

# HR HELSINKI FOUNDATION for HUMAN RIGHTS

## **The rule of law crisis in Poland**

Since late 2015, Poland has been facing an on-going rule of law crisis. The governing majority, Law and Justice, adopted a number of bills that threaten Polish constitutional democracy, stability and in effect, the system of protection of human rights. The governing majority aims at changing the entire system of the state in violation of the Polish Constitution.

### **The Independence of the Judiciary**

The governing majority has implemented numerous changes that affect the key institutions of the justice system, violate its independence and broaden political control over them:

- The Constitutional Tribunal – the Tribunal is a key element of the system of checks and balances. After adoption of six different Acts concerning the Tribunal, the governing majority has managed to take political control over this institution making it ineffective in the process of judicial review.
- The National Council of the Judiciary in Poland – the Council is a constitutional body responsible for protecting the independence of judges and courts. As a result of changes adopted in 2017, the Parliament gained almost exclusive competence to elect new members of the Council, and in consequence, gained control over the process of appointing new judges of the common courts, in contradiction to the Polish Constitution.
- The Supreme Court – the Court plays a crucial role in sustaining the independence of the justice system in Poland by supervising the works of the lower instance courts in terms of judicial control. Furthermore, the Court confirms the validity of parliamentary and presidential elections. In late 2017, the governing majority changed the Act on the Supreme Court which allowed the unconstitutional dismissal of almost 40% of sitting judges from the Court, including the First President of the Supreme Court, whose term of office is fixed in the Constitution. Eventually, after the interim measure issued by the European Court of Justice, the governing majority abolished these provisions. Nevertheless, the proceeding before the European Court of Justice concerning the violation of the EU law by the new Act on the Supreme Court is still on-going.
- Common courts - in 2017, the governing majority adopted changes which allow the Minister of Justice/Prosecutor General to dismiss and replace the presidents and deputy presidents of all common courts on the basis of his discretionary decision.

### **Freedom of the Media**

The public media remain under complete political control and their role has been reduced to publicizing the official narrative of the authorities.

- Public media - the governing majority changed the media law in a way that gave the government (and later the special council composed of the representatives of the Parliament) the power to dismiss the members of the supervisory boards and directors of the public media channels. Within a couple of days since this law came into power, all the members of the

supervisory boards and all directors of the public media channels were dismissed. In the aftermath of these changes, it is estimated that between 150 and 200 journalists were dismissed from public media.

- Private media - the governing majority has been also working on draft legislation changing the status of the private media, however none of the draft reforms have been published yet.

### **Civil Society Organisations**

Polish civil society organizations are facing numerous challenges related to laws and policies limiting their scope of activity and undermining their independence.

- Funds for civil society – certain civil society organisations supporting migrants and refugees as well as victims of domestic violence were cut from access to public funds for NGOs which forced them to significantly limit their work and support provided to people relying on their help,
- Limitations on advocacy activity – in 2018, the governing majority adopted new provisions introducing civil remedies for tarnishing the reputation of the Republic of Poland. This law may lead to hampering the work of NGOs that routinely provide vital information to the European Union, United Nations and other international organisations.

### **International Problems**

By weakening the independence of judiciary and undermining effectiveness of the system of checks-and-balances, slowly yet persistently the Polish governing majority has been squandering the position of Poland as a leader of democratic change and human rights protection in the region. Poland, as a member of the international democratic community, must fulfil its duties in creating the democratic system of the state based on the rule of law and human rights protection. Recognising the fact that democratic backsliding is not an internal problem of a given country, but it may bring a greater influence on the regional or global cooperation between states, the international community, should closely monitor the situation in Poland and encourage it to restore the full safeguards to the rule of law and human rights.

To find more information concerning the situation of judiciary and civil society organizations please find Annexes 1 and 2 attached to this brief.

## The situation of the judiciary in Poland

January 2019

### Summary

- Poland has been facing the constitutional crisis since 2015. The crisis has affected the position and works of the courts of all ranks - from the common courts up to the Supreme Court and the Constitutional Court.
- Since 2015, the governing majority adopted 15 pieces of legislation widening political influence over judiciary system and affecting its works. The changes also aimed at undermining judges' independence. Currently, there is no effective mechanism protecting judges' from political influence. Judges' independence depends only on their professional skills, knowledge and courage.
- None of the adopted changes aimed at solving any of the on-going problems of the Polish judiciary system such as e.g. excessive length of the proceedings or protection of the right to fair trial. To the contrary, the introduced changes destabilised the works of top-rank courts (such as the Supreme Court and the Constitutional Court).
- The changes concerning judiciary system were usually adopted at accelerated pace and without proper social consultations. This process was also accompanied by smear campaigns against judges orchestrated by the governing majority and public media.

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## THE CONSTITUTIONAL TRIBUNAL

In 2015, right after the parliamentary elections in Poland, the new governing majority started the process of undermining the position of the Constitutional Tribunal. First, the governing majority did not recognise the fact that the previous governing majority appointed legally three judges of the Tribunal and annulled the entire process. Furthermore, the President of Poland sworn into office three new persons who were appointed for the position of judges without a valid legal basis (these persons were assigned to cases in 2018 after the change in the position of Tribunal's president). The situation in which three persons appointed without a legal basis sit in benches of the Constitutional Tribunal provoked concerns regarding the legality and binding force of Tribunal's decisions.

### **Appointing the new President of the Tribunal**

The changes in the composition of the Tribunal were accompanied by the legal changes that affected its position and works. Since 2015, the Parliament has adopted seven acts regulating the work of the Constitutional Tribunal. If the amendments to the Act on the Constitutional Tribunal adopted in November and in December 2015 aimed at paralysing the Tribunal's works, the regulations adopted in 2016 primarily aimed at the securing for the governing majority the chance to appoint the new President of the Tribunal. The term of office of the previous President of the Constitutional Tribunal, Judge Andrzej Rzepliński, expired on 19th December 2016. A day later, the act changing the procedure of appointing the new President of the Court came into force. The Act introduced a function of a "judge acting as the President of the Constitutional Tribunal" - the Polish Constitution, however, includes provisions regarding the position of Deputy President of the Constitutional Tribunal and does not foresee the possibility of appointing another judge who might have a power to act as the President of the Constitutional Tribunal. Regardless these concerns, Justice Julia Przyłębska was appointed by the President of Poland for the position of the "judge acting as the President of the Constitutional Tribunal" and was given the power to organise the General Assembly of Judges of the Constitutional Tribunal in order to appoint candidates for the position of the President of the Constitutional Tribunal. Even though the General Assembly of Judges of the Constitutional Tribunal has never adopted a resolution appointing Judge Przyłębska as a candidate for the position of Tribunal's president, still the President of Poland appointed her for this post.

