social candidate for the Ombudsman.

In 2020, the term of office of the Ombudsman Adam Bodnar expired. According to the Constitution, the candidates for the position of the Ombudsman are presented by the group of MPs. In July and August, civil society organizations mobilized to present to the MPs their own candidate. Zuzanna Rudzińska-Bluszcz, a former director of strategic litigation in the Ombudsman's office, was supported by over 1,200 civil society organizations from across Poland. Her candidacy was presented by two political groups, yet she was not appointed for the position by the governing majority.²⁰

²⁰ Rp.pl, Sejm wybrał Piotra Wawrzyka na Rzecznika Praw Obywatelskich, available at: <https://www.rp.pl/Urzednicy/301219865-Sejm-wybral-Piotra-Wawrzyka-na-Rzecznika-Praw-Obywatelskich.html>