

Poland

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1 Introduction

This human rights review will cover approximately three years (i.e. 2016-2019) and will outline the most relevant human rights issues in Poland. It will analyse the human rights issues in the media and the new legislation adopted in Poland. However, the main focus of the review will concentrate on the most important decisions of the Polish Constitutional Court and European Court of Human Rights in respect to Poland. Due to the limited nature of this review, the Court's decisions can't be discussed exhaustively.

2 Human Rights Issues in the Media

The first matter presented here will concern human rights issues that received the most media coverage and public attention in Poland from the end of 2016 until December 2019.

2.1 *Prohibition of Abortion*

In late 2016, the attention of Polish citizens and media was drawn to the issue of abortion. The Polish Sejm was presented with two drafts of laws concerning abortion. Initially, the draft law facilitating abortion on demand was dismissed on 23 September 2016 and the draft law 'Stop abortion' was still under debate in parliament. This led to a disagreement by feminist organizations and general turmoil as a result. On 3 October 2016, large protests took place in major cities of Poland. Three days later, on 6 October 2016, the Polish Sejm rejected the draft law 'Stop abortion'. Currently, there are no legislative draft laws in this area. Polish law allows abortion in three situations, when: 1) pregnancy is a threat to the life or health of a pregnant woman, 2) prenatal examinations or other medical premises indicate a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life and 3) there is a reasonable suspicion that the pregnancy arose as a result of a criminal act.¹ However, there is still a lack of mechanisms guaranteeing women the real possibility of receiving the procedure when the doctor refuses to perform it. Because of this, a few cases

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1 Ustawa o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży z dnia 7.01.1993, Dz. U.1993, Nr 17, Poz. 78 (The law on family planning, protection of the human fetus and conditions for the termination of pregnancy, 7 January 1993), Art. 4a.

concerning Poland were brought before the European Court of Human Rights (ECtHR).² At the end of September 2017, the Committee of Ministers of the Council of Europe, the organ supervising the execution of these judgments, requested information on the action taken against medical service providers in respect of failure to comply with their contracts with the National Health Fund in respect of lawful abortion and on the general availability of lawful abortion in the Polish health care system.³

2.2 Justice Reform

On 12 July 2017, the Sejm adopted an amendment to the Act on the National Council of the Judiciary (*ustawa o Krajowej Radzie Sądownictwa*) prepared by the Ministry of Justice and an amendment to the Act – the Law on the System of Common Courts (*Prawo o ustroju sądów powszechnych*). The first one provided for the termination of office of all current members of the National Council of the Judiciary, a change in the method of selecting council members who are judges and the way in which the National Council of the Judiciary makes decisions regarding the selection of candidates for the office of judge. According to the Act, members of the National Council of the Judiciary would be elected by the Sejm and not by the judges themselves. The Act also provided that the mandate of the current members of the National Council of the Judiciary (fifteen judges, four deputies and two senators) would expire prematurely, after 30 days from the date of entry into force of the amended act, due to the introduction of a joint term of office of all elected members of the council. The amendment to the second act provided, *inter alia*, an increase in the competence of the Minister of Justice in appointing and dismissing presidents and vice presidents of courts, the introduction of a random assignment of cases to individual judges and the introduction of the principle of immutability of the adjudication panel.

On 20 July 2017, the Sejm adopted a new law on the Supreme Court (*ustawa o Sądzie Najwyższym*), which provides, *inter alia*, the possibility of retiring the current Supreme Court (*Sąd Najwyższy*) judges. The new act provides, among other actions, the creation of three new Supreme Court Chambers, changes in the procedure for appointing judges of the Supreme Court and enabling the retirement of current judges.

After the media news about amendments to the laws, there were numerous opponents to the changes. On 24 July 2017, the president announced that he would sign only one of the three laws. The laws on the National Council of the Judiciary and the Supreme Court were vetoed. In September, he presented two acts, which were adopted by the Sejm in mid-December.