### **Undermining the position and work of the Tribunal**

As a result of these changes, a significant decrease in the number of cases decided by the Constitutional Tribunal should also be noted. In 2017 the Tribunal received the smallest number of cases since the entry into force of the Constitution of 1997. The decrease refers to all of the most crucial types of cases decided by this institution; for instance, the number of individual applications in 2017 has fallen by 33% (when compared to 2015), while the quantity of preliminary questions has lowered from 135 (in 2015) to 21 (in 2017). Also, in 16 cases, the applications, questions or motions were withdrawn before the hearing. The trust to the Constitutional Tribunal might have been undermined due to numerous mutual visits of high-rank politicians of the governing party and the president of the Tribunal (in its premises or in the Parliament). It is worth mentioning that the Tribunal closed year 2017 with a backlog of 148 unheard cases, which is not a satisfactory result, given the drastically smaller number of incoming cases (to compare, the backlog for 2015 was 174 cases).

The Constitutional Tribunal adjudicated, after the new law had come into force, several politically sensitive cases, ruling on some of them (supposedly) according to political will of the governing party. For instance, it decided that the new provision of the Law on Assemblies, introducing a new category of “*cyclic assemblies*” that take precedence over the other for a period of three years, is consistent with the Constitution.

### **Disciplinary proceedings against former judges of the Tribunal**

Disciplinary proceedings against retired judges of the Constitutional Tribunal are also an issue. Two notable cases can be provided to exemplify this problem. The first one relates to justice Jerzy Stępień, a former judge (1999-2008) and president (2006-2008) of the Tribunal. In May, 2017, during a march organised by the opposition parties and trade unions in Warsaw, he gave a speech, saying inter alia that “*the government hung up the constitution on a peg*”. Although the disciplinary officer did not find grounds to indict him, a successful complaint against the decision to discontinue the proceedings was filed by the Tribunal’s vice-president (twice). Justice Stępień stands accused of “*an active participation in a political rally*” and is facing the prospect of admonition, reprimand, lowering of his pension by 10-20% for 2 years or even being deprived of the judge-emeritus status. He was long known for speaking critically of the reforms of the judiciary enacted by the ruling party. The second example pertains to justice Andrzej Rzepliński, whose term of office as the Tribunal's president ended in December, 2016. In November, 2015, he criticised the amendments to the Act on the Constitutional Tribunal in a TV interview, calling the Parliament's actions “*a bad farce that lowers the rank of Poland as a state*”. The Minister of Justice soon announced that he was going to file a motion to the Tribunal, demanding the disciplinary proceedings against justice Rzepliński (yet, it never happened, despite numerous other critical views of the government’s policy expressed by the judge).

## **THE SUPREME COURT**

In July 2017, after massive social protest the President of Poland decided to veto two out of three controversial Acts reforming the justice system in Poland. Once vetoing the Act on the Supreme Court and Act on the National Council of Judiciary, the President also announced that he would prepare his own draft laws regarding these two institutions and direct them to the Parliament.

On 25 September 2017, the President of Poland presented his two draft Acts on the Supreme Court and the National Council of Judiciary. Almost immediately, the Acts were directed to the Parliament without any social consultations with experts or stakeholders. The Act was adopted a couple weeks later, in December 2017.

### **Amendment to the Act on the Supreme Court**

Similarly, to the Act vetoed in July 2017, also this one includes numerous provisions that widen the political supervision over this institution. Furthermore, the Act introduces legal mechanisms which are new to the Polish legal system and lead to further violations of rule of law. The Act introduced several controversial provisions including:

- Retirement age of judges

Initially, the Act lowered the retirement age of judges. In the light of the Act the judge who turns 65 years old should submit a motion to the President of Poland upon allowing them to stay in the office for next 3 years. Such a permission could be granted only twice. The provision affected 40% of the sitting judges of the Supreme Court – including the First President of the Supreme Court whose 6-year tenure is guaranteed by the Constitution.

In July 2018, when the Act came to force, the President of Poland notified all 27 judges of the Supreme Court older than 65 years that they have retired. The judges (with an exception to the First President of the Supreme Court Małgorzata Gersdorf) left the office. However, in October 2018 the European Court of Justice issued an interim measure in the proceeding concerning the new Act on the Supreme Court. The Court ordered the Polish government to suspend changes in the Supreme Court. In the light of this decision, the judges affected by the new provisions concerning retirement age are back in the office.

- **New chambers of the Supreme Court**

The Act of December 2017 creates two new Chambers of the Supreme Court - the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs. All the judges sitting in these two chambers are appointed by the new National Council of the Judiciary.

The Disciplinary Chamber is responsible for hearing the disciplinary proceedings in the case of judges of the Supreme Court and appeals against the decisions issued in the disciplinary proceedings of attorneys at law, solicitors and prosecutors. The Chamber of the Extraordinary Control and Public Affairs will be responsible for among other hearings in the cases concerning extraordinary appeal and declaring the validity of the elections.

- **Extraordinary appeal**

The Act on the Supreme Court introduces a mechanism which was not known in the Polish legal system before. The extraordinary appeal is an appeal which a party can submit to the Supreme Court via among others the Prosecutor General, the Ombudsman or Child's Rights Commissioner. The appeal can be submitted in cases which have already been closed and the judgements become final. In general, the extraordinary appeal can be submitted within 5 years in criminal cases and 1 year in civil cases since the judgement became final. However, the Act also stipulates that within 3 years of Act's coming into force such an appeal could be submitted in reference to all judgements issued in last 20 years.

