

# Human Rights in the Times of a Pandemic



*Human Rights in the Times of a Pandemic. 10 months, 10 rights, 10 restrictions, 10 recommendations for the future...*

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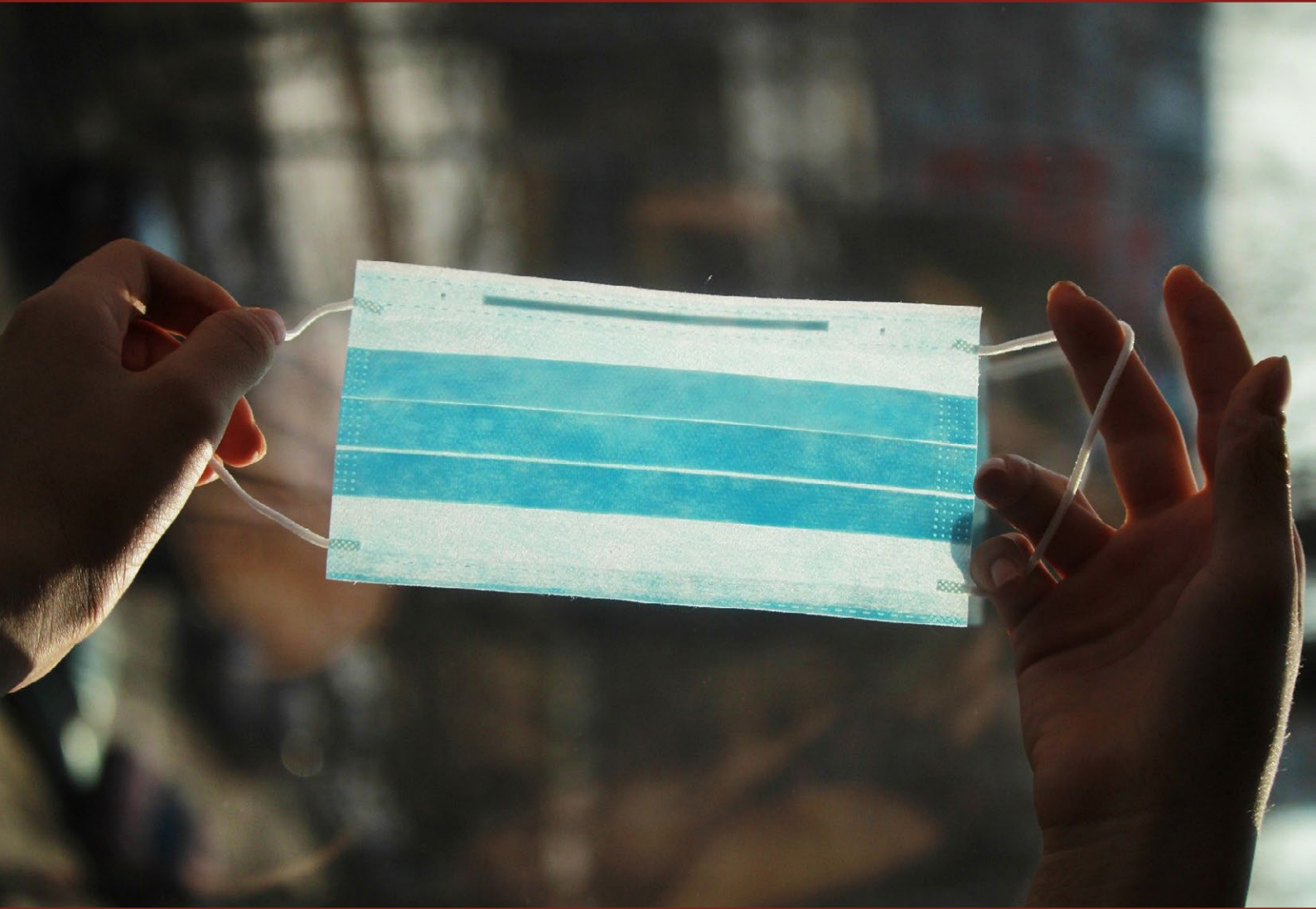


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# Contents

- Introduction . . . . . 2
- Introductory information . . . . . 4
- 1. Right to protection of life and health . . . . . 7
- 2. Freedom of movement . . . . . 12
- 3. Freedom of assembly . . . . . 16
- 4. The right to a court and a fair trial . . . . . 22
- 5. Right to family life . . . . . 32
- 6. Right to education . . . . . 36
- 7. Freedom of speech . . . . . 41
- 8. Prohibition of discrimination . . . . . 45
- 9. Rights of persons deprived of liberty . . . . . 52
- 10. Freedom of business activity . . . . . 62
- Summary . . . . . 68
- The Helsinki Foundation for Human Rights . . . . . 72

# Introduction



In March 2020, the World Health Organisation announced that the coronavirus epidemic reached the level of a global pandemic. In Poland, the state of pandemic emergency was initially introduced<sup>1</sup>, and a week later, the state of pandemic was declared<sup>2</sup>.

The last ten months have been a time of concern for the health of ourselves and our loved ones. The coronavirus pandemic has changed the way states and societies function. It has also created further human rights challenges, including specifically the right to life and health, to personal liberty, to a court, the right to education, the prohibition of discrimination, freedom of speech or the freedom to conduct a business. The pandemic has particularly affected the elderly, the homeless, persons in detention or need of specialist support. Also, it happened during a special period in Poland and coincided with events that aroused great emotions in society – presidential elections and numerous protests.

This report is an attempt to answer the question whether, under the pretext of combating the epidemic, the Polish authorities have not unduly restricted civil rights and freedoms and whether the legislator’s interference has always met the proportionality test set out in the Constitution. This report presents the introduced restrictions in the context of ten human rights, offering documentation of potential violations committed by the state. The report is also an attempt to formulate recommendations for the future, which we hope will guide public authorities in the coming months of the fight against the pandemic.

Moreover, it is also a first step towards assessing the long-term impact of the pandemic on our rights and freedoms. Undoubtedly, only in the long-term will we be able to assess its impact on human rights, both in the legislative (theoretical) and social (practical) dimension. The question remains open as to whether the rights and freedoms given up for noble reasons have not already been lost forever.

Piotr Kubaszewski  
Katarzyna Wiśniewska, PhD

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- 1 The Regulation of the Minister of Health of 13 March 2020 on the declaration of the state of pandemic emergency in the Republic of Poland (Journal of Laws of 2020, item 433, as amended).
  - 2 The Regulation of the Minister of Health of 20 March 2020 on the declaration of the state of pandemic in the Republic of Poland (Journal of Laws of 2020, item 491, as amended).

**Introductory information**



The coronavirus pandemic is one of the greatest global challenges in recent years. It forced the authorities of many countries to resort to exceptional legal instruments. Those instruments were designed to adapt the health care system to the extent of COVID-19 incidence, reorganise the work of public institutions, but also interfere with the functioning of societies to prevent the spread of the virus.

## No state of natural disaster

- ▶ In exceptional situations, the Constitution of the Republic of Poland allows for the introduction of extraordinary measures.
- ▶ One of them is **the state of natural disaster**.
- ▶ According to the Constitution, **the state of natural disaster** may be introduced to prevent natural disasters or technical failures having features of a natural disaster and remedy their effects (Article 232 of the Constitution). These concepts are defined in the Act on the state of natural disaster, which specifies in Article 3 (1) (2) that a natural disaster justifying the introduction of the state of natural disaster is, among others, the mass occurrence of infectious diseases in humans. The risk arising from a natural disaster or a technical failure must be exceptionally serious, since, under Article 228 (1) of the Constitution, an extraordinary measure may be imposed only if “ordinary constitutional measures are insufficient”<sup>3</sup>.
- ▶ The state of natural disaster may justify restricting certain freedoms and rights of an individual, which go far beyond the restrictions imposed under ordinary circumstances.
- ▶ As of the date of publication of this report, the Council of Ministers has not decided to introduce the state of natural disaster. Consequently, public authorities must not interfere with the essence of rights and freedoms and any restrictions imposed by law must comply with the principle of proportionality<sup>4</sup>.

## Exceeding statutory authorisations

As the basis for imposing restrictions on the several rights and freedoms described in this report, the Government indicated the Act of 5 December 2008 on the prevention and control of infections and infectious diseases in humans (the “Infectious Diseases Act”, Journal

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3 HFHR Analysis, *Stan kłeski żywiolowej. Analiza konstytucyjnych i ustawowych uprawnień władz publicznych*, [https://www.hfhr.pl/wp-content/uploads/2020/03/Raport\\_stan\\_kleski\\_zywiolowej.pdf](https://www.hfhr.pl/wp-content/uploads/2020/03/Raport_stan_kleski_zywiolowej.pdf) (accessed on: 10.01.2021).

4 NGOs’ call for action, <http://www.hfhr.pl/apel-organizacji-spoecznych-do-rady-ministrow-rp-o-wprowadzenie-stanu-kleski-zywiolowej/> (accessed on: 10.01.2021).

of Laws 2020, item 1845, as amended). However, the scope and nature of the restrictions announced (which will be presented in the following chapters) goes beyond a statutory authorisation and is not acceptable under ordinary circumstances.



## 1. Right to protection of life and health



The coronavirus pandemic, posing a risk to human life and health, has led to numerous restrictions. We should start our review of the impact of the pandemic on the rights and freedoms in Poland with the discussion of how the rights to protection of life and health were exercised in practice, as those rights were of concern to all of us. In the name of their protection, society was also willing to give up part of its freedom.

The right to protection of life is guaranteed in national and international law.

- ▶ **the right to protection of life has its basis in the Constitution** (Article 38) and ECHR (Article 2). **The Constitution also obliges the authorities to combat epidemic diseases** (Article 68 (4));
- ▶ whereas these provisions may be infringed where e.g. systemic negligence in the field of health services endangers the life and health of individuals;
- ▶ **authorities must therefore take effective actions to combat the pandemic and ensure effective health protection for infected persons.**

## 1. Combating the pandemic and restrictions on freedoms and rights:

- ▶ combating the pandemic requires certain restrictions on individual rights and freedoms;
- ▶ unfortunately, many such **regulations introduced by the government may be controversial in terms of their compliance with constitutional standards** and the aspect of restricting individual freedoms and rights;
- ▶ as the basis for their introduction, the Government indicated the Infectious Diseases Act.

## 2. Problems with the organisation of health care:

- ▶ the number of people infected with coronavirus and the number of deaths is constantly increasing – according to the data as of 25 January 2021, **1,478,119** people were infected (in total, since the beginning of the pandemic) and over **35,000 people died**<sup>5</sup>;
- ▶ media coverage showed that, specifically in autumn 2020, the situation in the healthcare sector was steadily deteriorating, which was reflected by **the shrinking number of beds and ventilators available**<sup>6</sup>;

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5 Data from the Ministry of Health, available at <https://www.gov.pl/web/koronawirus/wykaz-zarazen-koronawirusem-sars-cov-2> (accessed on 25.01.2021).

6 See especially: S. Jadczak, „Możecie sobie dzwonić nawet do papieża”. Doktor nie przyjmie pacjenta, bo „szpital jest zamknięty”, TVN 24, 29 October 2020, <https://tvn24.pl/polska/koronawirus->

- ▶ there have also been reports of deaths of patients (with COVID-19 symptoms or diseases not related to coronavirus) **who were not admitted to hospital** on time because of a lack of beds<sup>7</sup>;
- ▶ The Commissioner for Human Rights also drew attention to a lack of adequate systemic solutions for dealing with coronavirus infected patients in forensic psychiatric wards<sup>8</sup>.
- ▶ attention was also **paid to the insufficient number of SARS-CoV-2 tests performed in Poland**<sup>9</sup>;
- ▶ a positive aspect of the fight against coronavirus was the launch of the vaccination campaign at the end of December 2020<sup>10</sup>; however, on a larger scale vaccination will be carried out at the end of January<sup>11</sup> and, as media sources rightly point out, only then will it be possible to assess how effectively this campaign is being implemented<sup>12</sup>. However, already at the initial stage of the vaccination campaign, the media reported on certain

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[w-polsce-nagrana-z-karetek-w-warszawie-brak-miejsc-w-szpitalach-4735344](https://www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-na-pomorzu-dramatycznie-brakuje-lozek-z-respiratorami-dla-ch,nld,4761621) (accessed on: 9.01.2021); K. Kaługa, *Na Pomorzu dramatycznie brakuje łóżek z respiratorami dla chorych na Covid-19*, RMF 24, 29 September 2020, <https://www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-na-pomorzu-dramatycznie-brakuje-lozek-z-respiratorami-dla-ch,nld,4761621> (accessed on: 9.01.2021); M. Rogalski, *W niektórych regionach brakuje łóżek i respiratorów. W tych województwach jest najgorzej*, Gazeta.pl, 3 November 2020, <https://next.gazeta.pl/next/7,151003,26476410,w-niektorych-regionach-brakuje-lozek-i-respiratorow-w-tych.html> (accessed on: 9.01.2021).