- 2 ECtHR, *Tysiąc v. Poland*, Appl. no. 5410/03, Judgment of 20 March 2007; ECtHR, *P. and S. v. Poland*, Appl. no. 57375/08, Judgment of 30 October 2012, § 6-46, ECtHR, *R.R. v. Poland*, Appl. no. 27617/04, Judgment of 26 May 2011.
- 3 Committee of Ministers of Council of Europe, Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 11th Annual Report of the Committee of Ministers 2017, p. 205 (2017), available at: <https://rm.coe.int/annual-report-2017/16807af92b> (last accessed 31 December 2019).

Events in Poland were widely commented on by representatives of other countries and international organizations. In December 2017, the European Commission initiated the procedure pursuant to Article 7 of the Treaty on European Union. On 14 August 2018, the European Commission announced that it had implemented a new phase of the procedure regarding violations of the rule of law by Poland. This is related to undermining the principle of judicial independence and the inability to remove judges by the current provisions of the Act on the Supreme Court. The commission has set the Polish government a deadline until 14 September 2018 to remove any violations of the rule of law. In the absence of an adequate response, the commission did not rule out that the case would be referred to the Court of Justice of the EU.

On 24 June 2019, the Court issued a judgment in which it held that, first, by providing that the measure consisting of lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) is applied to judges, who were appointed to that court before 3 April 2018 and, secondly, by granting the President of Poland the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.⁴

2.3 Polish Constitutional Court on 2015-2019

Within the last four years, the Polish Constitutional Court (Trybunał Konstytucyjny – TK) was in the centre of attention of the international and national community. The origin of the events in 2015-2016 was the Constitutional Court Act of 25 June 2015. The provision created the possibility that the Sejm of the seventh term could appoint judges that normally should be appointed by the Sejm of the next term. In the parliamentary elections that took place on 25 October 2015, the Law and Justice Party (Prawo i Sprawiedliwość) obtained 37.50% of votes, which gave it 235 seats in the Sejm. First, the new governing majority focused on the Act on the Constitutional Court adopted in June 2015. The draft Act amending the Act on the Constitutional Court foresaw changes in the procedure of electing the president and vice-president of the TK, introduced a three-year tenure of office for the president and vice-president of the TK, terminated the tenures of the incumbent president and vice-president of the Court within three months of the act's entry into force and contained a new transitional provision regulating the elections of constitutional judges in 2015.⁵

On 20 November 2015, the senate adopted the act without amendments. The president signed it on the same day. The amending act entered into force 14 days after its publication in the *Journal of Laws*. On 22 December 2015, the Sejm passed a law that reorganized the Constitutional Court.⁶ The new law introduced

4 CJEU, *European Commission v. Republic of Poland*, C-619/18, Judgment of the Court (*Grand Chamber*) of 24 June 2019, § 1.

5 K. Kobyliński, *The Polish Constitutional Court from an Attitudinal and Institutional Perspective Before and After the Constitutional Crisis of 2015-2016*, *Wrocław Review of Law, Administration and Economics*, p. 100.

6 *Ibid.*

a two-thirds majority and the mandatory participation of at least 13, instead of nine, of the 15 judges. The act was approved by the Polish senate on 24 December 2015 and signed by the president on 28 December 2015. On 9 March 2016, the Constitutional Court decided that the amendments were non-compliant with the Polish Constitution. The Polish government regards this verdict as not binding, as it was not based on the rules introduced by the amendment, and refused to publish the verdict, which is a binding condition for its legal validity.

3 Judgments of the European Court of Human Rights

This part of the review is focused on the most paramount judgments of the ECtHR in the recent years concerning Poland. The case law of the ECtHR naturally causes a large impact on Polish law. It also influences the practice of the Polish Courts. This is due to the fact that the obligation of a state party to the European Convention on Human Rights (ECHR) is not limited only to the mere payment of compensation to a victim of a violation of convention. In certain situations, states must also take positive actions in order to fulfil their positive obligations. The states must also guarantee the implementation of judgments. Implementation very often requires legislative changes in the system of a state party. Naturally, the state has the possibility to choose the implementation measures. The process of implementation of judgments is monitored by the Committee of Ministers of Council of Europe.