### **Infringement procedure and preliminary questions**

In September 2018, the European Commission decided to refer Poland to the Court of Justice of the EU due to the violations of the principle of judicial independence created by the new Polish Law on the Supreme Court. In the opinion of the Commission Polish law on the Supreme Court is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations under Article. In response to the interim measure issued by the Court in this proceeding, the governing majority amended the provisions concerning judges' retirement age and abolished the provisions forcing judges older than 65 years old to retire. Nevertheless, the proceeding before the ECJ is still pending.

Earlier this year, the Polish Supreme Court asked the European Court of Justice for preliminary rulings and clarify whether the new provisions on judges' retirement age and the National Council of Judiciary violate the EU law. The proceedings in these cases are still pending.

## THE NATIONAL COUNCIL OF THE JUDICIARY IN POLAND

Simultaneously to the works on the draft Act on the Supreme Court, the Parliament worked also on the President's draft Act on the National Council of Judiciary in Poland. The National Council of the Judiciary in Poland is an administrative body composed of judges and representatives of the Parliament and the President. Its pivotal responsibilities are to protect the independency of the justice system, nominate the candidates for judges and present opinions on the draft legislation concerning the justice system.

### Changes in the process of appointing judges-members of the Council

The Council is composed of 15 judges (so far appointed by the courts of different ranks), 6 representatives of the Parliament, one representative of the President, Minister of Justice and Presidents of the Supreme Court and the National Administrative Court.

Until 2018, the judges-members of the Council were appointed by their peers. However, after the changes adopted by the Parliament the judges-members of the Council are appointed by the Parliament whereas the candidates are presented by 25 judges (including these judges who were delegated by the Minister of Justice to work in the Ministry) or a group of 2.000 citizens. Such a regulation widened the political supervision over the process of appointing the judges-members of the Council.

In the light of the new provisions, Council's previous term of office was terminated in January 2018, and the Parliament started the process of appointing new members of the Council. The process was highly politicised and non-transparent as the Chancellery of Sejm refused to release the information on the list of judges supporting the candidates to the Council. According to [the Forum of Civic Development](#), a Warsaw-based think tank, all the candidates have certain ties (either professional or private) to the Minister of Justice.

### Appointing new judges by the National Council of the Judiciary in Poland

In mid-2018, the National Council of Judiciary started recruitment process for the vacant position of judges in the Supreme Court. Two of the candidates who did not receive positive recommendation from the Council appealed against these decisions to the Supreme Administrative Court. The Court issued an interim measure in a light of which the recruitment process should be suspended until the case is decided by the Court. Nevertheless, the President of Poland decided to complete the process and appoint for the position of judges all the candidates selected by the Council.

## COMMON COURTS

### Changes in courts' leadership

In 2017, the governing majority continued its efforts in implementing the so-called reform of the justice system. In July 2017, the Parliament adopted the Act on the System of the Common Courts. The law changed the process of appointing and dismissing the presidents of the courts – the presidents of the courts are appointed by the Minister of Justice without any form of consultations with the general assemblies of the judges of each courts (such a consultation

process was required in the light of the previous version of the Act on common courts). The process of dismissing courts' presidents and vice presidents was not supported by a holistic analysis of the situation in the courts. The Minister of Justice dismissed court presidents and vice presidents on the basis of one-sentence decisions that had no explanation. Simultaneously, in the case of decisions concerning more than 80 courts, the Ministry of Justice published press releases with fragmentary information that supposedly justified the decisions. Altogether, the Minister replaced almost 150 presidents in the courts of every rank across the country.

The posts of courts' presidents were filled in by candidates selected by the Ministry. The entire process was conducted in a non-transparent way and based on irrelevant criteria – the Ministry of Justice did not conduct any open consultations with the judicial community on the appointment of new presidents. Although the amendments to the act did not introduce such a requirement, such consultations should still have been expected from the ministry, as best practice in court management.

### **The results of the changes**

The amendments to the act on the System of Common Courts broadened the opportunities for politicians to influence courts. The changes in the area of appointing court presidents and vice presidents, as well as the restriction on their competences, in practice aim to broaden political influence on the justice system. The appointment of court presidents by the Minister of justice without consultation with the judicial community deprives court presidents of their essential legitimacy to manage the courts, and additionally makes them dependent on the Ministry of Justice.

Moreover, the effects of the amendment to the Law on the System of Common Courts may violate the right to a fair trial. The amendments will not make court proceedings more efficient; on the contrary, they may have a negative effect on the implementation of the right to a fair trial. Insofar as in the majority of cases citizens will not sense any change in the way the courts function, the mechanisms of influencing courts and judges that were introduced may be used in political cases or in those that arouse public interest, which can be used for purposes devised by those in power.

### **Proceedings before the European Court of Justice**

It should be mentioned that the amendments to the law on common courts resulted also in a number of preliminary questions addressed to the Court of Justice of the European Union by Polish common courts (who followed example of the Supreme Court in this regard) in 2018. Two notable instances can be provided to illustrate this phenomenon. The first one was lodged by the Regional Court in Łódź in September 2018 and pertained to the matter of judges' independence in the light of new provisions on disciplinary proceedings. The court expressed fears that, if the case between the state and the local municipality is ruled on in favour of the latter, a judge might – according to the new provisions – face disciplinary charges. The second preliminary question came from the Regional Court in Warsaw. It also tackled the matter of disciplinary proceedings, specifically – the problem of political influence on the proceedings and the possibility they can be used as means of political control of jurisdiction. Both cases have been registered by the CJUE and are pending.



## THE PROSECUTION

In 2016, the new provisions regulating the prosecutor's office came into force. The introduced changes primarily combines the offices of the General Public Prosecutor and Minister of Justice, yet it is not accompanied by any guarantees of independence from political influence over prosecutors. The manner of adopting the legislation and lack of *bona fide* consultations might indicate this solution was politically motivated to a great extent and constituted another step meant to further centralise supervision of the justice system in the hands of the government. It is further noteworthy that the General Public Prosecutor – Minister of Justice also has oversight authority over the common courts. As such, a single individual who is not subject to any substantive review, now possesses excessive authority to shape the judicial system.