- 7 See e.g. M. Gardyas, *Karetka krążyła 5 godzin między szpitalami. Kobieta zmarła na SOR-ze*, RMF 24, 28 October 2020, <https://www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-karetka-krazyla-5-godzin-miedzy-szpitalami-kobieta-zmarla-na,nld,4820784> (accessed on: 9.01.2021); *Z udarem, od szpitala do szpitala, siedem godzin w karetce. W końcu go przyjęli, zmarł po 20 minutach*, TVN 24 Wrocław, <https://tvn24.pl/wroclaw/bielawa-80-latek-z-udarem-byl-wozony-karetka-przez-siedem-godzin-od-szpitala-do-szpitala-4784094> (accessed on: 9.01.2021 r.).
- 8 Statement of the Commissioner for Human Rights addressed to the Undersecretary of State of the Ministry of Health of 18 December 2020, [https://www.rpo.gov.pl/sites/default/files/WG\\_do\\_MZ\\_18.12.2020.pdf](https://www.rpo.gov.pl/sites/default/files/WG_do_MZ_18.12.2020.pdf) (accessed on: 22.01.2021); Statement of the Commissioner for Human Rights addressed to the Undersecretary of State of the Ministry of Health of 15 January 2021: [https://www.rpo.gov.pl/sites/default/files/Do\\_MZ\\_15.01.2021.pdf](https://www.rpo.gov.pl/sites/default/files/Do_MZ_15.01.2021.pdf) (accessed on: 22.01.2021).
- 9 See e.g. M. Rybak, *Eksperci alarmują: Jest za mało testów na koronawirusa! Tak nie opanujemy epidemii*, Gazeta Wroclawska, 25 November 2020, <https://gazetawroclawska.pl/eksperci-alarmuja-jest-za-malo-testow-na-koronawirusa-tak-nie-opanujemy-epidemii/ar/c1-15311877> (accessed on: 9.01.2021); D. Kowalska, *Sośnierz: Robimy zdecydowanie za mało testów, aby skutecznie stłumić epidemię*, Polska Times, 1 October 2020, <https://polskatimes.pl/sosnierz-robimy-zdecydowanie-za-malo-testow-aby-skutecznie-stlumic-epidemie/ar/c15-15208866> (accessed on: 9.01.2021); J. Kopeć, *Mamy chory system testów na koronawirusa. Gorzej jest tylko w Meksyku*, Biqdata.wyborcza.pl, 23 November 2020, <https://biqdata.wyborcza.pl/biqdata/7,159116,26516499,mamy-fatalny-system-testowania-na-koronawirusa-gorzej-jest.html> (accessed on: 9.01.2021).
- 10 *W CSK MSWiA zaszczepiono pierwszą osobą na COVID-19*, PAP, 27 December 2020, <https://www.pap.pl/aktualnosci/news%2C782571%2Cw-csk-mswia-w-warszawie-zaszczepiono-pierwsza-osobe-na-covid-19.html> (accessed on: 9.01.2021).
- 11 In accordance with the information provided by the Polish Government, "The process of registration for universal vaccination of Polish citizens against COVID-19 will start on 15 January 2021", <https://www.gov.pl/web/szczepimysie/procedura-szczepien-krok-po-kroku> (accessed on: 9.01.2021).
- 12 P. Walewski, *Polska szczepi się za wolno? Test dopiero przed nami*, Polityka, 6 January 2021, <https://www.polityka.pl/tygodnikpolityka/nauka/2097587,1,polska-szczepi-sie-za-wolno-test-dopiero-przed-nami.read> (accessed on: 9.01.2021).

organisational problems, including difficulties in registration<sup>13</sup>. Concerns are also being voiced that the vaccination campaign is being carried out too slowly<sup>14</sup>.

### 3. Health protection of residents of nursing homes and detainees:

- ▶ **the coronavirus pandemic has brought many threats to the life of residents of nursing homes and detainees** of e.g. prisons or the National Centre for the Prevention of Dissocial Behaviours (NCPDB) as well as **residents of nursing homes** and other residential care facilities<sup>15</sup>.

### 4. Health protection of people suffering from diseases not related to the coronavirus:

- ▶ **focusing healthcare efforts on combating the pandemic may have a negative impact on the health protection of patients affected by diseases unrelated to COVID-19;**
- ▶ the media reported on the transformation of further medical facilities into infectious diseases hospitals dedicated to treating patients infected with the coronavirus and the restriction and suspension of admissions of patients for pre-planned surgical procedures<sup>16</sup>;
- ▶ the Commissioner for Human Rights also pointed out that complaints sent to him by patients showed that many people suffering from diseases not related to the coronavirus were unable to obtain the necessary medical assistance<sup>17</sup>;
- ▶ the fight against the coronavirus pandemic, although extremely important, should not lead to violations of the right to the protection of the life and health of other sick persons<sup>18</sup>.

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13 See e.g. M. Gardyas, *Kolejki przed przychodniami, problemy z infolinią. Ruszyły zapisy seniorów 70+ na szczepienia*, RMF 24, 22 January 2021, [https://www.rm24.pl/raporty/raport-program-szczepien-przeciw-covid/SG24/news-kolejki-przed-przychodniami-problemy-z-infolinia-ruszyly-zap\\_nld,5002618](https://www.rm24.pl/raporty/raport-program-szczepien-przeciw-covid/SG24/news-kolejki-przed-przychodniami-problemy-z-infolinia-ruszyly-zap_nld,5002618) (accessed on: 25.01.2021).

14 *Wydaje się, że cała akcja szczepień idzie troszeczkę za wolno*, TVN24, 10 January 2021, <https://tvn24.pl/polska/szczepionka-na-koronawirusa-w-polsce-jak-idzie-akcja-szczepien-profesor-andrzej-matyja-prezes-nrl-za-wolno-4935785> (accessed on: 25.01.2021).

15 See Chapter 5 (nursing homes) and Chapter 9 (NCPDB) for more information.

16 See e.g. K. Kowalczyk, *Możliwe ograniczanie planowych zabiegów. Szumowski: To nie dotyczy onkologii*, *Wprost*, 21 March 2020, <https://www.wprost.pl/koronawirus-w-polsce/10308467/mozliwe-ograniczanie-planowych-zabiegow-szumowski-to-nie-dotyczy-onkologii.html> (accessed on: 12.01.2021); *NFZ zaleca wstrzymanie przyjęć pacjentów na planowe zabiegi*, *Radio Lublin*, 21 March 2020, <https://radio.lublin.pl/2020/03/nfz-zaleca-wstrzymanie-przyjec-pacjentow-na-planowe-zabiegi/> (accessed on: 12.01.2021); M. Książkowski, *NFZ zaleca ograniczenie części planowych zabiegów medycznych*, *Puls Medycyny*, 15 October 2021, <https://pulsmedycyny.pl/nfz-zaleca-ograniczenie-czesci-planowych-zabiegow-medycznych-1005492> (accessed on: 12.01.2021).

17 The statement of the Commissioner for Human Rights sent to the Minister of Health dated 12 November 2020, [https://www.rpo.gov.pl/sites/default/files/WG\\_do\\_MZ\\_ws\\_problenow\\_sluzby\\_zdrowia\\_w\\_epidemii\\_12.11.2020.pdf](https://www.rpo.gov.pl/sites/default/files/WG_do_MZ_ws_problenow_sluzby_zdrowia_w_epidemii_12.11.2020.pdf) (accessed on: 7.01.2021).

18 The statement of the HFHR sent to the Minister of Health dated 24 March 2020, [https://www.hfhr.pl/wp-content/uploads/2020/03/1873\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/03/1873_001.pdf) (accessed on: 7.01.2021).

## Conclusions

- ▶ The Infectious Diseases Act contains too many provisions that enable authorities to impose broad restrictions on freedoms and rights;
- ▶ At the time of the highest daily increases in coronavirus cases, the Polish health service was sometimes inefficient;
- ▶ The fight against the pandemic has had a negative impact on the protection of the right to life and health of persons affected by other diseases.

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## Recommendation

- The Infectious Diseases Act should be amended by delineating, in an explicit and constitutional manner, the permissible limits of restrictions on freedoms and rights in the state of pandemic and the state of pandemic emergency.

## 2. Freedom of movement



Pursuant to Article 52 of the Constitution, everyone is granted the freedom of movement within the territory of the Republic of Poland; everyone may also leave that territory, and these rights may be subject to limitations specified by statute. However, the freedom of movement, like the freedom of assembly, has been restricted within the last 10 months in an unconstitutional manner.

### **1. A total movement ban may only be introduced if an emergency measure has been put in place, which, as already indicated, has not yet been the case.**

- ▶ Without resorting to an emergency measure public authorities must not interfere with the essence of rights and freedoms and any restrictions imposed by law must comply with the principle of proportionality.

### **2. Although, under existing laws, in the state of pandemic the legislator could merely restrict the manner in which Polish citizens can move, it has introduced a total movement ban.**

- ▶ In the state of pandemic the provisions of the Infectious Diseases Act allow for the introduction of a temporary restriction on the manner in which people move or an order to move in a specific manner (e.g. by introducing a requirement to maintain social distance) – **however, under these provisions it is not possible to prohibit movement as such.**
  - ▷ Despite this, several regulations introduced such a ban: for example, under para. 5 of the Regulation of 31 March 2020<sup>19</sup>, persons' movement was prohibited unless it was related to work, volunteering to fight COVID-19, participating in religious rites and ceremonies, or meeting the necessary needs of everyday life.
- ▶ In connection with the introduction of that regulation, in spring the media reported about “round-ups” of cyclists, the police demanding shop receipts or approaching persons with children staying in a yard<sup>20</sup>.
- ▶ **A decision by a police officer to hand out a ticket or notify a local sanitary and epidemiological station about a breach of restrictions (resulting in an imposition**

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19 The Regulation of the Council of Ministers of 31 March 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 566).

20 See a letter from the HFHR to the Chief Commissioner of the Police in connection with interventions against persons in public spaces: [https://www.hfhr.pl/wp-content/uploads/2020/04/2541\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/04/2541_001.pdf) (accessed on 13.01.2021).

of a high administrative penalty) was often contingent on his or her interpretation of the vague grounds of “the necessary needs of everyday life”.

### 3. The restrictions disproportionately affected children and the elderly

- ▶ **The ban on the movement of minors under the age of 18 without being accompanied by an adult was introduced together with the general ban on movement but did not provide for any exceptions<sup>21</sup>.**
  - ▷ Over time, the restriction was revoked for minors over the age of 13, and in the summer it was repealed completely. In autumn, the ban was reintroduced and minors under the age of 16 could only move accompanied by an adult Monday to Friday, from 8:00 to 16:00, unless they moved to or from school. It was only on 4 January 2021 that the ban was repealed by a regulation.
  - ▷ The situation where children and the youth cannot go out home on their own is a disproportionate restriction on their right to privacy and may lead to the worsening of their mental state. It is also a particular threat to people experiencing domestic violence. **Their inability to leave their place of residence on their own practically cuts them off from the possibility of any assistance<sup>22</sup>.**
- ▶ Another group covered by the ban on movement, albeit to a different extent than minors, were persons over the age of 70 who, under the Regulation of 9 October 2020<sup>23</sup>, were allowed to leave their place of residence solely in order to: perform professional activities, meet the necessary needs of everyday life or participate in religious worship. However, it was decided not to continue the ban in subsequent regulations.

### 4. The introduced restrictions were accompanied by information chaos

- ▶ Although the wording of the restrictions was disclosed at frequent press conferences, regulations were often published at the last moment, entered into force on the day of their publication and were not always consistent with the information provided at a conference or on the government FAQ website.
- ▶ A lack of information coherence was particularly evident in connection with “the New Year’s Eve 2020 curfew”. Although the regulation was published some time in advance

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21 See e.g. para. 18 of the Regulation of 31 March 2020, para. 17 of the Regulation of 10 April 2020.

22 Empowering Children Foundation, *Nowe obostrzenia związane z epidemią uderzają w dzieci!*, <https://fdds.pl/nowe-obostrzenia-zwiazane-z-epidemia-uderzaja-w-dzieci/> (accessed on: 13 January 2021).

23 The Regulation of the Council of Ministers of 9 October 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 1758).



and contained an explicit ban on travelling at certain times, the government explained that it had only been an appeal<sup>24</sup>.

## 5. Disproportionate penalties

- ▶ Under Art. 48a (1) (1) of the Infectious Diseases Act penalties for a failure to comply with the restrictions applicable in the state of pandemic are administered by a state district sanitary officer. Such a penalty is often more severe than a ticket:
  - ▷ it amounts to up to PLN 30,000 and is immediately enforceable;
  - ▷ the punished person cannot refuse to accept it.

## Conclusions

Far-reaching restrictions on movement, which are in force for a significant duration of the state of pandemic, constitute a disproportionate and unconstitutional interference with the rights of individuals, including, in particular, children, the youth and the elderly. Contradictory statements make it difficult for citizens to adapt to restrictions, and excessively severe administrative penalties can lead to additional violations of their rights.

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## Recommendation

- Any restrictions on persons' movement should be introduced within the limits laid down by the statutory delegation, in accordance with the principle of proportionality and in a non-discriminatory manner.

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24 The HFHR's statement, <https://www.hfhr.pl/stanowisko-hfpc-dot-zakazu-przemieszczania-sie-w-noc-sylwestrowa/> (accessed on: 13 January 2021).

**3. Freedom of assembly**



The freedom of assembly is one of the fundamental freedoms in a democratic society that enables individuals to express visible objection to actions taken by public authorities. The pandemic in Poland developed during a special period and coincided with events that aroused great emotions in society – presidential elections, protests in defence of the rights of LGBTQIA persons or “the judgment” of the Constitutional Tribunal on abortion<sup>25</sup>. It was especially the announcement of the CT judgment that excluded the possibility of legally terminating a pregnancy due to embryopathological reasons (severe and irreversible fetal impairment or its incurable life-threatening illness) that resulted in mass protests in defence of women’s rights throughout the country. Despite this:

### **1. The authorities have made far-reaching changes with regard to assemblies:**

- ▶ it was already in the Regulation introducing the state of pandemic emergency that the prohibition of assemblies (of more than 50 persons) was established<sup>26</sup>;
- ▶ the prohibition set out in the Regulation of 10 April 2020 was absolute in its nature<sup>27</sup>;
- ▶ it was later replaced by very far-reaching restrictions – in the Regulation of 21 December 2020, the maximum number of participants in an assembly was reduced to 5 persons<sup>28</sup>.

### **2. These restrictions are, however, unconstitutional, which the HFHR has repeatedly noted in its letters sent to the public authorities<sup>29</sup>:**

- ▶ the delegation of legislative powers under the Infectious Diseases Act does not allow for restricting the freedom of assembly;
- ▶ any restrictions must always have a statutory basis and be proportionate;
- ▶ a total prohibition of assemblies is only possible in the state of emergency or during martial law, which has not yet been introduced.

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25 The HFHR’s statement on the so-called “judgment” of the Constitutional Tribunal of 22 October 2020, <https://www.hfhr.pl/stanowisko-helsinskiej-fundacji-praw-czlowieka-ws-tak-zwanego-orzeczenia-trybunalu-konstytucyjnego/> (accessed on: 14.01.2021).

26 The Regulation of the Minister of Health of 13 March 2020 on the declaration of the state of pandemic emergency in the Republic of Poland (Journal of Laws of 2020, item 433, as amended).

27 The Regulation of the Council of Ministers of 10 April 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 658);

28 The Regulation of the Council of Ministers of 21 December 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws of 2020, item 2316).

29 See, for example, the HFHR’s comments on the draft regulation of 18 April 2020, <https://www.hfhr.pl/wp-content/uploads/2020/04/uwagi-HFPC-rozporzadzenie-do-projektu-rozporzadzenia-RM-z-18.04.20.pdf> (accessed on: 4.01.2021).