Recently, the number of judgments against Poland has dropped. In 2018, the number of judgments was lower than earlier. It concerns applications allocated to a judicial formation, applications inadmissible or struck out and those communicated to the government.⁷ The number of applications in which judgments were delivered is on the same level (24 in 2018, 20 in 2017 and 29 in 2017).⁸

The judgments concerning Poland focused on various issues. The issue of lengthy proceedings should be mentioned, as well as the problem of lack of consent of the relatives of the deceased for an autopsy of the bodies of the air crash. We also decided to mention the issue of a disabled father facing problems developing contact with his child and with spending more time with his son.

The most important ECtHR judgment concerning Poland in recent years was definitively *Rutkowski and Others v. Poland*.⁹ This judgment was made on 7 July 2015, so it technically shouldn't be a part of this report, but we decided that it should be mentioned due to its importance. The case is important because of the problem of lengthy proceedings. This is the most common argument for applications before the Court and the most common problem of States Parties to the convention. The ECtHR has already given several pilot judgments in this area.

7 European Court of Human Rights, Analysis of Statistics 2018, p. 24 (2018), available at: www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf (last accessed 29 December 2019).

8 *Ibid.*

9 ECtHR, *Rutkowski and Others v. Poland*, Appl. no. 72287/10, Judgment of 7 July 2015.

They concerned Germany,¹⁰ Greece,¹¹ Turkey¹² or Bulgaria.¹³ The judgment in *Rutkowski and Others v. Poland* is also a pilot judgment, in which the Court identified the structural dysfunction in Polish legal system.

The issue was noticed by the Court for the first time on the occasion of the ECtHR judgment in *Kudła v. Poland*.¹⁴ To implement this judgment, Poland enacted the Law of 17 June 2004 on the complaint about the breach of the right to have a case examined in judicial proceedings without undue delay (Ustawa o skardze na naruszenie prawa strony do rozpoznania sprawy w postępowaniu sądowym bez nieuzasadnionej zwłoki). The Court found the remedies introduced in this act effective, which was confirmed in three leading cases.¹⁵ However, after a certain period of time, the ECtHR noted that despite the adoption of the 2004 Act, the cases concerning lengthy proceedings before Polish courts were piling up. In the years 2005-2011, the Court gave 280 judgments concerning this issue and struck from its list of cases 358 applications where the parties had either concluded a friendly settlement agreement or where the Court accepted the government's unilateral declaration acknowledging a violation of Articles 6 § 1 and 13.¹⁶

The main applicant, Mr Rutkowski, was a policeman, who was arrested on suspicion of participating in an organized criminal group and corruption. He was charged with those offences in 2002. He was finally acquitted on 21 July 2010.¹⁷ The case of the second applicant, Mr Orlikowski, concerned an action for damages and securing a claim. The action was lodged on 4 March 1999, and it finally ended in 2010.¹⁸ The third applicant, Ms Grabowska, lodged a civil action for payment and accounting in 1999. The action concerned property that had been inherited by the applicant. The judgment was made on 18 June 2013.¹⁹

In *Rutkowski and Others v. Poland*, the Court identified the structural problem concerning the excessive length of proceedings in Poland accompanied by the lack of sufficient redress for a breach of the reasonable time requirement. The ECtHR didn't mention any particular measures, stating that Poland continue to make further, consistent long-term efforts to achieve compliance by the national courts with the 'reasonable time' requirement laid down in Article 6 § 1.²⁰ In regard to Article 13, the Court noticed the new resolution adopted by Poland in 2013 but decided that it cannot, by itself, put an end to the situation identified in the

10 ECtHR, *Rumpf v. Germany*, Appl. no. 46344/06, Judgment of 2 September 2010.

11 ECtHR, *Michelioudakis v. Greece*, Appl. no. 54447/10, Judgment of 3 April 2012.

12 ECtHR, *Ümmühan Kaplan v. Turkey*, Appl. no. 24240/07, Judgment of 20 March 2012.

13 ECtHR, *Dimitrov and Hamanov v. Bulgaria*, Appl. no. 48059/06 2708/09, Judgment of 10 May 2011; *Finger v. Bulgaria*, Appl. no. 37346/05, Judgment of 10 May 2011.