The amended Law on the Prosecution Service allows the politician holding the office of General Public Prosecutor to influence particular criminal proceedings. Therefore, it opens the possibility to initiate and conduct politically motivated investigations. The law also provides no guarantees with respect to shaping human resource policy, which should be based on transparent criteria for promotion and demotion. Human resource changes implemented after March 2016, in connection with the ability to delegate prosecutors anywhere, indicate a dangerous trend in which a prosecutorial career may be dependent on non-substantive criteria.

Several examples of supposedly politically-influenced decisions of public prosecutors, issued after March 2016, can be provided in support of the abovementioned.

- In August 2017 an investigation into exceeding the statutory authorisation by the Minister of Justice (with regard to unjustified payments for prosecutors) was discontinued. The same prosecutor later discontinued the proceedings related to nepotism on the part of the Minister of Agriculture.
- An investigation, instituted in August 2016, concerning the decision of Andrzej Rzepliński, the then president of the Constitutional Tribunal, not to assign the three wrongfully appointed judges to the cases.
- Discontinuation of proceedings against an ex-secret service agent (and later – a member and MP of the ruling party), accused of violating the law during a police provocation.
- Withdrawal of indictment and discontinuation of proceedings, in June 2017, concerning bribery allegedly committed by the president of a large state-owned company.
- An investigation, instituted in 2018, into propagating fascism by a reporter of a private TV station who took part (undercover) in a secret neo-Nazi event while preparing a documentary.

## GROWING PRESSURE ON THE JUDICIARY AND THE PROSECUTION

The systemic changes in the judiciary are also accompanied by disciplinary proceedings against judges and prosecutors who openly criticised the reforms. Several recent examples of disciplinary proceedings against judges can be provided to illustrate the growing pressure on the judiciary as a whole:

- Justice **Olimpia Barańska-Maluszek**, a member of the Association of Polish Judges *Iustitia*, was one of the authors of the association's recently-issued resolution on the independence of the judiciary. She is also an active commentator on legal matters in the social media, where she tackles the topics such as the organisation of common courts, the rule of law or constitutional law. The Deputy Disciplinary Officer for Common Courts' Judges requested in September,

2018 an insight into the files of cases that justice Barańska-Małoszek was supposed to examine – from the time period of last three and a half years. No formal complaint regarding to the judge's judicial work has been made so far. The disciplinary officer decided to institute disciplinary proceedings and raise a charge related to delays in the preparation of written reasonings to ten judgments on the part of justice Barańska-Małoszek.

- Justice **Bartłomiej Przymusiński**, a judge and the spokesman for *Iustitia*, was summoned to testify as a witness before the Disciplinary Officer for Common Courts' Judges. The judge has been long known for speaking critically of the recent changes in the judiciary (for instance, he called the process of appointing new members of the Supreme Court "*a beauty contest*", or described the creation of the new National Council of Judiciary as "*fully dependent on the Minister of Justice*").

- Justice **Igor Tuleya**, a judge with over 20 years of professional experience, is a defendant in the disciplinary proceedings. He was summoned to testify on September 21st. In his opinion, the charge he is facing is very enigmatic. Apart from that, there are other five cases pending, in which he is involved (some of them regarding to, for instance, public lectures on legal matters such as constitutional freedoms or tripartition of power). Justice Tuleya has been very critical of the newly-appointed National Council of the Judiciary. In the past, he also delivered a judgement convicting one of the high-rank officials of the present government and, since then, has been an object of constant criticism for the part of the ruling party members.

There are also recent instances of disciplinary proceedings against public prosecutors:

- **Krzysztof Parchimowicz** is an experienced public prosecutor and the president of prosecutors' association Lex Super Omnia, known for speaking against the Minister of Justice – General Prosecutor. He used to work in the General Prosecutor's Office but then, after the criticised new law came into force, he was moved to the lowest-level district prosecutor's office. The disciplinary proceedings in his case concern a comment he made in an interview, referring to the political grounds of the degradation of two other prosecutors (their refusal to indict an opposition politician). The second charge pertains to the remarks he made publicly on the working conditions in his office ("*stuffiness, narrowness, dirt*"). Recently, Mr Parchimowicz was summoned by the disciplinary commissioner to present explanation concerning his participation in a conference on criminal proceeding organised by Ombudsman's office.

- **Beata Mik** is a prosecutor and the long-standing author of many columns published in press titles, including Rzeczpospolita, a popular national daily newspaper. In March, 2018, she was accused of not having notified her superiors of her further collaboration with the title, which had allegedly "*weakened public trust in the independence of the prosecution service and prosecutors*". The accusation related to the articles published in 2016 and 2017, whereas Beata Mik started writing for Rzeczpospolita in 2008. Already in 2000, the prosecutor obtained the consent of then-incumbent Prosecutor General for engaging in the work of a columnist. In November 2016, she informed the National Prosecutor of her intention to conclude a contract for the assignment of copyrights to her columns with the newspaper's publisher. Ms. Mik did not sign this contract, complying with the National Prosecutor's objection, which was not accompanied by any statement of justification. The Disciplinary Tribunal ruled that Ms. Mik had not performed her obligation to notify the National Prosecutor of her engagement in a different professional activity. The Tribunal considered her behaviour a violation of professional integrity.

- **Wojciech Sadrakula**, a retired public prosecutor, participated as a lecturer in an event organised to promote constitutional law knowledge among school students. The NGO that organised the event then received a letter from the disciplinary officer for public prosecutors,

demanding the details about Mr Sadrakūła's involvement in the event for the purpose of an ongoing investigation regarding to a disciplinary misconduct. Wojciech Sadrakūła, a lawyer with a 40-year professional experience, has already been found guilty of a misconduct in other proceedings (he appealed and awaits the ruling). He is known for his critical and public opinions pertaining to the reform of the Constitutional Tribunal in Poland.

Apart from the disciplinary proceedings, judges (and – to a lesser extent – public prosecutors) have been under constant pressure coming from two main sources. The first one is public media (the television in particular), whose coverage is aimed at stigmatising and exaggerating every case of judges' misconduct (even though, in one case, it was committed by a retired judge with a diagnosed mental illness) and extrapolating them to the entire group of Polish judges. The second wave of unjustified criticism comes from the members of the ruling party, who call the judges "a caste" or "a group of cronies", or, like Mr Marek Suski MP, accuse the former judge-members of the National Council of the Judiciary of hiding gold in their gardens.