### **3. The police invoked the prohibition laid down in the regulation by taking repressive measures against male and female participants of assemblies such as:**

- ▷ informing local sanitary and epidemiological stations of a breach of restrictions, which may have resulted in the imposition of an administrative penalty of several thousand zloty;
- ▷ issuing tickets and filing criminal citations.
- ▶ Such measures were taken, among others:
  - ▷ during the Business Owners' Strike in May 2020, when 220 tickets were handed out and 150 motions to impose a penalty were brought<sup>30</sup>;
  - ▷ during the Women's Strike on 18 November 2020, when 320 motions to impose a penalty were brought and 277 notes of police officers were sent to local sanitary and epidemiological stations<sup>31</sup>;
  - ▷ during the protest on 28 November, when as many as 450 such notes were sent, and 370 motions to impose a penalty were filed<sup>32</sup>.
- ▶ The commencement of criminal proceedings against protesters was also encouraged by the National Prosecutor; he underlined in letters sent to units of the prosecution service that holding protests satisfies the elements of an offence under Article 165 (1) of the Criminal Code (posing a threat to the life and health of many people)<sup>33</sup>.

### **4. At the same time, the risk of punishment was associated not only with organising or participating in demonstrations:**

- ▶ police officers appeared at the home of a 14-year-old boy from Krapkowice, after he had posted information about a protest on his Facebook account<sup>34</sup>;
- ▶ A few days after the strike on 28 October 2020 the Ministry of National Education (MNE) announced that repressive measures would be taken against students and teachers for participating in the Women's Strike and showing gestures of solidarity with its postulates<sup>35</sup> – on the day of strike many students and teachers did not attend classes;

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30 The HFHR's letter on the Business Owners' Strike: <https://www.hfhr.pl/wp-content/uploads/2020/05/KGP.pdf> (accessed on: 4.01.2021).

31 The HFHR's letter regarding the events of 18 November 2020: <https://www.hfhr.pl/wp-content/uploads/2020/11/Interwencja-pl.-Powstancow-i-SO-KGP-3.pdf> (accessed on: 4 January 2021).

32 The HFHR's letter regarding the events of 28 November 2020: [https://www.hfhr.pl/wp-content/uploads/2020/12/2852\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/12/2852_001.pdf) (accessed on: 4 January 2021).

33 See e.g. the statement of the National Prosecutor's Office: <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/oswiadczenie-prokuratury-krajowej-13/> (accessed on: 4.01.2021).

34 The HFHR's letter about a 14-year old boy from Krapkowice: [https://www.hfhr.pl/wp-content/uploads/2020/11/2814\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/11/2814_001.pdf) (accessed on: 4.01.2021).

35 The HFHR's position regarding the MNE's message: [https://www.hfhr.pl/wp-content/uploads/2020/11/Stanowisko-nauczyciele\\_KW\\_PK-1.pdf](https://www.hfhr.pl/wp-content/uploads/2020/11/Stanowisko-nauczyciele_KW_PK-1.pdf) (accessed on: 4.01.2021).

some schools allowed its students and staff to participate in protests during classes, and symbols of the Women's Strike were made visible during online classes in place of visual elements depicted in online teaching materials.

## 5. Many arrests were made during assemblies:

- ▶ according to the SZPIL(A) Collective, **115 people were arrested during the two months of protests following the Constitutional Tribunal's "judgement" on abortion**, 69 of those arrested spent the night at a police station<sup>36</sup>;
- ▶ the Police preventively arrested activists of the Polish National Trade Union "Employee Initiative", who were going to a demonstration in Warsaw<sup>37</sup>;
- ▶ sometimes it did not end with arrest – it also happened that **motions for pre-trial detention were made**<sup>38</sup>.

## 6. Police interventions during assemblies have repeatedly raised doubts regarding the respect for freedom from torture, inhuman and degrading treatment by:

### a) disproportionate and unjustified use of chemical incapacitating agents:

- ▶ **tear gas or pepper sprays should always be used as a last resort. Moreover, the use of irritant chemicals carries an increased risk of developing COVID-19<sup>39</sup>** – hence, they should not, as a rule, be used in the state of coronavirus pandemic;
- ▶ nevertheless, **their use on protesters has become routine**. What is particularly worrying is the practice of using hand-held pepper sprays against:
  - ▷ female parliamentary deputies showing their identity cards to police officers – and applying the same at a very close distance;
  - ▷ persons locked in a "kettle" – surrounded by the Police from all sides, unable to move away or keep distance<sup>40</sup>;

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36 <https://www.facebook.com/kolektywuszpila/posts/113727750571100> (accessed on: 4.01.2021).

37 The HFHR's letter on the arrest of male and female trade union activists: [https://www.hfhr.pl/wp-content/uploads/2020/11/2755\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/11/2755_001.pdf) (accessed on: 4.01.2021).

38 The HFHR has submitted an amicus curiae brief regarding a motion for pre-trial detention of a female participant of a protest who is suspected of physically assaulting a police officer: [https://www.hfhr.pl/wp-content/uploads/2020/11/2799\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/11/2799_001.pdf) (accessed on: 4.01.2021).

39 Omega Research Foundation, *Opinia: Obniżanie ryzyka – ograniczanie wykorzystywania drażniących substancji chemicznych podczas pandemii COVID-19*, [https://www.rpo.gov.pl/sites/default/files/Opinia\\_Omegi\\_polskie\\_tlumaczenie\\_Position\\_Paper\\_Lowering\\_the\\_Risk\\_Nov\\_2020.pdf](https://www.rpo.gov.pl/sites/default/files/Opinia_Omegi_polskie_tlumaczenie_Position_Paper_Lowering_the_Risk_Nov_2020.pdf) (accessed on: 8.01.2021 r.); a similar proposal is expressed by the NMPT in its report: <https://www.rpo.gov.pl/pl/content/Policja-zatrzymania-demonstracje-strajk-kobiet-raport-KMPT> (accessed on: 15.01.2021).

40 The HFHR's interventions regarding the protest of 18 November 2020 – <https://www.hfhr.pl/wp-content/uploads/2020/11/Interwencja-pl.-Powstancow-i-SO-KGP-3.pdf>, the protest of 28 November 2020 – <https://www.hfhr.pl/uzycie-gazu-wobec-poslanki-otoczenie-kordonem-masowe-legitymowanie-kolejna-interwencja-hfpc/> (accessed on: 8.01.2021).

## b) acts of violence against protesters has become routine:

- ▶ during the protest of 18 November 2020, **an unidentified police officer beat up people protesting with a telescopic baton**. The man who suddenly pulled out the baton in the crowd of people gathered did not wear any visible identification. Protesters chanting “where are the police?”, convinced that they had been attacked by a hooligan, sought help from police officers who were passively watching the entire incident<sup>41</sup>;
- ▶ following the protest of 26 October, the National Mechanism for the Prevention of Torture received a complaint from an arrested person who had signs of injury on his body and reported that he had been beaten in a police car by police officers<sup>42</sup>;

## c) abuse of physical power during arrest:

- ▶ arrests were repeatedly made during the protests; witnesses described them often as “brutal”<sup>43</sup>;
  - ▷ during an arrest of a person involved in a spontaneous protest outside a police station, police officers **broke her arm**. Although paramedics were in the vicinity, the arrested woman was not offered adequate medical assistance (ultimately the victim was transported to an A&E department by an MP who had arrived on the scene)<sup>44</sup>.

## 7. The police also interfered with the freedom of assembly in other ways, including primarily:

- ▶ **tightly cordoning off protesters**, while at the same time calling them to disperse (the method known as “kettling”);
- ▶ **mass identity checks** – during the protest of 18 November 2020, 500 people were subject to identity checks, whereas on 28 November as many as 900 people were asked for their identity documents; the police cited the fact that they witnessed a petty offence referred to in Article 141 of the Petty Offences Code (including the use of indecent words) as a reason why identity checks were performed on some of them.

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41 The HFHR’s intervention regarding the protest of 18 November 2020...

42 *Wizytacja KMPT w Komendzie Rejonowej Policji Warszawa I. Przedstawiciele RPO przyjęli zgłoszenie od jednego z zatrzymanych dotyczące tortur*, a press release published on the website of the Commissioner for Human Rights, <https://www.rpo.gov.pl/pl/content/wizytacja-kmpt-ujawnia-tortury-policjantow-wobec-zatrzymanego> (accessed on: 8.01.2021).

43 See in particular item 6.2 of the NMPT’s report: <https://www.rpo.gov.pl/pl/content/Policja-zatrzymywania-demonstracje-strajk-kobiet-raport-KMPT> (accessed on: 15.01.2021).

44 The HFHR’s intervention regarding the protest of 9 December 2020: [https://www.hfhr.pl/wp-content/uploads/2020/12/2973\\_001.pdf](https://www.hfhr.pl/wp-content/uploads/2020/12/2973_001.pdf) (accessed on: 8.01.2021).

## Conclusions

**The freedom of assembly acquires a particular significance when a crisis situation is used to introduce very controversial changes that largely interfere with the fundamental rights of individuals.** When deciding to introduce them, public authorities should take into account the constitutional right to protest – this applies not only to legislative and legislative authorities but also to those who enforce the restrictions (including, above all, the Police). At the same time, the pandemic emergency does not release police officers from the obligation to act in a proportionate manner and respect dignity and human rights in the process, including the freedom from torture and inhuman and degrading treatment. The events of the pandemic clearly show that these obligations are not always respected.

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## Recommendation

- Public authorities must ensure that freedom of assembly may be safely exercised and respected, also in the state of pandemic or pandemic emergency; they should pay more attention to the obligation to respect the principle of subsidiarity when applying direct coercive measures as well as refrain from the use of chemical incapacitating agents in the state of pandemic.

#### **4. The right to a court and a fair trial**





**A**round 15 million cases are registered annually in Polish courts<sup>45</sup>. These data prove that for many Polish citizens it is a matter of great importance to assess the manner in which rights to a court and fair trial are enforced in recent months, where Poland and the world have been dealing with the coronavirus pandemic. The importance of this issue is even greater due to the fact that courts (common and administrative ones) constitute a special mechanism for monitoring the actions of public authorities and the restrictions they impose during the pandemic.

The starting point for the conducted analyses must be national and international regulations, according to which everyone has the right to access to a court and fair trial before an independent and impartial court established by law. According to these standards, proceedings must be conducted within a reasonable time and provide basic guarantees (including the principle of equality of arms, right to information, right to the assistance of a lawyer, right to the assistance of an interpreter).

## **Justice system before the pandemic**

The pandemic has caused many restrictions and changes in the functioning of the justice system. Certainly, some of them were and are inevitable for the protection of the life and health of the parties, judges, court employees and the public. However, the pandemic has also highlighted and exacerbated many of the problems faced by the Polish judiciary for many years.

The following issues have come to the fore:

- ▶ **the justice system is not computerised<sup>46</sup>;**
- ▶ **there are staff shortages (in particular of judicial clerks);**

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45 Data from the Government's position presented to the Committee of Ministers of the Council of Europe on the issue of the implementation of the ECtHR's judgment in the case *Rutkowski and Others v. Poland*, available at: [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2020\)359E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2020)359E%22%5D%7D), (accessed on: 28.12.2020).

46 See: The statement of the Justice Defence Committee of 12 November 2020, available at: <https://komitetobronysprawiedliwosci.pl/opinia-kos-ws-pogarszajacej-sie-sytuacji-w-wymiarze-sprawiedliwosci-spowodowana-pandemia-wirusa-sars-cov-2/> (accessed on: 28.12.2020); An INPRIS analysis, *Działanie sprawiedliwości w pierwszych tygodniach pandemii czyli od kwarantanny i prowizorki do bezpiecznego, cyfrowego sądownictwa*, available at: [http://www.inpris.pl/fileadmin/user\\_upload/documents/VARIA/INPRIS\\_31\\_mar\\_2020\\_wymiar\\_sprawiedliwosci.pdf](http://www.inpris.pl/fileadmin/user_upload/documents/VARIA/INPRIS_31_mar_2020_wymiar_sprawiedliwosci.pdf) (accessed on: 6.01.2021).

- ▶ **proceedings are protracted<sup>47</sup>;**
- ▶ **there are difficulties with planning the course of proceedings;**
- ▶ **information policy of courts is unclear;**
- ▶ **there is no interdisciplinary and intersectoral discussion about the problems of the justice system and necessary reforms.**

## **Diagnosis of the justice system in the times of a pandemic**

These problems and circumstances have influenced the pace of adaptation of courts and judges to the new demanding conditions in which they must operate. They were not sufficiently addressed by the legislative changes introduced in the Courts Act and procedural laws (in particular the Code of Criminal Procedure and the Code of Civil Procedure).

In consequence, the following problems have been observed over the last 10 months.

### **1. Cancelled hearings and sessions, which will undoubtedly result in an extension of the duration of court proceedings in the long term**

- ▶ According to surveys conducted by the HFHR in ten regional courts, the number of hearings/sittings in March 2020 was already significantly lower as compared to March 2019. For example, in the Regional Court in Warsaw 1,160 hearings/sittings were held in March 2020 as compared to 2,863, i.e. more than twice as many, in March 2019. The situation was similar in the Regional Court in Poznań: in March 2020, 824 hearings/sittings in civil cases were conducted there, whereas a year earlier the figure was 2,057.
- ▶ The largest drops in the number of hearings and sittings were recorded in April and May 2020. In April 2020, the Regional Court in Warsaw conducted only 7 hearings/sittings in civil cases as compared to 2,889 (i.e. 412 times more) held in April 2019. Likewise, in the Regional Court in Poznań, there were only 32 hearings/sessions in civil cases in April 2020, while the figure for the Regional Court in Wrocław was 55. In many courts, no cases related to labour and social insurance law or commercial law were heard.
- ▶ Taking all courts combined most hearings/sittings were held in criminal cases, which is undoubtedly primarily related to the fact that many types of criminal cases were included in a “list of urgent matters”<sup>48</sup>. For instance, in the Regional Court in Wrocław there were 810 hearings/sittings in criminal cases in March 2020, 485 in April 2020 and

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47 See: the HFHR’s report, *W poszukiwaniu rozsądnego czasu postępowania sądowych* (In search of reasonable time... of court proceedings), <https://www.hfhr.pl/wp-content/uploads/2020/07/Raport-przewle-k%C5%82o%C5%9B%C4%87-1.pdf> (accessed on: 28.12.2020).

48 These included sittings in the matter of pre-trial detention, protective measures, the European Arrest Warrant or parental authority. A list of urgent matters was referred to in Article 14a of the Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies (Journal of Laws of 2020, item 374, as amended).

710 in May 2020. In 2019, the court held about 1200-1300 hearings/sittings per month. It is worth noting that the Regional Court in Rzeszów recorded more sittings in March, April and June 2020 than in the same months in 2019 (in March 2020 there were 507 sittings as compared 454 in March 2019; in April 2020 the figure was 586 against 513 in April 2019; in June 2020 647 sittings took place against 592 in June 2019)<sup>49</sup>.