14 ECtHR, *Kudła v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000.

15 ECtHR, *Charzyński v. Poland*, Appl. no. 15212/03, Decision of 1 March 2005, § 39; *Ratajczyk v. Poland*, Appl. no. 11215/02, Decision of 31 May 2005; *Krasuski v. Poland*, Appl. no. 61444/00, Decision of 18 November 2003.

16 *Rutkowski and Others v. Poland*, § 8.

17 *Ibid.*, § 14-25.

18 *Ibid.*, § 30-45.

19 *Ibid.*, § 50-71.

20 *Ibid.*, § 209.

present case, especially as it has not yet been established that the lower courts have put it into practice.²¹

As a follow-up to this pilot judgment, the Polish parliament adopted new legislation in November 2016. Its purpose was to eliminate the identified structural dysfunctions. The ECtHR assessed the new legislation in *Zatuska, Rogalska and Others v. Poland*. The Court stated that Poland demonstrated an active and reliable commitment to take measures intended to remedy the systemic defects in Polish legislation and judicial practice identified by the Court in its pilot judgment. The Court was satisfied with the general measures introduced by the government and it found no reasons to justify a continued examination of the applications.²²

It is also important to mention the judgment *Solska and Rybicka v. Poland*. The case concerned the exhumation of victims of the air crash of presidential plane in Russia. The air crash took place on 10 April 2010 during the plane's approach to Smolensk aerodrome, killing all 96 people on board. The passengers were the President of Poland, his wife and many high-ranking officials. They were travelling to Russia to attend a ceremony marking the 70th anniversary of the Katyń Massacre, which was committed by the Soviets.²³

The Polish prosecution ordered the exhumations in 2016 as part of the investigation into the crash. The authorities wanted to conduct autopsies to help establish the cause of the crash. An earlier autopsy was conducted by Russian authorities and was negligent. The Russian experts had not properly recorded the injuries sustained by the victims and, in the case of six out of the nine bodies exhumed, had wrongly identified the victims. The prosecutor stated that, in the circumstances, doubts also remained in respect of the other victims of the crash. He further intended to resolve doubts concerning the alleged explosion on board the plane.²⁴

The applicants objected to the exhumations. They considered them unnecessary. They also stressed that they had not been involved in the decision-making process regarding the exhumation of their husbands' bodies and that domestic law did not provide them with any effective remedy which they could have used.²⁵

The ECtHR decided that the exhumation order given by the prosecutor was not required to assess whether the aims of the investigation could have been attained through less restrictive means and to evaluate the possible implications of the impugned measures for the private and family life of the applicants. It also stressed that the prosecutor's decision was not amenable to appeal before a criminal court or to any other form of adequate scrutiny before an independent authority. The civil courts didn't review the necessity of the impugned measure

21 *Ibid.*, § 220.

22 ECtHR, *Zatuska, Rogalska and Others v. Poland*, Appl. no. 53491/10 *et al.*, Decision of 20 June 2017, § 45-46.

23 ECtHR, *Solska and Rybicka v. Poland*, Appl. no. 30491/17, 31083/17, Judgment of 20 September 2018, § 6-39.

24 *Ibid.*, § 15.

25 *Ibid.*, § 61-86.

nor weigh the interference resulting from the prosecutor's decision against the applicants' interests safeguarded by Article 8 of the Convention. Taking the above into consideration, the Court decided that Polish law did not provide sufficient safeguards against arbitrariness with regard to a prosecutorial decision ordering exhumation.²⁶

In the reviewed period, the ECtHR gave several other interesting judgments concerning Poland. However, due to the limited nature of this review, some restrictions were necessary. We would like to mention one interesting judgment – *Kacper Nowakowski v. Poland*.