Below are presented several statements of the representatives of the ruling party and the government which may be perceived as attacks on the independence of the judiciary or exertion of political pressure on it.

- „*Polish justice system is a huge scandal, and it has to be ended*” (Jarosław Kaczyński, leader of the PiS political group, public radio interview, February 10<sup>th</sup>, 2017);
- <<*We replace “judgecracy” by democracy. In the name of the superior authority of the nation, these changes are necessary. Judges do not rule in their own names but in the name of the state, the society, in the name of all citizens. And these citizens should have impact, even the smallest one, on who and how becomes a judge*>> (Marcin Warchoł, undersecretary of state in the Ministry of Justice, a speech during the session of the Parliament, April 5<sup>th</sup>, 2017);
- “*The question is: who rules in Poland? Is it the democratically elected Sejm or is it the Constitutional Tribunal? The Sejm deputies, members of the Government are accountable for their actions to the citizens, for example during the next elections. And what is the accountability of the Tribunal judges for their decisions? None. Even if they don't perform their basic duties properly*” (Andrzej Duda, President of Poland, “wSieci”, January 23<sup>rd</sup>, 2016).

Moreover, in September 2017, Polish National Foundation (an organisation launched by 17 state-owned companies) started a social campaign „*Fair Courts*”. The campaign was supposed to be an answer to the massive protests which took place in July 2017 (the protests were organized under the slogan „*Free Courts*”). The campaign's aim was to explain the necessity to reform the justice system. The main communication channel of the campaign, whose total budget was almost 19 million PLN (ca. 5 million EUR), were billboards presenting the cases of the most controversial decisions of the courts or cases of judges against whom the disciplinary or criminal proceedings were initiated. The Supreme Court has issued several statements referred to the specific pieces of content of the campaign and correcting the facts.

## ABOUT HFHR

The Helsinki Foundation for Human Rights is one of the biggest and oldest non-governmental organisations dealing with the human rights protection in Poland. HFHR's mission is to promote human rights protection in democratic state ruled by law. HFHR undertakes

educational, legal and monitoring activities both in Poland and the countries of the former Soviet block. HFHR has a consultative status at ECOSOC and is a member of numerous research networks and platform.

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## The situation of the civil society organisations in Poland

### Summary

- Since the beginning of 2016 the civil society sector has faced numerous challenges detrimental to its works that has and limited its ability to perform its role of promoting democratic participation facilitating government accountability towards the rule of law and human rights standards. The challenges have come in the form of shrinking space for dialogue between civil society and the authorities, changing the process of distributing public funds for NGO and limiting certain freedoms (like e.g. freedom of assemblies) as well as attacks on non-governmental organizations (both physical and by smearing campaigns).
- In 2017, the Parliament adopted the Act on the National Institute of Freedom which changes at the national level the process of distributing public funds for NGOs. The law fails to provide any guarantees for open and transparent process of distributing the funds.
- In February 2018, the President signed the highly controversial amendments to the Act on the National Institute of Remembrance. The new law establishes civil law remedies for infringements of the good name of the Republic of Poland and that of the Polish Nation. The latter provisions may hamper the NGOs advocacy activity at the international level.

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## SHRINKING SPACE FOR DIALOGUE BETWEEN CSOS AND THE ADMINISTRATION

Since late 2015 in Poland the space for public dialogue and social consultations had been shrinking. Most the pieces of legislation, key from the perspective of the system of the state and human rights protection, was not subject to public consultations. Each act introducing consecutive reforms of the Constitutional Tribunal<sup>1</sup>, the Act amending the Act on the Police<sup>2</sup> and the Act on Prosecutor's Office<sup>3</sup> were submitted to the Parliament as private bills of MPs in order to bypass obligations to organize public consultations. In the case of the Anti-terrorist Act, even though the government promised to launch a public consultation process, the draft has not been opened for consultation and, which is even more worrying, remained confidential until shortly before directing to the Parliament.<sup>4</sup>

The Civil Forum of Legislation (one of the programs of Stefan Batory Foundation) stressed that between May and September 2016 very often the authorities responsible for organizing public consultations set very short deadlines for consultations (14 days) and only the first version of the draft law was subject to consultations. Furthermore, the remarks received during the consultations were not always published and the responsible authorities almost never responded to the received remarks.<sup>5</sup> According to the data collected by the Polish Federation of NGOs since 2015 in 60 cases the state's agencies and ministries breached the rules of transparency and participation when it comes to organizing social consultations or process of distributing public funds for NGOs.<sup>6</sup>

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<sup>1</sup> Since late 2015, the Parliament has adopted six different acts regulating the works of the Constitutional Tribunal. Each of the draft laws were presented as a private bill and were not subject of social consultations. Two of these acts (from November and December 2015) were adopted at an accelerated pace: Act on the Constitutional Tribunal of November 2015: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=12> and Act on the Constitutional Tribunal of December 2015: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=122> The other four were adopted within two months, yet all the experts opinions were disregarded. Act on the Constitutional Tribunal of July 2016: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=558> and three Acts regulated the works of the Constitutional Tribunal adopted in December 2016: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1750>, <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1059> and <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=880>

<sup>2</sup> Sejm, Poselski projekt ustawy o zmianie ustawy o Policji oraz niektórych innych ustaw, available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=154>

<sup>3</sup> Sejm, Poselski projekt ustawy - Prawo o prokuraturze, available at: <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=162>

<sup>4</sup> Helsinki Foundation for Human Rights, HFHR opinion on new antiterrorism law, available at: [www.hfhr.pl/en/hfhr-opinion-on-new-antiterrorism-law/](http://www.hfhr.pl/en/hfhr-opinion-on-new-antiterrorism-law/)

<sup>5</sup> Obywatelskie Forum Legislacji, Obserwacja praktyki procesu legislacyjnego w okresie od 16 maja do 10 września 2016 r., available at: [www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Komunikat%20z%20VIII%20obserwacji.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Komunikat%20z%20VIII%20obserwacji.pdf)

<sup>6</sup> OFOP, Raport z Repozytorium Ogólnopolskiej Federacji Organizacji Pozarządowych. Zestawienie udokumentowanych przypadków naruszania zasad współpracy z organizacjami pozarządowymi w okresie XI 2015 - XI 2018, available at: <https://repozytorium.ofop.eu/wp-content/uploads/2018/11/Raport-podsumowuj%C4%85cy-XI-2015-XI-2018.pdf>

## CHANGES IN THE PROCESS OF DISTRIBUTION PUBLIC FUNDS

Since 2015, there were several policy changes that affected the process of distributing public funds for non-governmental organisations working on fundamental rights.