- ▶ It is noteworthy that sometimes the work at the courts was temporarily suspended due to a quarantine. This was the situation at the Regional Courts in Janów Lubelski<sup>50</sup>, Biłgoraj<sup>51</sup> or Katowice<sup>52</sup>.

## **2. Difficulties in lodging pleadings (this was particularly evident in the first period of the pandemic, in which courts specified different rules for lodging pleadings at registry offices or allowed for the possibility of sending e-mail correspondence but at the same time restrictions on the operation of post offices were imposed)**

- ▶ During the first wave of pandemic various solutions were adopted in courts: from the possibility of submitting pleadings directly at registry offices, through depositing them in specially prepared containers (including envelopes handed out by security staff), to sending them by e-mail<sup>53</sup> or through the agency of another registry office located in the same judicial circuit; finally, some courts only allowed for pleadings to be sent by postal service<sup>54</sup>.

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49 Extracts from the HFHR's report *Sądowy kalendarz w dobie lockdownu (Judicial timetables in the lockdown era)*, <https://www.hfhr.pl/wp-content/uploads/2020/10/covid-s%C4%85dy-cz-3-08-10-2020-v2.pdf> (accessed on: 28.12.2020).

50 <https://www.prawo.pl/prawnicy-sady/sad-zawiesil-dzialalnosc-z-powodu-koronawirusa,498526.html> (accessed on: 10.01.2021).

51 <https://www.prawo.pl/prawnicy-sady/sad-rejonowy-w-bilgoraju-objety-kwarantanna-powod-koronawirus,498654.html> (accessed on: 10.01.2021).

52 <https://www.gov.pl/web/sprawiedliwosc/zamkniety-budynek-sadu-rejonowego-w-katowicach> (accessed on: 15.01.2021).

53 See: The Regulation of 20 March 2020, No. 94/2020, <https://bip.warszawa.so.gov.pl/artukul/113/5424/komunikat-w-sprawie-przesylania-do-sadu-okregowego-w-warszawie-tresci-srodkow-zaskarzenia-oraz-wnioskow-o-sporzadzenie-uzasadnienia-orzeczenia-lub-zarzadzenia-za-pomoca-poczty-elektronicznej> (accessed on: 10.01.2021).

54 For more information on this issue, see the HFHR's Reports: *Dostęp do sądu w dobie pandemii...*, Part 1: <https://www.hfhr.pl/wp-content/uploads/2020/04/Dost%C4%99p-do-s%C4%85du-w-dobie-pandemii-16-04.pdf>, Part 2: <https://www.hfhr.pl/wp-content/uploads/2020/04/Dostep-do-sadu-w-dobie-pandemii2-FIN.pdf> (accessed on: 29.12.2020). See also the CHR's General statement to the Minister of Justice of 8 June 2020, available at: <https://www.rpo.gov.pl/sites/default/files/WG%20do%20MS%20w%20sprawie%20konieczno%C5%9Bci%20elektronizacji%20s%C4%85downictwa%2C%208.06.2020.pdf> (accessed on: 29.12.2020).

### **3. A lack of uniform information on how to contact courts during the pandemic, which undoubtedly hampered citizens' access to courts**

- ▶ The survey carried out by the HFPC in April 2020 showed that courts reported in different ways on changes in the way pleadings were filed in connection with the pandemic: on websites of some courts, such information was available immediately after entering in the form of a pop-up window, on other court websites it was posted in the News section. Unfortunately, there were also courts that did not post such information on their websites, which was a great inconvenience for the parties to proceedings and their counsel<sup>55</sup>.

### **4. Restricting the public openness of court proceedings (both in common and administrative courts), which made public oversight of the judiciary impossible or difficult**

- ▶ The analyses carried out by the HFHR in July 2020 revealed that almost all of the 369 courts in Poland restricted public access to open court proceedings.
- ▶ More than half of the courts, 202 to be exact, which amount to 54.7%, allow the public to attend hearings and sittings. However, a significant number of them introduced the requirement of prior notification in order to obtain an entry card or permission of an authorised person (usually the president or manager of a court or the head of a relevant division).
- ▶ The total exclusion of the public from hearings and court sessions was introduced in 24 courts (6.5%). 119 courts (32.3%) did not explicitly prohibit the participation of third parties in sessions and hearings, but the public was not included in the list of persons authorized to enter the building. In 24 courts (6.5%) no information was provided on the possibility of public access to hearings and sessions<sup>56</sup>.

### **5. Promoting the use of paper hearings by administrative courts**

- ▶ NGOs and professional associations have noticed that neither the Provincial Administrative Court in Warsaw nor the Supreme Administrative Court made use of the

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55 For more information on this issue, see the HFHR's Reports: *Dostęp do sądu w dobie pandemii...*, Part 1: <https://www.hfhr.pl/wp-content/uploads/2020/04/Dost%C4%99p-do-s%C4%85du-w-dobie-pandemii-16-04.pdf>, Part 2: <https://www.hfhr.pl/wp-content/uploads/2020/04/Dostep-do-sadu-w-dobie-pandemii2-FIN.pdf> (accessed on: 29.12.2020).

56 See: the HFHR's publication, *Ograniczenie udziału publiczności i mediów w rozprawach i posiedzeniach sądowych (Restrictions on public and media access to court hearings and sessions)* (as of July 2020) [https://www.hfhr.pl/wp-content/uploads/2020/07/Tabela\\_dostepnosc\\_sadow\\_dla\\_publicznosci-1.pdf](https://www.hfhr.pl/wp-content/uploads/2020/07/Tabela_dostepnosc_sadow_dla_publicznosci-1.pdf) (accessed on: 29.12.2020). Cf. The Court Watch Poland Foundation's report on monitoring compliance with the principle of openness, available at: <https://courtwatch.pl/wp-content/uploads/2020/06/FCWP-Monitoring-jawno%C5%9B-ci-2020-06-25.pdf> (accessed on: 29.12.2020).

possibility of holding remote hearings and all cases are referred to be resolved through paper hearings regardless of the consent of the parties.

- ▶ This is also the case in matters relating to fundamental human rights and matters to which vulnerable persons are parties.
- ▶ Courts argue that they do not have the technical capability to hold hearings remotely<sup>57</sup>.

## **6. Difficulties in accessing case files (by both the parties and their counsel)<sup>58</sup>**

- ▶ Courts introduced a requirement of ordering case files in advance (lasting even a few days)<sup>59</sup>.
- ▶ Courts' reading room opening hours were limited<sup>60</sup>.
- ▶ In the face of the pandemic and sanitary requirements, some courts set time limits for reading files (there were even reports of a 15-minute limitation, which was supposed to apply regardless of the volume of the file)<sup>61</sup>.

## **Conclusions**

The effects of these phenomena will undoubtedly be felt in the coming months and even years at the general (systemic) level, but most importantly at an individual level, i.e. in specific matters that concern the rights and freedoms of particular persons.

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57 See: the NGOs' position of December 2020 available at: [https://interwencjaprawna.pl/wp-content/uploads/2020/12/wystapienie\\_NSA\\_14.12.2020.pdf](https://interwencjaprawna.pl/wp-content/uploads/2020/12/wystapienie_NSA_14.12.2020.pdf) (accessed on: 29.12.2020). Cf. The response of the President of the PAC in Warsaw to the statement of the President of the Regional Bar Council (RBC) in Warsaw, <https://informator.ora-warszawa.com.pl/2020/pismo-prezesa-wojewodzkiego-sadu-administracyjnego-w-w-warszawie/> (accessed on: 29.12.2020); The response of the President of the SAC to the statement of NGOs (accessed on: 12.01.2020).

58 See: the NGOs' position of December 2020 available at: [https://interwencjaprawna.pl/wp-content/uploads/2020/12/wystapienie\\_NSA\\_14.12.2020.pdf](https://interwencjaprawna.pl/wp-content/uploads/2020/12/wystapienie_NSA_14.12.2020.pdf) (accessed on: 29.12.2020). Cf. The response of the President of the PAC in Warsaw to the statement of the President of the Regional Bar Council in Warsaw, <https://informator.ora-warszawa.com.pl/2020/pismo-prezesa-wojewodzkiego-sadu-administracyjnego-w-w-warszawie/> (accessed on: 29.12.2020).

59 Information about the statement of the Commissioner for Human Rights, <https://www.rpo.gov.pl/pl/content/interwencja-rpo-dlugi-termin-na-poznanie-akt-sprawy-w-sadzie> (accessed on: 12.01.2020).

60 See: The resolution of the RBC in Katowice, <http://adwokatura.katowice.pl/sprawozdanie-ogolne-sekretarza-okregowej-rady-adwokackiej-w-katowicach-z-posiedzenia-ora-w-katowicach-z-dnia-16-stycznia-2020-roku/>, (accessed on: 12.01.2020).

61 See: <https://www.prawo.pl/prawnicy-sady/15-minut-na-przejrzanie-akt-rpo-interweniuje-do-sadu-okregowego,502686.html> (accessed on: 12.01.2020).

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## Recommendation

It must also not be forgotten that, unfortunately, the pandemic is still a developing story, which is why **it is necessary to take further action related primarily to the digitisation of the judiciary, and in particular:**

- **Promote the use of remote hearings and sessions:**
  - ▷ in a manner which preserves the procedural guarantees of the parties to the proceedings (in particular access to the assistance of a defence lawyer and confidentiality of such contact, as well as the protection of victims' rights);
  - ▷ in consideration of the level of digital exclusion of a part of the society<sup>62</sup>;
  - ▷ having first consulted the parties (in particular in criminal cases);
  - ▷ excluding from this category the sessions which require personal contact between the court and a party to the proceedings, in particular those relating to pre-trial<sup>63</sup> detention or matters relating to broadly defined personal liberty.

According to the data obtained by the HFHR, courts are already resorting to this form of court sittings. They use various applications when hearing cases remotely. The most popular ones are Avaya Scopia, Microsoft Teams, Jitsi Meet, Cisco Webex.

Most remote sittings are held by penitentiary divisions. By way of example, in the period between 1 March and 17 December 2020, the Regional Court in Bielsko-Biała conducted 534 cases in the form of videoconferencing, nearly 93% of which constituted cases heard by the Penitentiary Division, in the Regional Court in Lublin the figure was 1404 hearings/sittings (85.5% in the Penitentiary Department)<sup>64</sup> and in the Penitentiary Department of the Regional Court in Siedlce 615 sittings were held by means of a remote connection<sup>65</sup>. In the Regional Court in Suwałki, this option was used only in

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62 According to Eurostat surveys carried out in 2019, as many as 53 per cent of people between 65 and 74 years of age in Poland have never had contact with the Internet, which gives one of the worst results in the European Union.

63 Cf.: Art. 250 (3a – 3b) CCP. See: the judgment of the Supreme Court in Norway of 8 May 2020, case no. HR-2020-972-U.

64 A response of the President of the Regional Court in Lublin of 21 December 2020, no. 095-340/20.

65 A response of the President of the Regional Court in Siedlce of 18 December 2020, ref. A. 0151-126/20.

39 cases (all of them were criminal cases and as many as 37 were heard in April).

One could also venture to say that the remote form is growing in popularity over time. An example here is the Regional Court for Warszawa Śródmieście, in which 52 sittings/hearings (92.3% of which were civil cases) were held remotely in December, while in the period from March to August no hearings were held through ICT means<sup>66</sup>.

However, there are courts that have not used this possibility so far, e.g. the Regional Court for Warszawa Praga-Południe<sup>67</sup>.

According to the data obtained by the HFHR, parties do not complain about court sittings being conducted remotely and technical problems are isolated incidents.

- ensuring public openness of remote hearings and hearings conducted with increased sanitary measures in place;

Courts' replies sent to the HFHR at the end of December 2020<sup>68</sup> show that remote hearings generally do not involve the public<sup>69</sup>. Court presidents mostly stated that such requests [to allow the public access to court proceedings] had not been received. Despite this, some courts explicitly noted that this was technically possible<sup>70</sup>. Some court presidents argued that the question of participation of the public in sittings conducted remotely is not statutorily regulated; some presidents, however, cited internal regulations governing the participation of the public in hearings in the period of the pandemic<sup>71</sup>. In their replies, court presidents also indicated that the participation of the public in the remote system is prevented by the fact no

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66 A response of the President of the Regional Court for Warszawa Śródmieście of 21 December 2020, no. 0143 – 269/20.

67 A Response of the President of the Regional Court for Warszawa Śródmieście of 17 December 2020, Adm. 0143 – 124/20.

68 Data compiled on the basis of responses to public information requests submitted by the HFHR to appeal, regional and selected district courts on 30 November 2020.

69 In the Regional Court in Olsztyn one of the remote sittings was attended by one person only (a Response of the President of the Regional Court in Olsztyn of 21 December 2020, Adm. – 063- 203/20). As stated in a response of the President of the Court of Appeal in Gdańsk the public attended 2 remote hearings conducted by this Court (the Response of 18 December 2020, Adm. 105 – 281/2020).

70 A Response of the President of the Regional Court in Ostrołęka of 15 December 2020, Adm. 424-127/20.

71 A response of the President of the Regional Court in Siedlce of 18 December 2020, ref. A. 0151-126/20.

information about remote trials is made available to a wider public (apart from the parties to the proceedings and persons summoned for a specific hearing).

Some courts stated that remote participation of the public was theoretically possible, but it was subject to prior notification of such intention and a relevant court decision<sup>72</sup>. Some courts explicitly indicated that such participation is not possible<sup>73</sup> or not provided for<sup>74</sup>. It was also argued in responses that connecting another person reduces the quality of the connection. Some courts pointed out that it was possible for the public to participate in a hearing conducted remotely by being present on the court's premises in accordance with the general principles<sup>75</sup>. There were also courts that mentioned both options for the public to participate in a hearing conducted remotely (by being present on the court's premises as well as connecting via a link)<sup>76</sup>.

- making it possible to file and receive pleadings electronically<sup>77</sup>;
- digitisation of case files and enabling parties and legal representatives to review them through electronic communication systems;
- creating an interdisciplinary team on computerisation and modernisation of the judiciary, comprising representatives of courts, judicial associations, the Bar, legal counsellors, court staff, NGOs, legal and technological scholars and technology, prosecutors;
- designing and implementing a social information campaign on access to the justice system through the use of remote forms of communication (adapted to different age and social groups).

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72 E.g. A Response of the President of the District Court for Warszawa-Śródmieście of 21 December 2020, Adm. 0143 – 269/20, A Response of the President of the Regional Court in Lublin of 21 December 2020, Adm. 095- 340/20, A Response of the President of the Regional Court in Białystok of 21 December 2020, Adm. 061- 137/20.