This case concerned an applicant who was deaf and mute. He used sign language to communicate with other people. He was married and had a child with his wife. After the parents' divorce, the child stayed with his mother. The applicant had difficulties concerning contact with the child after the divorce. This situation was caused by a conflict between the former spouses. A communication barrier also existed between the father and his son. The applicant used mostly sign language, while the child communicated only orally. The father was very interested in developing contact with his child and wanted to spend more time with his son. However, the Regional Court decided that a limitation of the applicant's parental authority was in the interests of the child. It also ruled that the communication barrier constituted an objective obstacle to relations between the applicant and his son.²⁷

The ECtHR noted that the Polish courts should have envisaged additional measures adapted to the specific circumstances of the case. Having regard to the specifics of the applicant's situation and the nature of his disability, the authorities were required to implement particular measures that took due account of the applicant's situation. The expert's report, which was crucial in this case, did not address possible means of overcoming the barriers resulting from the disability. The experts focused on the existence of barriers instead of reflecting on possible means for overcoming them. The ECtHR also stated that the domestic courts' duty is to address the issue of what steps can be taken to remove existing barriers and to facilitate contact between the child and the non-custodial parent. In this case, they failed to consider any means that would have assisted the applicant in overcoming the barriers arising from his disability.²⁸ This was the reason why the Court decided that there was a violation of Article 8 of the ECHR.

4 Conclusion

As can be noted, the reviewed period concerned courts in many aspects. The recent reforms were discussed on numerous occasions, especially in the media. They were also commented on by the Court of Justice of the European Union.

26 *Ibid.*, § 124-126.

27 ECtHR, *Kacper Nowakowski v. Poland*, Appl. no. 32407/13, Judgment of 10 January 2017, § 6-46.

28 *Ibid.*, § 93-95.

The cases communicated to the Polish government clearly show that this will be an issue discussed in the future at the ECtHR.

The most important ECtHR judgment concerning Poland also concerned Polish courts. In particular was the issue of lengthy proceedings in *Rutkowski and Others v. Poland*. This pilot judgment shows the problem that is common and widespread in many Member States of the Council of Europe. This is also the reason why it should be mentioned how important the process of the implementation of such judgments is. That was clearly presented in the follow-up of the *Rutkowski and Others* judgment.

It's worth mentioning that the number of cases against Poland before the ECtHR has dropped in recent years. The above does not situate Poland anymore among the States Parties that cause the highest count of violations of the ECHR. Naturally, it is important to continue effective implementation of the judgments in order to guarantee full enjoyment of the Convention rights.

5 Postscriptum: COVID-19 and Human Rights in Poland

Like many other countries, Poland has introduced measures to slow the spread of COVID-19, such as a prohibition on gatherings; a prohibition on entering forests, parks and other green spaces, and the closure of restaurants, bars, cinemas, universities, schools and kindergartens. The government has also significantly restricted freedom of movement and made wearing masks in public mandatory.

To enact these emergency measures, the Polish government declared a 'state of epidemic' to counter COVID-19. This state is covered by the Act on Preventing and Combating Infections and Infectious Diseases and was adopted in 2008. Additionally, on 2 March 2020, Polish parliament adopted the Act on Specific Solutions Related to the Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them. The Polish authorities did not announce a state of natural disaster or a state of emergency, which are enshrined in the Constitution. It was widely commented that declaring a formal state of emergency would automatically postpone the presidential election for at least 90 days after its termination.

Polish lawyers have identified violations of the Constitution regarding freedom of movement, freedom of assembly, the inviolability of the home, freedom to conduct business and personal security. They underlined that some of the restrictions violated the principle of equality before the law.²⁹

To protect the country's economy and mitigate the effects of the COVID-19 pandemic, the Polish government, in cooperation with the Polish Financial Supervision Authority and Narodowy Bank Polski, has developed a package of measures known as the 'Anti-crisis Shield'. The aim of these solutions is to stabilize the economy and provide an investment stimulus. The shield focusses on

29 M. Małecki, 'Poland's Coronavirus Restrictions are Unconstitutional, Unlawful and Risk Years of Legal Chaos', 18 April 2020, Notes from Poland, available at: <https://notesfrompoland.com/2020/04/18/polands-coronavirus-restrictions-are-unconstitutional-unlawful-and-risk-years-of-legal-chaos/> (last accessed 20 July 2020).

the security of employees, providing financing to businesses, supporting the health care system, strengthening the financial system and supporting public investments.³⁰

30 National Reform Programme, Europe 2020, Approved by the Council of Ministers on 28 April 2020, p. 7.