The first disturbing trend concerns limitation of non-governmental organisations' access to public funds. This practice is reflected in **deteriorating standards for organising public calls for proposals**. According to the data gathered by the Polish Federation of Non-Governmental Organisations, in the period between late 2015 and early 2017, 19 calls for proposals organised by the authorities at the national level were annulled or organised with a very short deadline (e.g. the deadline for presenting offers was 7 days from the call's publication). The same research shows other malfunctions, e.g. an announcement on public consultations of the programme of cooperation between the Ministry of Foreign Affairs and NGOs was published under a link "car sale".<sup>7</sup> Furthermore, there are examples of decisions on distributing public funds in a way that favours specific organizations close to the governing majority. For example, in July 2016 the Ministry of Foreign Affairs announced that the grant to establish Regional Centres for International Debate was awarded to an organization that was established in 2015, even though the rules of the call required that a bidder have a documented experience from the period 2013-2015. The funds from the same call were also granted to the catholic Academia which had not previously dealt with the issues related to international policy.<sup>8</sup>

The second trend concerns distribution of funds to non-governmental organisations **providing aid to victims of crimes**. On the basis of Article 43 of the Criminal Executive Code and the Regulation of the Ministry of Justice, the Ministry of Justice distributes to non-governmental organisation the funds for their activity embracing different forms of support for victims of crimes. Since 2014, the overall amount of funds distributed within this Fund varied from 11 million PLN (ca. 2,500,250 EUR) in 2014 to 20 million PLN (ca. 5 million EUR) in 2016 to 16 million PLN (ca. 4,000,000 EUR) in 2017. Since 2012, when the Fund was created, three well-experienced non-governmental organisations providing specific aid for children and women victims of crime were among the organisations which received funding from the Fund. However, since 2016 those three organisations (namely the Women's Rights Centre, Association for Women BABA and Empowering Children Foundation) have not received any access to this fund, even though their proposals were assessed very highly. According to the Ministry of Justice, the funds were granted to the organisations which provide victims with comprehensive aid. After the Ombudsman's intervention in this case, the Minister of Justice announced that the reason why the Women's Rights Centre did not receive funding is because it specialises only in one group of victims of crime (women) and, therefore, such a practice should be found discriminatory towards men who can also suffer from domestic violence. The Ministry of Justice also announced that the offers of two other organisations (Empowering Children Foundation and Association for Women BABA) were assessed lower than the offers presented by e.g. Caritas and Brother Krystian Association of Aid for Neighbours.<sup>9</sup> Also in 2018, the Empowering Children Foundation did not receive funding from the Minister of Justice's Fund.<sup>10</sup>

<sup>7</sup> Polish Federation of Non-governmental Organisations (OFOP), Repozytorium, available at: <http://repozytorium.ofop.eu/>

<sup>8</sup> Stankiewicz A., Strumień dotacji dla o. Rydzyska, Rzeczpospolita, available at: <http://www.rp.pl/Kosciol/307069869-Strumien-dotacji-dla-o-Rydzyska.html#ap-1>

<sup>9</sup> Ombudsman's Office (Biuro Rzecznika Praw Obywatelskich), Dlaczego niektóre organizacje pozarządowe nie mogą liczyć na dotacje? – Minister Sprawiedliwości odpowiada RPO, available at: <https://www.rpo.gov.pl/pl/content/dlaczego-niektore-organizacje-pozarządowe-nie-moga-liczyc-na-dotacje-minister-sprawiedliwosci>

<sup>10</sup> Empowering Children Foundation (Fundacja Dajemy Dzieciom Siłę), Nie ma sprawiedliwości dla dzieci, available at: <https://fdds.pl/sprawiedliwosci-dla-dzieci/>

Another example relates to the works of the Autonomia Foundation which run a project „ZERO violence - engagement, education and advocacy against the gender-based violence”. The project was funded from the funds of the Civic Initiatives Fund. After a rapid and unexpected monitoring from the Ministry of Family, Labour and Social Policy (which operates the Fund) the agreement between the organization and the Fund was solved immediately. It was the first case of such a rapid monitoring in the entire history of the Fund. It should be stated that a couple of days before the monitoring two MPs directed a question to the Ministry of Family, Labour and Social Policy about the cooperation with Autonomia Foundation. In their letter the works of the Autonomia Foundation were described as including „an enormous load of ideology” and the Foundation’s statute was said to include „aims strictly referring to LGBT ideology” and a declaration on „fight against sexual intolerance”. The MPs asked the Ministry how this agenda can go hand in hand with the Ministry’s activity towards „the strong position of the family and marriage”.<sup>11</sup>

The third disturbing trend concerns the distribution of **funds for legal aid and support for migrants and refugees**. In 2016, the Ministry of Interior announced that the call for proposals within the Asylum, Migration and Integration Fund was annulled. The Ministry explained its decision by stating that between the announcement of the call and presentation of its results significant changes had occurred in relation to migration and integration. Given that, the Ministry decided to announce two new calls for proposals. Altogether, the Ministry was supposed to distribute over 2,500,000 PLN (approx. 625,000 EUR).<sup>12</sup> The deadline in those two calls was set for June 2016 and the costs were eligible as of August 2016. However, none of these calls have been resolved yet (almost year and a half later). The significant delay in resolving these calls affected the NGOs’ capacity to provide legal aid and support to migrants and refugees.<sup>13</sup>

#### NATIONAL INSTITUTE OF FREEDOM – CENTRE FOR CIVIL SOCIETY DEVELOPMENT

In December 2016, the Prime Minister announced the plans to create the National Center for the Development of Civil Society. In September 2017, the **Act on the National Institute of Freedom – Centre for Civil Society Development** was adopted by the Parliament.