73 E.g. A Response of the Regional Court in Bielsko-Biała of 23 December 2020, Adm. 0191-153-20, A response of the President of the District Court for Warszawa-Mokotów of 17 December 2020, Adm. 0143 – 277/20, A Response of the President of the Regional Court in Opole of 21 December 2020, Adm. A061- 208/20, A Response of the President of the Regional Court in Świdnica of 22 December 2020, Adm. A061-187/20.

74 A Response of the President of the Regional Court in Zamość of 11 December 2020, Adm. 061-131/20.

75 A Response of the District Court for Warszawa Wola of 21 December 2020, Adm. 0143-199/20, A Response of the President of the Regional Court in Suwałki of 15 December 2020, RW-060-104/20.

76 A Response of the President of the Regional Court in Łódź of 17 December 2020, AXX-026-375-20.

77 See: the Electronic Service [of Documents] Act of 18 November 2020, Journal of Laws of 2020, item 2320.



In conclusion, both the recent and coming months are undoubtedly a major challenge for all individuals and entities involved in the functioning of the justice system. They also forced all of us to speed up discussions on changes in the daily work of courts. However, it should be borne in mind that this discussion must always be accompanied by the concern to preserve the fundamental guarantees of the right to a fair trial, so that the e-Court is a better, fairer and faster court, but still the court.

## **5. Right to family life**



The main recommendation of the authorities for the duration of the pandemic has been to maintain social distance and reduce person-to-person contacts. This recommendation, or even an order, justified on medical grounds, has had an impact on the enjoyment of the right to protection of family and private life, which is guaranteed, among others, by Article 8 of the European Convention on Human Rights and Article 47 of the Constitution of the Republic of Poland.

There are groups of people who have been particularly affected by these restrictions, such as residents of nursing homes and hospital patients. They have experienced significant interference with their right to protection of family life.

## **Restrictions on contact with the outside world in nursing homes**

A community particularly affected by the pandemic and the restrictions introduced for its duration were residents of nursing homes, of which there are about 80,000 throughout Poland. They were almost cut off from the outside world.

The period of pandemic also highlighted previous neglect regarding support and care provided to persons with disabilities, and specifically:

- ▶ basing the system on institutionalised forms of assistance and large care facilities;
- ▶ long-term neglect in the provision of an adequate level of care and nursing staffing in nursing homes.

### **1. In recent months there have been radical changes in the way nursing homes operate**

- ▶ visitation bans were introduced and residents were forbidden to leave the premises. Alternatively, communication with family and loved ones was supposed to take place via telephone or instant messaging, but this was not always possible;
- ▶ various forms of spending time together and group activities were reduced to a minimum, residents of nursing homes were no longer allowed to eat together and contacts between them were also restricted<sup>78</sup>.

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78 To find out more go to: the Report entitled *Domy pomocy społecznej w dobie pandemii. Doświadczenia, potrzeby wyzwania* (Nursing homes in the era of a pandemic. Experiences, needs and challenges), <https://www.hfhr.pl/wp-content/uploads/2020/11/Domy-pomocy-spoecznej-w-dobie-pandemii-19-11.pdf> (accessed on: 13.01.2021).

## 2. The restrictions undoubtedly negatively affected residents of nursing homes:

- ▶ their well-being and health deteriorated;
- ▶ they could not keep in touch with their loved ones;
- ▶ additionally, residents were distressed by the length of the restrictions.

## Changes in hospital admission policies

At the time of the pandemic, hospitals introduced numerous visiting restrictions, including limiting the possibility of the presence of a companion during family births<sup>79</sup>.

### 1. Such restrictions (although varied) have also been introduced in paediatric and neonatal wards:

- ▶ minor patients have the statutory right to be accompanied by a parent/carer in the hospital;
- ▶ this right was not respected by some hospitals which completely prohibited parents or carers from visiting or staying with hospitalised children<sup>80</sup>;
- ▶ the described restrictions were met with an objection from such persons and organisations as the Commissioner for Human Rights<sup>81</sup>, non-governmental organisations, including the Helsinki Foundation<sup>82</sup> for Human Rights and the Empowering Children Foundation<sup>83</sup> and parents and carers of patients.

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79 See: interventions of the Commissioner for Human Rights, <https://www.rpo.gov.pl/pl/content/koronawirus-ponowna-interwencja-rpo-do-mz-nfz-ws-porodow-rodzinnych> (dostęp: 25.01.2021 r.) and the Childbirth with Dignity Foundation, <https://www.rodzicpoludzku.pl/covid.html> (accessed on: 25.01.2021).

80 <https://tvn24.pl/pomorze/koronawirus-w-polsce-bydgoszcz-po-interwencji-rzecznika-praw-dziecka-rodzice-moga-zostac-z-dziecmi-w-szpitalu-4515111>; Information posted on the websites: St. Ludwig Children's Hospital in Kraków, <https://www.dzieciecyszpital.pl/pl/zmiana-organizacji-udzielania-swadczen-zdrowotnych>; John Paul II Paediatrics Centre in Sosnowiec, <https://www.centrum-pediatrici.com.pl/>, including the information regarding the Department of Psychiatry and Psychotherapy of Developmental Age, John Paul II Paediatrics Centre in Sosnowiec, <https://www.centrum-pediatrici.com.pl/pub/files/Informacja-dla-rodzicw-Psychiatria.pdf>; Jan Bogdanowicz Children's Hospital in Warsaw, <http://www.nieklanska.pl/>; the information posted on the website of the Polish Mother's Memorial Hospital- Research Institute about the suspension of visits in the Department of Neonatology and Department of Intensive Care and Congenital Malformations of newborns and infants, <https://www.iczmp.edu.pl/?p=63136> (all websites were accessed on: 1.04.2020).

81 See: <https://www.rpo.gov.pl/pl/content/rpo-rodzic-ma-prawo-byc-z-dzieckiem-w-szpitalu-i-podczas-epidemii> (accessed on: 13.01.2021).

82 A letter from the HFHR addressed to the Minister of Health and the Minister's reply available at: <http://www.hfhr.pl/hfpc-zwraca-sie-z-pytaniem-do-ministra-zdrowia-w-sprawie-obmedzenen-odwiedzin-w-szpitalach-pediatrycznych-i-na-oddzialach-dziecieczych/> accessed on: 13.01.2021).

83 See: <https://fdds.pl/apel-do-ministra-zdrowia-w-sprawie-zapewnienia-dzieciom-opieki-rodzicow-podczas-pobytu-szpitalu-takze-w-stanie-epidemii/> (accessed on: 13.01.2021).

## 2. As a result, recommendations were developed to remedy this situation:

- ▶ The National Consultant in the field of Paediatrics and National Consultant in the field of Infectious Diseases have drawn up guidelines on the hospital stay of children during the pandemic, which highlighted the right of minor patients to the presence and care of their parents/carers<sup>84</sup>;
- ▶ However, it is the management of a given institution that makes a final decision on the restrictions to be imposed;
- ▶ It is important that decisions taken by hospitals take account of the individual situation of the child, his or her age and the state of emotional development and guarantee, as far as possible, that the child has contact with his or her parents or guardians while respecting the principles of health safety.

## Conclusions

- ▶ The changes in the operation of nursing homes constituted a serious interference with the rights and freedoms of their residents;
- ▶ The support provided by public authorities to nursing homes was insufficient;
- ▶ Hospitals took insufficient account of the individual situation and well-being of children when they decided to exclude visits or prevented parents/carers from staying with children in paediatric and neonatal wards.

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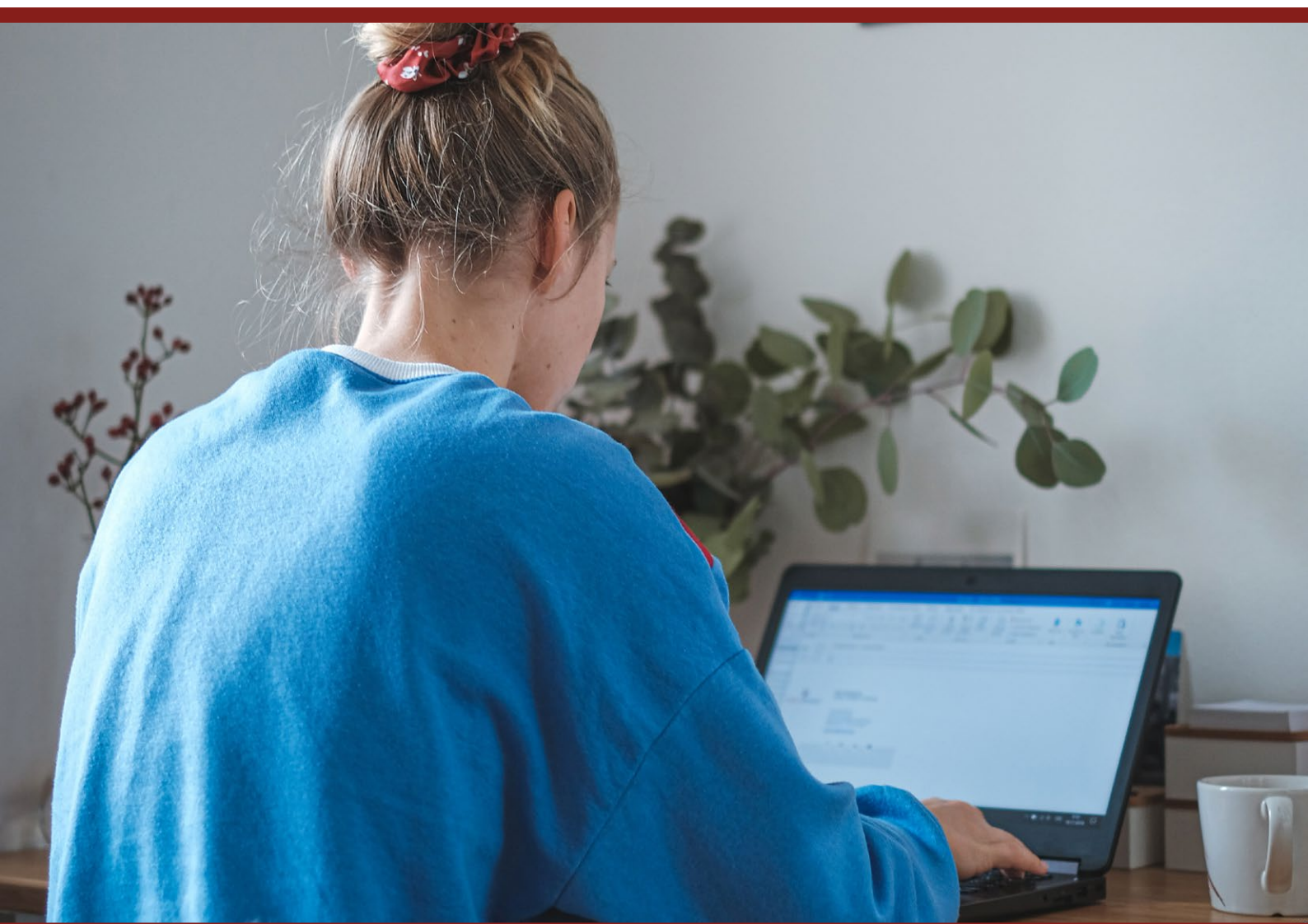
## Recommendation

- Nursing homes should receive more support for in tackling the effects of the pandemic; however, the long-term goal should be to deinstitutionalise forms of care and support.

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84 The guidelines are available at: <https://www.hfhr.pl/wp-content/uploads/2020/04/Procedura-postepowania-z-dzieckiem-w-SOR-IPP-oddziale-pediatrycznym-003.pdf> (accessed on: 13.01.2021).

## 6. Right to education



The Constitution of the Republic of Poland guarantees universal and equal access to education provided in public schools without payment. This right is not only one of the fundamental rights of the individual, a special privilege of the contemporary human being, but also a prerequisite for social development. It is the responsibility of the state to eliminate differences in access to education which are not based on pupils' qualifications or skills. This obligation must not be limited to eliminating legal disparities, but must also have a practical dimension, especially in the case of material inequalities. In the 2019/2020 school year, there were **14,396** primary schools and **6,551** secondary schools for children in Poland<sup>85</sup>. A total of **4,891,056** students attended Polish schools<sup>86</sup>, of which **over 3 million** were primary schools' pupils. These figures show that the exercise of the right to education in recent months is extremely important for a large part of our society (children, but also their parents and carers).

A key change in access to education caused by the coronavirus pandemic was **the continuation of the education process using distance learning methods and techniques**<sup>87</sup>. The said change has brought the following issues to the fore<sup>88</sup>:

### **1. The lack of adequate preparation of teachers to conduct classes remotely due to a lack of previous training and equipment**<sup>89</sup>

- ▶ In the initial phase of the pandemic, the main problem in this area was that teachers were not sufficiently equipped with computer equipment to enable them to teach remotely. This was partially mitigated by allowing teachers to conduct lessons remotely from school buildings. However, this solution raises some epidemiological concerns. In addition, there are practical problems related to the simultaneous participation of

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85 Data available at: <https://stat.gov.pl/obszary-tematyczne/edukacja/edukacja/oswiata-i-wychowanie-w-roku-szkolnym-20192020,1,15.html> (accessed on: 9.01.2021).

86 *Ibid.*

87 Originally, the work of schools with the use of distance learning methods and techniques was laid down in the MNE's Regulation of 20 March 2020 (Journal of Laws, item 493). The current restrictions on classroom learning in connection with the COVID-19 pandemic began on 9 November 2020.

88 Already in March 2020 the Helsinki Foundation for Human Rights informed the Ministry of National Education about its concerns that conducting remote learning in its current form raises serious doubts from the point of view of equal treatment – it may lead to the creation of a system discriminating against some pupils on the basis of their economic situation. The MNE's response is available at: <https://www.hfhr.pl/wp-content/uploads/2020/04/Do-Helsi%C5%84skiej-Fundacji-Praw-Cz%C5%82owieka.pdf>; in response to subsequent requests the MNE also provided the Foundation with an extensive response concerning the measures taken by the Ministry in the above-mentioned respect from 1 May 2020.

89 See e.g.: <https://wiadomosci.onet.pl/kraj/koronawirus-nauczanie-zdalne-nauczyciele-od-marca-nic-sie-nie-zmieniło/zq6rxgb> (accessed on: 9.01.2021).

some students in this form of classes also from the school building (described in more detail below).

- ▶ In many places, there is still no adequate Internet access, which makes it impossible for teachers to properly conduct distance learning.
- ▶ A serious problem is also a lack of adequate training of teachers to conduct lessons remotely using modern educational and communication platforms in a way that encourages and attracts students. As a result of inconsistencies in the training of teachers, there is a high variation in the quality of conducted classes.

## **2. The phenomenon of digital exclusion of students, which significantly influenced the quality of access to education, and in extreme cases even led to a complete loss of contact between schools and some pupils<sup>90</sup>**

- ▶ The Municipal Office of the Capital City of Warsaw informed about the loss of contact with **209**<sup>91</sup> students after switching to distance learning mode. However, according to a recent study by the Centrum Cyfrowe [Digital Centre], **48%** of the surveyed teachers indicated that at least one of their students was not participating in remote education<sup>92</sup>. The Education Authority in Lublin reported, in turn, that in primary schools in Lublin **1,992** pupils<sup>93</sup> participated in remote classes (or educational classes) in the school building (this possibility exists on request if a pupil cannot participate in distance classes from their own home)<sup>94</sup>. The Education Authority in the Mazowieckie Province informs that according to a survey completed by approximately 70% of the headmasters of schools in Mazowsze the number of such students is **9,779** (of whom 6,381 are students with disabilities)<sup>95</sup>. In the Warmińsko-Mazurskie Province, their number is 2,110 in primary schools alone<sup>96</sup>. Moreover, this situation is in some contradiction with the basic objective of introducing remote learning during the pandemic.
- ▶ The figures cited above show that the measures taken by the Ministry of National Education to eliminate material inequalities, such as the purchase of 60,000 tablets for students, prove to be insufficient. There are still cases of digital exclusion. Although

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90 See e.g.: <https://wiadomosci.wp.pl/edukacja-zdalna-znikajacy-uczniowie-nierownosci-brak-dostepu-do-lekcji-alarm-organizacji-pozarzadowych-6588287674604352a>; <https://www.pap.pl/centrum-prasowe/642341%2C-milion-dzieci-walczy-z-wykluczeniem-cyfrowym-dla-nich-juz-od-14-maja-gra> (accessed on: 9.01.2021).

91 As of 5.01.2021.

92 <https://wiadomosci.gazeta.pl/wiadomosci/7,114883,26627360,edukacja-zdalna-organizacje-spoeczne-alar-muja-uczniowie-znikaja.html> (accessed on: 9.01.2021).

93 As of 17.11.2020.

94 Currently, the Foundation is still waiting for a full set of data owned by selected municipal offices and education authorities, which makes it impossible to make a full diagnosis of the problem at this moment.

95 For the period 7.12–10.12.2020.

96 As of 17.11.2020.



recently there have been no more reports of students participating in classes solely on a paper basis through postal services (frequent in the first phase of the pandemic), there are still many students who do not have a device or the Internet connection enabling them to participate in remote classes. The phenomenon of “disappearing students” (especially among children from dysfunctional families) is still observed.

### **3. Lack of adaptation of educational materials to the needs of students with migration experience**

- ▶ Due to the pandemic, students with migration experience are deprived of the possibility of effectively taking advantage of education provided in Polish schools. This is caused primarily by a lack of educational materials adapted to their needs, consistent with the current core curriculum, and at the same time adequate to the conditions of distance learning<sup>97</sup>.

## **Conclusions**

The practical measures taken by the Ministry of National Education in connection with the education process being implemented with the use of distance learning methods and techniques, although visible, still prove to be insufficient. The most affected are economically disadvantaged groups, such as families with many children or inhabitants of smaller towns, where a lack of access to computer equipment (or its insufficient number) or a lack of adequate Internet connection significantly impedes the exercise of the constitutional right to education. In extreme cases, this even results in the “disappearance” of students – in this event one could potentially argue that universal access to education is no longer guaranteed.

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## **Recommendation**

- ➔ Public administration should be address certain practical problems in a more active fashion, (i) in particular by taking action to the eliminate inequalities related to the material status of students that restrict or prevent the exercise of their right to education to avoid infringements of the constitutional principles of equality and even the universality

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97 An open letter to Minister of National Education Dariusz Piontkowski: <http://migrant.poznan.pl/pl/aktualnosci/list-otwarty-do-ministerstwa-edukacji-narodowej-podpisz-sie/> (accessed on: 15.01.2021); The MNE's response: [https://drive.google.com/file/d/1F0DhC69bojc\\_u\\_kv9Jv8EaB42J95w0X0/view](https://drive.google.com/file/d/1F0DhC69bojc_u_kv9Jv8EaB42J95w0X0/view) accessed on: 15.01.2021); The statement regarding the MNE's response: <http://migrant.poznan.pl/pl/aktualnosci/ministerstwo-edukacji-narodowej-odpowiedzialo-na-nasz-list/> (accessed on: 15.01.2021).

of this right; (ii) responsible local government authorities should become more involved in detecting and combating the phenomenon of “disappearing” students as well as in identifying the causes of this worrying situation (in particular, school superintendents should be more involved in this area).

## 7. Freedom of speech



The freedom of speech is guaranteed by national acts, with the Constitution of the Republic of Poland as a primary one, as well as international instruments, including the European Convention on Human Rights. The dual nature of the freedom of speech is manifested in the fact that, on an individual level, it is aimed at intellectual improvement of the individual, while on a collective level, it is a necessary condition for the functioning of democracy. The freedom of speech in the constitutional sense consists of three different freedoms: freedom of expression, freedom to obtain information and freedom to disseminate information.

**The epidemiological situation cannot serve as a pretext for restrictions on civil rights and freedoms. Unfortunately, for the last 10 months, we have been able to observe various types of actions in Poland that threatened the broadly defined freedom of speech.**

### **1. Insufficient protection of whistleblowers**

- ▶ In connection with the COVID-19 pandemic, from March 2020, hospital directors (in respect of doctors) and the Ministry of Health (in respect of provincial medical consultants) introduced **a ban on reporting about the situation in the health care sector** (by contacting media sources/through social media).
- ▶ Such provisions should be regarded as “prior restrictions”, the application of which, according to the case-law of the ECtHR, must be accompanied by extreme caution, requiring specific justification. Moreover, according to the Press Law Act<sup>98</sup>, no one can suffer negative consequences for providing information to the press if they act within the boundaries of the law. Above all, however, the **current epidemiological situation makes obtaining information on health care particularly important for the public interest**. Thus, imposing such prohibitions on health professionals seems excessive and disproportionate.
- ▶ **Health care employees who chose to go public with their information and opinions faced employment-related consequences and sanctions so severe as the termination of their employment contract<sup>99</sup>, which must be deemed unacceptable.**

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98 Journal of Laws of 2018, item 1914.

99 See e.g.: <https://www.rpo.gov.pl/pl/content/rpo-dr-pawel-grzesiowski-sygnalisci-ujawniajacy-zagrozenie-w-interesie-publicznym>; <https://www.wprost.pl/koronawirus-w-polsce/10309233/polska-pielegniarka-zwolniona-z-pracy-za-wpis-na-facebooku-przestancie-robic-z-ludzi-idiotow.html> (accessed on: 9.01.2021).

- ▶ As whistleblowers, i.e. persons who report irregularities in the public interest, they deserve special legal protection, which takes on additional importance in a situation of widespread threat to society<sup>100</sup>.

## 2. Restriction of citizens' access to public information

- ▶ The Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies suspended, for the duration of the pandemic, the application of the provisions that governed the consequences of the inactivity of bodies which received access to public information requests.
- ▶ Such an arrangement must be regarded as unjustifiably undermining the freedom to obtain information (or, more precisely, its element, the right of access to public information), which is completely illegitimate from the perspective of the constitutionally permissible restrictions.
- ▶ The aforementioned rule was repealed by a law enacted on 14 May 2020, however, for more than three months, during a period of heightened uncertainty and social anxiety, citizens were deprived of any influence over the authorities' compliance with the two-week deadline.

## 3. In light of the current pandemic situation, legislative initiatives have emerged in an attempt to establish criminal sanctions for spreading coronavirus fake news.

- ▶ In October 2020, the opposition presented a parliamentary bill amending the Infectious Diseases Act. The bill proposes to penalise public statements denying or undermining, contrary to current medical knowledge, the existence of present epidemiological threats as well as encouraging or inciting non-compliance with, or non-application of, the procedures and protocols established to address those threats.
- ▶ The Constitution allows restrictions imposed on freedom of expression in a law provided that such restrictions do not infringe the essence of the freedom, are necessary for the protection of, inter alia, public safety and order or public health, and comply with the principle of proportionality. Undeniably, fake news about the pandemic situation poses this kind of threat.
- ▶ However, given the particular importance of freedom of expression, **particular care should be taken to ensure that any relevant change of legislation meets the requirements of purpose and proportionality.** The introduction of similar legislation

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100 See a call for action of the HFHR and Citizens Network Watchdog Poland: [https://siecobywatelska.pl/wp-content/uploads/2020/03/apel\\_hfpc\\_watchdog\\_lekarze\\_swoboda\\_wypowiedzi.pdf](https://siecobywatelska.pl/wp-content/uploads/2020/03/apel_hfpc_watchdog_lekarze_swoboda_wypowiedzi.pdf) (accessed on: 9.01.2021).

in Hungary has even led to a sentence of imprisonment<sup>101</sup>, which, in the context of restrictions on freedom of expression, raises serious concerns and may set a dangerous precedent.

- ▶ It is important to note that in recent months the EU has also significantly stepped up its efforts to combat disinformation in connection with the current epidemiological situation. However, at present the European Commission has abstained from further legislative action, invoking the special value of freedom of expression for the entire legal system.

## Conclusions

The pandemic further exposed the problem of insufficient legal protection given to whistleblowers in Poland. Consequently, the freedom of expression of medical professionals has been restricted in an unacceptable way, and some of them who have acted in the public interest have suffered serious negative consequences as employees.

Moreover, in the Foundation's opinion, the Government, invoking the current epidemiological situation, has imposed disproportionate and unjustified restrictions on the constitutional freedom to obtain information.

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## Recommendation

- Actions should be taken to **strengthen the legal protection of whistleblowers**, as it has been repeatedly argued by non-governmental organisations and the Commissioner for Human Rights over the years. The first step in this area should be the immediate implementation of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the mandatory implementation must take place by 16 December 2021).

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101 <https://www.rp.pl/Prawo-karne/309039975-Wegry-skazany-za-fake-newsa-o-koronawirusie.html> (accessed on: 9.01.2021).

## 8. Prohibition of discrimination



By affecting society on many different levels, the pandemic has exacerbated existing inequalities. Many international actors have highlighted that the deepening economic and social crisis could lead to a worsening of the situation of persons who face discrimination or exclusion. Another significant problem was the accessibility of the authorities' advice on how to tackle the pandemic for persons with disabilities, including deaf persons.<sup>102</sup> At the same time, different legislative changes intended to mitigate the effects of the existing situation have sometimes led to discriminatory treatment of certain individuals.

**Although it is impossible to mention all the groups that may have been specifically affected by the negative consequences of the state of pandemic, the following should be mentioned:**

- ▶ victims of domestic violence who have been “sentenced” to home confinement with their abusers<sup>103</sup>;
- ▶ students with special needs<sup>104</sup>;
- ▶ women who, as a result of legislative changes, have received lower maternity benefits;
- ▶ people facing a homelessness crisis;
- ▶ foreigners.

The following discussion will focus on the last three groups whose situation was directly addressed in the actions taken by the HFHR.

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102 See the activities of the Commissioner for Human Rights, <https://www.rpo.gov.pl/pl/content/koronawirus-glusi-rzad-uruchamia-kanaly-komunikacji>, <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-poprawic-dostepnosc-komunikatow-dla-nieslyszacych> (accessed on: 25.01.2021).

103 Cf. <https://www.rpo.gov.pl/pl/content/osoby-doswiadczajace-przemocy-domowej-znalazly-sie-w-sytuacji-za-grozenia-zycia>, <https://www.rpo.gov.pl/pl/content/plan-awaryjny-przemoc-domowa-pomoc-w-epidemii> (accessed on: 13.01.2021).

104 Cf. <https://www.rpo.gov.pl/content/koronawirus-rpo-pyta-men-czy-prowadzi-ewaluacje-przebiegu-zdalnej-edukacji-i-jakie-sa-jej-wyniki> (accessed on: 13.01.2021).



## The situation of women on maternity leave

### 1. The legislative measures introduced for the pandemic period have particularly affected women receiving maternity benefit or those who gave birth to a child during the pandemic:

- ▶ the measures adopted under the Anti-crisis Shields<sup>105</sup> enabled reductions of an employee's working time;
- ▶ in some cases, a reduction in working time led to a reduction in the employee's pay;
- ▶ the reduced pay was the basis for calculating a lower amount of maternity benefit.

### 2. The above reduction of maternity benefits is a violation of:

- ▶ the principle of equal treatment (Article 32 of the Constitution of the Republic of Poland);
- ▶ the principle of social justice (Article 2 of the Constitution of the Republic of Poland);
- ▶ the principle of maternity protection (Articles 18 and 71 (2) of the Constitution of the Republic of Poland).

Ultimately, at the end of 2020, in the wake of the comments expressed by, among others, the Commissioner for Human Rights<sup>106</sup> and non-governmental organisations, including the HFHR<sup>107</sup>, provisions were introduced to offset the measures' negative impact on women on maternity leave (and other employees receiving sickness benefits).

## People facing a homelessness crisis

People facing a homelessness crisis (at least 30,000 individuals<sup>108</sup>) are a group particularly exposed to the negative effects of the pandemic due to their situation<sup>109</sup>.

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105 The Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies (Journal of Laws, item 374, as amended) and Act of 19 June 2020 on interest relief for business undertakings affected by the effects of COVID-19 who have taken out bank credit and on a simplified procedure for the approval of arrangements in connection with the emergence of COVID-19 (Journal of Laws, item 1086).

106 Cf. <https://www.gov.pl/web/rodzina/wyniki-ogolnopolskiego-badania-liczby-osob-bezdomnych-edycja-2019> (accessed on: 13.01.2021).

107 HFHR's letter to the Minister of Family, Labour and Social Policy, <https://www.hfhr.pl/matki-kontra-zus-wys-tapienie-hfpc-do-minister-rodziny-pracy-i-polityki-spolecznej/> (accessed on: 13.01.2021).

108 Cf. <https://www.gov.pl/web/rodzina/wyniki-ogolnopolskiego-badania-liczby-osob-bezdomnych-edycja-2019> (accessed on: 13.01.2021).