In the light of the law, Institute’s Director and the majority of Director’s Council are to be appointed by another new institution: the Committee for Public Benefit Activity, chaired by a member of the Polish Cabinet, Council of Ministers. The participation of the representatives of the civil society will be illusory - in the light of the law, the civil society representatives will have only 5 seats in 11-member Council of the Institute. The Council is designed to play a marginal role, with its main responsibilities including issuing opinions on action plans and finances of the Institute.

<sup>11</sup> Repozytorium OFOP, MRPiPS: rozwiązanie umowy FIO z Fundacją Autonomia w trybie natychmiastowym, available at: <http://repozytorium.ofop.eu/mrpips-rozwiazanie-umowy-fio-z-fundacja-autonomia-w-trybie-natychmiastowym/>

<sup>12</sup> Ministry of Interior, Department of Border Policy and International Fund (Ministerstwo Spraw Wewnętrznych, Departament Polityki Granicznej i Funduszy Międzynarodowych), Dwa nowe nabory w ramach Funduszu Azylu, Migracji i Integracji, available at: <http://fundusze.mswia.gov.pl/ue/aktualnosci/13784,Dwa-nowe-nabory-w-ramach-Funduszu-Azylu-Migracji-i-Integracji.html>

<sup>13</sup> Mazur N., MSWiA ma miliony na integrację cudzoziemców, ale w 2016 r. nie wydało na to ani złotówki, Gazeta Wyborcza, available at: <http://wyborcza.pl/7,75398,21216958,mswia-ma-miliony-na-integracje-cudzoziemcow-ale-w-2016-r-nie.html>



The Institute will be a body responsible for distributing funds to CSOs at the national level (the former Civic Initiatives Fund, which distributed approx. 14 million EUR per year for the projects selected in the open competitions, would be abolished and its resources would be operated by the Centre). The law fails to provide detailed information on the competitions which would be organized to distribute funds. The law also includes a provision in light of which it would be possible for the President of the Centre to delegate public tasks to be performed by particular NGOs. As a result, it will lead to a complete discretion in distributing public funds.

Furthermore, according to the law, in future the National Freedom Institute will also be responsible for the allocation of funds obtained from the European Union and other international funds (e.g. EEA funds). The new law contains no guarantees that the relevant EU rules imposed on the Member States will be followed during the Institute's decision-making process. Examples of such rules are respecting EU and domestic laws, promoting the equality between men and women and non-discrimination as well as the principle of sustainable development.

Unlike to the previous mechanisms which used to be decentralized, right now the government is aiming at centralizing all the funds under one institution. The draft Act has been strongly criticized by numerous non-governmental organizations. The Klon/Jawor Association stated that "the draft law is contradictory to the rules of partnership and sovereignty, competitiveness and transparency guaranteed not only by the Act on the activity for social benefit, but also preserved by years of cooperation".<sup>14</sup>

## THREATS TO THE NGOS' WORKS

In February 2018, the President of Poland announced that he will sign a highly controversial law amending the **Act on the Institute of the National Remembrance**. The new law introduces criminal liability for statements imputing responsibility for crimes of the Nazi regime to the Polish nation and establishes civil law remedies for infringements of the good name of the Republic of Poland and that of the Polish Nation. These provisions entail two kinds of dangers – the first one relates to the general limitation of the freedom of expression while the second relates to the possibility of impeding CSOs' ability to hold the government accountable. If adopted, the proposed version of the Act may discourage members of the public from discussing certain aspects of Poland's history because of the risk of facing criminal sanctions.<sup>15</sup> In the opinion of HFHR there is a risk that in the future this provision may be used against watchdog organizations and human rights defenders, particularly those active at international fora, for voicing critical opinions about the government's actions or providing information about the irregularities in the functioning of state institutions.<sup>16</sup>

<sup>14</sup> Citizens Observatory of Democracy, Projekt ustawy o Narodowym Centrum Rozwoju Społeczeństwa Obywatelskiego, available at: <http://obserwatoriumdemokracji.pl/ustawa/o-projekt-ustawy-o-narodowym-centrum-rozwoju-spoleczenstwa-obywatelskiego/>

<sup>15</sup> Helsinki Foundation for Human Rights, The HFHR on draft amendment to National Remembrance Institute Act, available at: <http://www.hfhr.pl/en/the-hfhr-on-draft-amendment-to-national-remembrance-institute-act/>

<sup>16</sup> Bychawska-Siniarska D., Godzisz P., Warso Z., Information on the recent challenges faced by human rights defenders and civil society in Poland, Helsinki Foundation for Human Rights, available at: <http://www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf>

The President also decided to direct to the Constitutional Tribunal a motion upon verification the constitutionality of the criminal provisions of the law. The Constitutional Tribunal has not ruled in this case yet. The law will come into force on 1 March 2018.

## FREEDOM OF ASSEMBLIES

In December 2016, the Parliament adopted amendments to the Act on assemblies. The amendment introduced the concept of “cyclical assemblies”, defined as assemblies organised on an annual basis within last three years or at least four times a year. A province governor, who is an official of the government administration, will decide whether a given assembly is deemed cyclical. The amendment raised considerable opposition. Almost 200 non-governmental organisations pledged the President to refuse to sign the amendment into law. NGOs warned that the introduction of cyclical amendment contravenes the civic nature of the constitutional freedom of assembly and may be used as a tool for abusing powers by public authorities.<sup>17</sup> In March 2017, the Constitutional Tribunal ruled that this law is constitutional.