109 Cf. HFHR's call for action statement for public authorities on the situation of people facing a homelessness crisis during the coronavirus pandemic, <https://www.hfhr.pl/apel-helsinskiej-fundacji-praw-czlowieka-do-wladz-publicznych-w-sprawie-sytuacji-osob-w-kryzysie-bezdomnosci-w-czasie-pandemii-koronawirusa/> (accessed on: 13.01.2021).

## **1. Public authorities have taken action<sup>110</sup> to address the needs of people experiencing a homelessness crisis by:**

- ▶ providing additional resources for local authorities and institutions;
- ▶ developing guidelines for support institutions;
- ▶ establishing the rule that a person may be admitted to an institution providing support for people experiencing a homelessness crisis after a 10-day quarantine or having tested negatively for the coronavirus.

## **2. Unfortunately, these measures cannot be considered as guaranteeing adequate assistance and safety<sup>111</sup> because:**

- ▶ the resources provided do not satisfy all the needs of the support institutions;
- ▶ the institutions need more personnel and additional organisational support;
- ▶ not all institutions have access to sufficient quarantine facilities;
- ▶ not all quarantine facilities are accessible to persons with disabilities;
- ▶ people experiencing a homelessness crisis still have practical difficulties in accessing healthcare and free coronavirus tests.

## **Access to the international protection procedure**

- ▶ The pandemic necessitated restrictions on the operations the Border Guard bodies and the Office for Foreigners, which initially suspended and later restricted the provision of face-to-face customer services.
- ▶ The pandemic also resulted in a temporary suspension or reduction of traffic at specific border crossing stations where applications for international protection had previously been lodged<sup>112</sup>.

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110 Cf. <https://www.gov.pl/web/koronawirus/dodatkowe-ponad-17-mln-zl-na-pomoc-osobom-bezdomnym-w-czasie-pandemii>, <https://www.gov.pl/web/rodzina/minister-malag-zaapelowala-do-wojewodow-o-szczegolne-wsparcie-osob-bezdomnych> (accessed on: 13.01.2021); letter from the Ministry of Family and Social Policy to the HFHR dated 19.01.2021, ref.: DPS-IV.070.90.2020.KS.

111 <https://www.rynekzdrowia.pl/Polityka-zdrowotna/Bezdomni-w-czasie-epidemii-na-ziemi-niczyjej-Mnoza-sie-pytania-o-testy-i-kwarantanne,215397,14,3.html>, <https://www.radiokrakow.pl/wiadomosci/krakow/krakow-organizuje-pomoc-dla-bezdomnych-w-trudnym-czasie-zimowo-pandemicznym/>, <https://sadeczanin.info/wiadomosci-telewizja/mroz-ale-pandemia-zamyka-przed-bezdomnymi-drzwi-noclegowni-brata-alberta?page=0%2C0> (accessed on: 13.01.2021).

112 HFHR's statement sent to the Minister of the Interior on the situation of foreigners in Poland in the context of the coronavirus pandemic: <https://www.hfhr.pl/wp-content/uploads/2020/03/Wyst%C4%85pienie-NGOs-do-MSWiA-2020.03.26.pdf> (accessed on: 13.01.2021).

- ▶ Despite many calls from NGOs<sup>113</sup> and the Border Guard's assurances that applications for international protection were accepted on an ongoing basis, in 2020, Poland received only 1620 such applications, involving a mere 2803 persons<sup>114</sup>. This is the lowest figure recorded since 1999<sup>115</sup>.
- ▶ This, in turn, created a new problem: persons who have declared their intent to apply for international protection but have been unable to submit the above-mentioned application could not use the social and medical assistance provided by the Head of the Office for Foreigners<sup>116</sup>.
- ▶ Despite the calls from NGOs, no changes have been made that would result in the availability of social and medical assistance for persons declaring their intention to submit an application for international protection.

## Foreigners: residence, work, services and social assistance

- ▶ On 8 March 2020, a law known as the “Coronavirus Special Purpose Act” entered into force<sup>117</sup>. The Coronavirus Special Purpose Act was later amended on several occasions by the legislation collectively referred to as the “Anti-crisis Shields”<sup>118</sup>. These legal acts

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113 *Ibid.*; Koronawirus. Sytuacja migrantów i migrantek. (Coronavirus. The Situation of Migrants), Commissioner for Human Rights' and Experts' Commission for Migrants' position statement <https://www.rpo.gov.pl/sites/default/files/Stanowisko%20Komisji%20Ekspert%C3%B3w%20ds.%20Migrant%C3%B3w%2C%2013.05.2020.pdf> and a statement sent to the Ministry of the Interior and Internal Affairs, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20MSWiA%20ws%20sytuacji%20na%20granicach%2C%2012.05.2020.pdf> (accessed on: 9.01.2021).

114 Annual data provided by the Head of the Office for Foreigners, an e-mail of 8 January 2020.

115 Statistics for 1992-2000 provided by the Head of the Office for Foreigners, [https://udsc.gov.pl/wp-content/uploads/2014/12/41206412b98bd\\_nsuch\\_gotowe.xls](https://udsc.gov.pl/wp-content/uploads/2014/12/41206412b98bd_nsuch_gotowe.xls) (accessed on: 9.01.2021); Statistics for 2001-2003 provided by the Head of the Office for Foreigners, [https://udsc.gov.pl/wp-content/uploads/2014/12/4097756888bac\\_polski.zip](https://udsc.gov.pl/wp-content/uploads/2014/12/4097756888bac_polski.zip) (accessed on: 9.01.2021); Statistics for 2003-2005 provided by the Head of the Office for Foreigners, [https://udsc.gov.pl/wp-content/uploads/2014/12/442266f618809\\_dane\\_2003\\_2005.zip](https://udsc.gov.pl/wp-content/uploads/2014/12/442266f618809_dane_2003_2005.zip) (accessed on: 9.01.2021); Statistics for 2006-2008 provided by the Head of the Office for Foreigners, [https://udsc.gov.pl/wp-content/uploads/2014/12/biul\\_2006\\_2008\\_pol.xls](https://udsc.gov.pl/wp-content/uploads/2014/12/biul_2006_2008_pol.xls) (accessed on: 9.01.2021); Eurostat, Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded) for 2008-2017.

116 Accordingly, the HFHR called for an extension of the categories of persons eligible for social assistance as part of the procedure for granting international protection. See the HFHR's opinion on the Anti-crisis Shield: [https://www.hfhr.pl/wp-content/uploads/2020/03/HFPC-Senat-druk-96\\_opinia.pdf](https://www.hfhr.pl/wp-content/uploads/2020/03/HFPC-Senat-druk-96_opinia.pdf) (accessed on: 13.01.2021), the proposal to amend the language of Article 70 (1) of the Act of 13 June 2003 on the granting of protection to foreigners in the Republic of Poland (Journal of Laws of 2019, item 1666) by deleting the passage “the applicant and a person on whose behalf the applicant acts” and replacing it with the passage “the applicant, a person declaring their intention to submit the application for international protection and a person on whose behalf they act”.

117 The Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies (Journal of Laws 2020, item 374) (the “Coronavirus Special Purpose Act”).

118 Act of 31 March 2020 amending the Act on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies and certain other acts (Journal of Laws 2020, item 568), effective from 31 March 2020 (the “Shield 1.0”). The Act of 16 April 2020 on specific support instruments implemented to address the outbreak of SARS-CoV-2 virus (Journal of Laws 2020,

introduced measures that affected the residence, employment and social situation of foreigners staying in Poland.

- ▶ Anti-crisis Shield 1.0 has already introduced measures that extended, for the duration of the emergency, the validity of many residence permits issued to foreigners<sup>119</sup>. However, the law lacked several important solutions<sup>120</sup> such as an automatic extension of the validity of foreigners' identity documents accompanying some of the residence permits.
- ▶ The legislator has not envisaged these arrangements, despite the fact that the authorities responsible for issuing the documents in question have suspended, or reduced the availability of, their services to the public. Notably, the extension of the validity of certain residence cards was required for example to obtain the 500+ parental allowance. These solutions were only included in Shield 2.0<sup>121</sup>.
- ▶ None of the Anti-crisis Shields has addressed the need to expand the categories of foreigners eligible for social benefits<sup>122</sup>.
- ▶ No such arrangements were made despite the actual risk that many employed holders of residence permits may lose their jobs during the state of pandemic emergency or state of pandemic.

## Conclusions

- ▶ The pandemic has increased the risk of deteriorating the situation of persons who are already vulnerable to discrimination or exclusion.
- ▶ The hasty and uninformed implementation of legislative measures sometimes resulted in negative consequences that violated the principle of equal treatment.

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item 695), effective from 18 April 2020 ("Shield 2.0"). The Act of 14 May 2020 on certain protective measures implemented to address the outbreak of SARS-CoV-2 virus (Journal of Laws 2020, item 875), effective from 16 May 2020 ("Shield 3.0").

119 Office for Foreigners, *Szczególne rozwiązania prawne dla cudzoziemców w związku epidemią wirusa SARS-CoV-2* (Specific legal measures for foreigners applied in connection with the SARS-CoV-2 pandemic): <https://bit.ly/3c6o54Q> (accessed on: 13.01.2021).

120 The HFHR's opinion on the Anti-crisis Shield: [https://www.hfhr.pl/wp-content/uploads/2020/03/HFPC-Sen-at-druk-96\\_opinia.pdf](https://www.hfhr.pl/wp-content/uploads/2020/03/HFPC-Sen-at-druk-96_opinia.pdf) (accessed on: 13.01.2021).

121 HFHR's opinion on Anti-crisis Shield 2.0: [https://www.hfhr.pl/wp-content/uploads/2020/04/opinia\\_hfpc\\_do-druku-330-1.pdf](https://www.hfhr.pl/wp-content/uploads/2020/04/opinia_hfpc_do-druku-330-1.pdf) (accessed on: 13.01.2021).

122 By expanding these categories on the foreigners who "hold a residence card with the annotation 'access to the labour marker granted'", i.e. as in the case of the entitlement to the 500+ parental benefit (i.e. as in Article 1 (2) (2) (d) of the Act of 11 February 2016 on the State aid in upbringing children, Journal of Laws of 2016, item 195) or family benefits (i.e. as in Article 1 (2) (2d) of the Act of 28 November 2003 on family benefits, Journal of Laws of 2003, No. 228, item 2255. Under with this provision, the available benefits are: family allowance (with additional payments, if applicable), one-off childbirth allowance, care-related benefits: nursing allowance, care allowance and special care allowance, carer's allowance, parental benefit).

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## **Recommendation**

- Further actions for local governments and entities providing assistance to persons exposed to discrimination and exclusion should be taken. Such actions should involve, in particular, the provision of social and medical support as well as additional manpower.

## 9. Rights of persons deprived of liberty



The SARS-CoV-2 pandemic has particularly affected persons deprived of liberty (in remand centres, prisons, psychiatric hospitals, young offender institutions or nursing homes<sup>123</sup>). It is very difficult to manage an outbreak in detention conditions and the virus spreads extremely quickly in custodial settings. The main reasons for this are as follows:

- ▶ the high population density at detention facilities;
- ▶ dormitory-style housing;
- ▶ the buildings lacking facilities to accommodate the needs of the quarantine and enhanced sanitary requirements;
- ▶ underdeveloped in-house medical infrastructure.

## Situation in prisons and remand centres

A total of 172 prisons, remand centres and external detention units operate in Poland. On the eve of the pandemic outbreak, nearly 75,000 persons were deprived of liberty in Poland, and the occupancy rate at the facilities exceeded 91%. At the same time, more than 3,000 persons<sup>124</sup> (more than 4.5% of all inmates) were aged 60 or more, being at particular risk of a severe SARS-CoV-2 infection.

### 1. Reduction of the population of penitentiary facilities

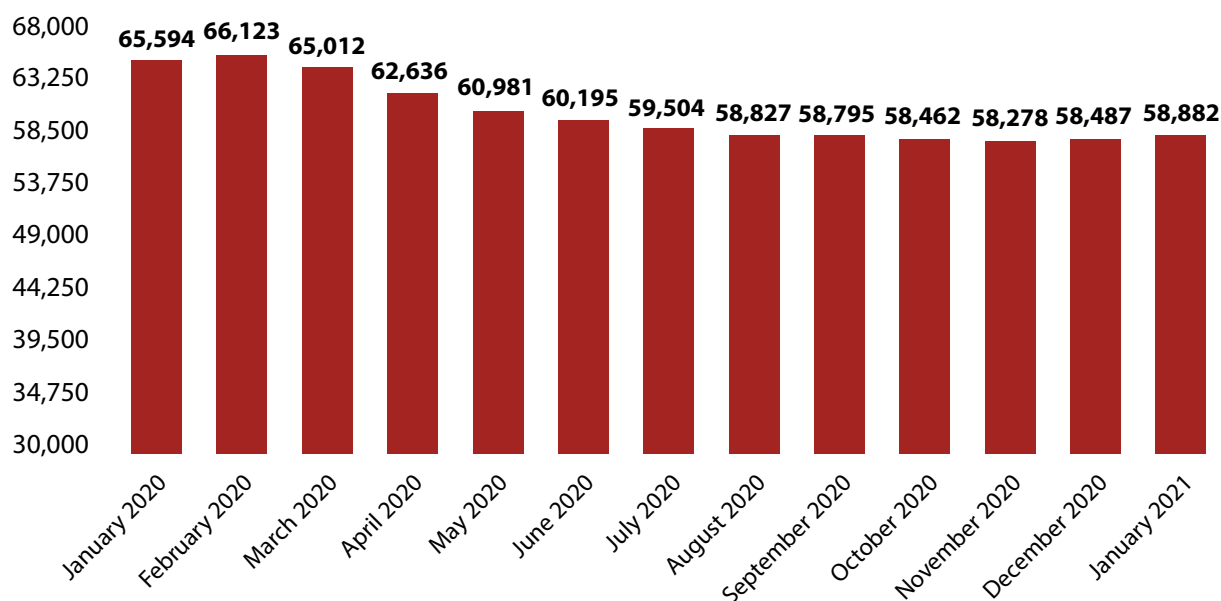
- ▶ To minimise the spread of the coronavirus in penitentiary facilities, the international community in charge of the protection of the rights of persons deprived of liberty has called for a reduction of the prison population and the use of measures such as the parole and electronic tagging, especially in relation to prisoners with light sentences<sup>125</sup>.
- ▶ In pandemic-stricken Poland, we have observed a systematic decrease in the number of convicted persons serving custodial sentences. Between February and November 2020, the number of inmates at penitentiary facilities was steadily decreasing – from 66,123 in February 2020, to 58,278 in November 2020. This translates to a decrease in the prison population by almost 8,000, or 12%.

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123 For more information on nursing homes, see Chapter 5.