Numerous groups, including activists of the Citizens of Republic of Poland Foundation, continue to protest against this law and favoring by the authorities certain types of the assemblies which are granted a privileged status according to this new law (e.g. so-called *miesięcznice* – assemblies organized every month by the governing majority to commemorate victims of the Presidential aircraft in Smoleńsk in 2010 or the Independence March organized by the far-right groups on the Polish Independence Day). The protesters face charges of disturbing the course of a legal assemblies. It is estimated that in the end of January 2018 there were 472 pending cases against the protesters. So far, 226 protesters were sentenced in absentia and the courts ordered to each of the protesters approx. 500 PLN fines (ca. 150 EUR).<sup>18</sup> The second group of activists who are most prone to be prosecuted in the light of this new law are ecologists who protested against harvesting Białowieża forest. In one of the cases, the group of ecologist faced charges of blocking the equipment used to harvest the forest. However, in January 2018 the court found them not guilty and stated that the ecologist acts were necessary to protect „a greater good and the defense of the common good from reckless harvesting was worth such sacrifice”.<sup>19</sup>

## ATTACKS ON NGOS

At the beginning of 2016, the headquarters of organizations acting for LGBTQ rights (namely Campaign Against Homophobia and Lambda Foundation) were attacked by persons unknown. The criminal proceedings in these cases were discontinued due to the impossibility of identifying their perpetrators. Furthermore, almost at the same time, an activist of HejtStop (Stop Hate Project) faced an enormous wave of hate speech and threats after she reported racist statement published by one sportsman to the administrators of Facebook. None of these incidents were condemned by the authorities. A letter signed by over 300 NGOs with an appeal

<sup>17</sup> Helsinki Foundation for Human Rights, Apel 194 organizacji do Prezydenta RP, available at: <http://www.hfhr.pl/apel-194-organizacji-do-prezydenta-rp/>

<sup>18</sup> Magdalena Kursa, PiS walczy z obrońcami demokracji. Już 226 zaocznych wyroków, Gazeta Wyborcza, available at: <http://wyborcza.pl/7,75398,23025719,pis-walczy-z-obroncami-demokracji-juz-226-zaocznych-wyrokow.html>

<sup>19</sup> Anna Siek, "Stan wyższej konieczności". Ekolodzy z Puszczy Białowieskiej uniewinnieni, TOKFM, available at: <http://www.tokfm.pl/Tokfm/7,102433,22880430,stan-wyzszej-koniecznosc-ekolodzy-z-puszczy-bialowieskiej.html>

to the Prime Minister to take action against a rising wave of hatred and attacks against NGOs remained unanswered.<sup>20</sup>

At the end of October 2016, the public media carried out a smear campaign aimed at certain civil society organizations which work on the rule of law and human rights, and which had received public funding for their work. The campaign began with news reports that originally was directed at the previous judge of the Constitutional Tribunal who currently strongly criticizes the reforms of the Tribunal, including undermining its independence by the governing majority. The public media used the fact that the judge is a board member of a particular CSO to attack the organization. public media made allegations that this organization received public funding in a fraudulent way.

A similar approach was taken towards other CSOs. Relying on publicly available documents, the broadcasts suggested that some organizations received funds in a non-transparent way and through family and personal ties. While making allegations, the broadcasts were not backed by any evidence of a breach of law or any other irregularities such as wasting public funding.<sup>21</sup> For example, Akcja Demokracja, one of the leaders of the civil society's massive protests against the reforms of the judiciary in 2017, was targeted by public media in July and August 2017. The campaign run by the public media and far right press aimed at allegedly "uncovering" the sources of financing of the organisations (all information was publicly available at the organisation's website) and suggesting that Akcja Demokracja implemented the priorities of the German government in Poland as two of its major donors have offices registered in Germany.<sup>22</sup>

In 2017, a year after the country protest against the proposal of complete abortion ban, the Police raided headquarters of two women's rights organizations. The police seized organizations documents and computers, including all sensitive information on organization's clients and their cases. The raid was a part of investigation concerning the process of distributing funds from Ministry of Justice's Funds for Victims distributed during the period of the previous government. Although the organizations are not accused of any tax or financial misconduct, still Police's raid significantly hampered their work and could have potential created a chilling effect among the potential organizations' clients.<sup>23</sup>

In May 2018, the Minister of Interior filed a motion upon receivership over and organization Citizens of the Republic Foundation. The Citizens of the Republic is a group of streets activists who protested against government's reforms and policies since the end of 2016. The Foundation is known from using the civil disobedience in their actions – usually they organise the peaceful counter-demonstrations to the assemblies organised by the government or organizations supporting the government. The Minister of Interior, who supervises the work of the

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<sup>20</sup> Obywatele dla Demokracji, List do premier Beaty Szydło z prośbą o podjęcie działań na rzecz przeciwstawienia się fali nienawiści, available at: <http://www.ngofund.org.pl/apel-do-premier-beaty-szydlo-o-podjecie-dzialan-w-sprawie-atakow-na-organizacje-pozarzadowe/>

<sup>21</sup> Bychawska-Siniarska D., Godzisz P., Warso Z., Information on the recent challenges faced by human rights defenders and civil society in Poland, Helsinki Foundation for Human Rights, available at: [www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf](http://www.hfhr.pl/wp-content/uploads/2016/11/HRD-report-30112016-FIN.pdf)

<sup>22</sup> Paweł Kościński, Akcja Demokracja broniła sądów. Teraz atakuje ją TVP, a poseł PiS donosi do prokuratury, Wyborcza.pl, 20 August 2017, available at: <http://wyborcza.pl/7,75398,22255187,akcja-demokracja-bronila-sadow-teraz-atakuje-ja-tvp-a-posel.html>

<sup>23</sup> The Guardian, Police raid offices of women's groups in Poland after protests, available at: <https://www.theguardian.com/world/2017/oct/05/police-raid-offices-of-womens-groups-in-poland>

organization, justified the motion by stating that the organization “has repeatedly violated the law”. The court dismissed Minister’s motion in November 2018.<sup>24</sup>

## ABOUT HFHR

The Helsinki Foundation for Human Rights is one of the biggest and oldest non-governmental organisations dealing with the human rights protection in Poland. HFHR’s mission is to promote human rights protection in democratic state ruled by law. HFHR undertakes educational, legal and monitoring activities both in Poland and the countries of the former Soviet block. HFHR has a consultative status at ECOSOC and is a member of numerous research networks and platform.

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<sup>24</sup> Wp.pl, MSWiA chciało "przejąć" fundację Obywateli RP. Sąd nie pozwolił, available at: <https://wiadomosci.wp.pl/mswia-chcialo-przejac-fundacje-obywateli-rp-sad-nie-pozwolil-6318629700081793a>