124 *Ministry of Justice, Central Prison Service Authority, Annual statistical information for 2019*, letter ref. BIS.0332.17.2019.AP, p. 14, <https://www.sw.gov.pl/assets/95/70/75/c1cee7d03200820a03cdaa2c6afe897c-482422ca.pdf> (accessed on: 10.01.2021).

125 <https://www.hfhr.pl/appeal-by-european-ngos-involved-in-the-field-of-prison-health-and-in-the-defence-of-the-right-to-health-protection-for-prisoners/> (accessed on: 10.01.2021).



Number of inmates of penitentiary facilities (at the end of the month)<sup>126</sup>

- ▶ The above trend is certainly an outcome of many factors, including the introduced changes in legislation. One of such changes was effected by a law amending the Code of Execution of Criminal Sentences, which entered into force on 31 March 2020. The amendment allows convicted persons to apply for the permission for serving their custodial sentences (up to 18 months) in the electronic monitoring system (before the amendment, only convicted persons sentenced to a prison term of no more than 12 months were eligible for the electronic monitoring scheme)<sup>127</sup>. However, it was not until June-November 2020 when the scheme became more and more frequently used. In May 2020, there were 4,126 persons serving their sentences in the electronic monitoring system. In December, the figure rose to 5,768, which represents an increase of over 1,600<sup>128</sup>.
- ▶ The Polish legislator's responded to the pandemic inter alia by introducing an extra option for heads of penitentiary facilities to apply for a break in the execution of a prisoner's custodial sentence (or, the prison leave) if the prisoner's temporary release will contribute, among other things, to a reduction or elimination of a risk associated with

126 The chart is based on the statistics published by the Prison Service at <https://www.sw.gov.pl/dzial/statystyka>. The figures for January 2021 are given as of 22 January 2021, see *Information on the penitentiary facilities occupancy rates*, letter ref. BIS.0335.4.2020.DB, <https://www.sw.gov.pl/assets/12/35/49/10447f8248d-2e9063d3a7844f83b8821da972255.pdf> (accessed on: 22.01.2020).

127 Art. 15 (1) of the Act of 31 March 2020 amending the Act on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies and certain other acts (Journal of Laws of 2020, item 568, as amended) amending Art. 43la § 1 (1) of the Code of Execution of Criminal Sentences.

128 The data provided are taken from the statistics published by the Prison Service at <https://www.sw.gov.pl/dzial/statystyka> (accessed on 19.01.2021).



the pandemic<sup>129</sup>. However, the statistics show that this legislative change did not lead to a significant increase in the number of approved applications for the prison leave. Over the last 10 months, the monthly number of granted prison leaves only twice exceeded 100 (in June and July 2020, respectively 114 and 105 such applications were granted)<sup>130</sup>.

- ▶ However, no Polish law enacted to tackle the pandemic has introduced rules that would relax the conditions of, or introduced additional procedures for, the application of the parole (officially termed “conditional early release”). On the other hand, statistics show that already in April 2020, the number of prisoners released on parole increased from 443 to 683. Between May and July 2020, the monthly number of paroled prisoners did not fall below 500<sup>131</sup>.
- ▶ From 31 March 2020, parole hearings can be held over a video link. A representative of the prison’s (or the remand centre’s) management takes part in such hearings accompanying the prisoner at the facility<sup>132</sup>. At the same time, from 31 March 2020 to 4 May 2020, videoconferenced parole hearings were held at virtually all 45 penitentiary courts, with the exception of the Regional Courts in Kielce, Kalisz and Nowy Sącz<sup>133</sup>.
- ▶ The statistics on persons in pre-trial detention looked different from those concerning prisoners. Statistical data show no indication that the pandemic has directly influenced the decisions of the courts regarding the application of pre-trial detention. At the outset of the pandemic, between February and April 2020, the number of suspects detained on remand initially decreased, from 8,640 to 8,285. However, already in May 2020, the number of persons in pre-trial detention increased by more than 400, as compared to the previous month. This upward trend had not stopped until September 2020, when 9,466 persons in pre-trial detention were recorded. By December 2020, the population of remand centres decreased to 8,692, i.e. by almost 800.
- ▶ Notably, according to media accounts the courts have ordered the pre-trial detention of persons suspected of violations of the coronavirus isolation rules<sup>134</sup> and home quarantine rules<sup>135</sup>.

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129 Art. 14c of the Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies (consolidated text: Journal of Laws of 2020, item 1842, as amended).

130 The data cited are taken from the statistics published by the Prison Service at <https://www.sw.gov.pl/dzial/statystyka> (accessed on 10.01.2021).

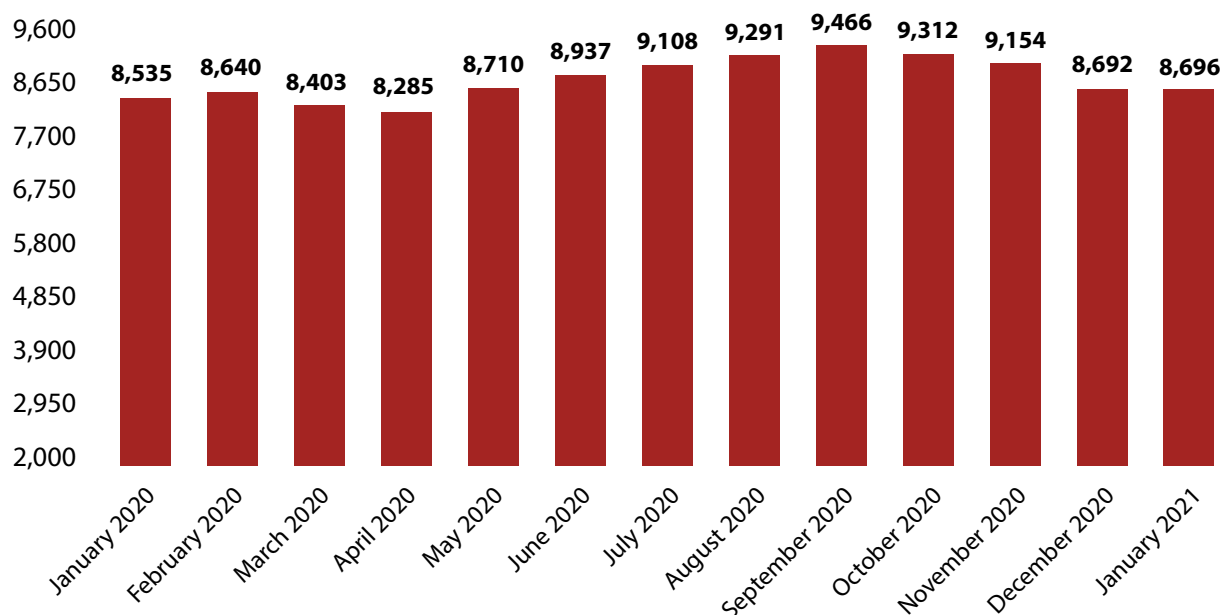
131 The data cited are taken from the statistics published by the Prison Service at <https://www.sw.gov.pl/dzial/statystyka> (accessed on 10.01.2021).

132 Art. 14f (1) the Act of 2 March 2020 on special measures related to preventing, counteracting and combating COVID-19, other infectious diseases and the ensuing emergencies.

133 Cf.: E. Dawidziuk, *Jednostki penitencjarne w dobie pandemii Covid-19*, [in]: T. Gardocka, D. Jagiełło (Eds.), *Pandemia Covid-19 a prawa i wolności obywatela*, Warszawa 2020, 1st edition, Legalis.

134 *Piłkarz usłyszał zarzuty i trafił do aresztu. „Nie wiedzieliśmy o jego zakażeniu”*, eurosport.tvn24.pl, 22 August 2020, <https://eurosport.tvn24.pl/pilka-nozna,105/pilkarz-zakazony-koronawirusem-zagral-w-meczu-uslyszal-zarzuty,1027314.html> (accessed on: 10.01.2021).

135 *Kobieta od maja przebywająca w areszcie za złamanie kwarantanny, wychodzi na wolność*, polsatnews.pl, 24 September 2020, <https://www.polsatnews.pl/wiadomosc/2020-09-24/od-maja-siedziala-w-areszcie-bo-zlamala-kwarantanne-zostala-zwolniona/> (accessed on: 10.01.2021).



Number of persons in pre-trial detention (at the end of the month)<sup>136</sup>

## 2. The statistics of the pandemic in penitentiary facilities

- ▶ The Prison Service employs 28,813 officers and civilian workers<sup>137</sup>. From 1 March to 3 December 2020, 6,881 tests for SARS-CoV-2 were performed in the above group, and 3,199 of these were positive<sup>138</sup>. This means that approximately 11% of the officers and civilian employees of the Prison Service have been infected with the coronavirus.
- ▶ In 2020, the average daily number of persons imprisoned and detained on remand in Polish penitentiary facilities was 69,936. Between 1 March and 3 December 2020, 2,952 persons deprived of liberty were tested for the coronavirus.
- ▶ At the same time, 400 inmates (ca. 0.5%) were infected with the coronavirus<sup>139</sup>.
- ▶ Notably, as of 3 December 2020, 123 inmates were infected with the coronavirus and isolated and further 249 were quarantined<sup>140</sup>.

136 The chart is based on the statistics published by the Prison Service at <https://www.sw.gov.pl/dzial/statystyka>. The figures for January 2021 are given as of 22 January 2021, see *Information on the penitentiary facilities occupancy rates*, letter ref. BIS.0335.4.2020.DB, <https://www.sw.gov.pl/assets/12/35/49/10447f8248d-2e9063d3a7844f83b8821da972255.pdf> (accessed on: 22.01.2020).

137 *Ministry of Justice, Central Prison Service Authority, Annual statistical information for 2019*, letter ref. BIS.0332.17.2019.AP, p. 40, <https://www.sw.gov.pl/assets/95/70/75/c1cee7d03200820a03cdaa2c6a-fe897c482422ca.pdf> (accessed on: 10.01.2021).

138 The above data were obtained from a letter from the Central Prison Service Authority dated 8 December 2020, ref. BDG.0143.303.2020.KS.

139 The above data were obtained from a letter from the Central Prison Service Authority dated 8 December 2020, ref. BDG.0143.303.2020.KS.

140 The above data were obtained from a letter from the Central Prison Service Authority dated 8 December 2020, ref. BDG.0143.303.2020.KS.

- ▶ Those inmates infected with the coronavirus who are asymptomatic or mildly symptomatic have been placed at isolation facilities created in the Bytom Remand Centre (capacity of 76 beds) and in the Potulice Prison (22 beds). At the same time, a unit or several cells of each penitentiary facility located under the jurisdiction of each District Inspectorate of the Prison Service have been designated to accommodate asymptomatic or mildly symptomatic patients in the event of increased coronavirus incidence and the exhaustion of the capacity of the currently functioning isolation facilities and medical facilities subordinate to the Ministry of Health. Moreover, any patient treated in prison medical facilities whose condition deteriorates to a degree requiring hospitalization is to be immediately transferred to the local non-penitentiary hospital providing treatment and care of coronavirus patients<sup>141</sup>.
- ▶ Quarantine may be imposed in all penitentiary facilities<sup>142</sup>.

### **3. “Lockdown in lock-up”, or restrictions on the exercise of prisoners’ fundamental rights and freedoms**

- ▶ The pandemic amplified the severity of the deprivation of liberty due to the restrictions and limitations imposed.
- ▶ As of April 2020<sup>143</sup>, the following restrictions were imposed in penitentiary facilities:
  - ▷ in 161 facilities (94% of the total number), inmates were no longer able to work outside prison;
  - ▷ visits were suspended in 171 facilities (99%);
  - ▷ 138 facilities (80%) suspended worship and religious services.
- ▶ These temporary restrictions may have constituted a direct violation of the rights and freedoms of persons deprived of liberty, and in particular their right to privacy, which includes the right to family life and right to freedom of conscience and religion.
- ▶ In the Warszawa-Białołęka Remand Centre, an attorney who wanted to meet a client had to obtain permission from the head of the Centre, which was issued on the basis of a medical certificate with a two-day validity period. On the other hand, the Gdańsk Remand Centre has entirely suspended all visits of defence lawyers, legal representatives,

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141 The above information was obtained from a letter from the Central Prison Service Authority dated 15 January 2021 ref. BDG.0143.325.2020.KS.

142 *Ibid.*

143 *Prawa osób pozbawionych wolności w dobie koronawirusa*. (English title: Rights of persons deprived of their liberty in the times of the coronavirus), a report by the HFHR, <https://www.hfhr.pl/prawa-osob-pozbawionych-wolnosc-w-dobie-koronawirusa-opracowanie-hfpc/> (accessed on: 10.01.2021.).

notaries and lawyers appearing on behalf of their clients before the European Court of Human Rights<sup>144</sup>.

- ▶ At the same time, during the coronavirus pandemic in Poland, prisoners faced problems with accessing medical procedures outside the penitentiary facility. For example, an inmate had been referred to undergo a surgery, which was scheduled for April 2020 but due to the pandemic, the surgery was cancelled by the hospital<sup>145</sup>.
- ▶ Some penitentiary facilities allowed the inmates to communicate with family members via online messaging applications due to the temporary suspension of on-site family visits. However, it turned out that a similar solution can be used by suspects detained on remand only with the prosecutor's approval, even for those who already had family visit privileges<sup>146</sup>.
- ▶ Prisoners and their families complained to the Foundation about problems conducive to the spread of the coronavirus in penitentiary facilities such as insufficient access to hygienic and sanitary products or hot water. Complaints also described the lack of disinfection of shared facilities (e.g. telephone booths), as well as prison guards non-compliance with sanitary requirements. Problems in establishing contact with the family were also pointed out<sup>147</sup>.

Responding to the above allegations, the Prison Service indicated that compensatory measures were taken to alleviate the restrictions imposed on the prisoners. Such measures include, among other things:

- ▶ offering inmates wider access to running hot water and showers (according to availability);
- ▶ extending the duration of telephone calls (in justified cases, also at the Prison Service expense), and in some facilities, in consultation with telecommunication providers, increasing the number of telephone sets and distributing additional telephone cards among the inmates, in particular, those unable to afford their own cards;
- ▶ increasing the availability of online messaging services by creating additional electronic communication stations;
- ▶ increasing the frequency of calls and, above all, creating appropriate technical conditions to increase internet connectivity;

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144 *Notice of the Head of the Gdańsk Remand Centre*, <https://www.sw.gov.pl/aktualnosc/areszt-sledczy-w-gdansk-ku-komunikat3> (accessed on: 10.01.2021).

145 *Interwencja HFPC dotycząca operacji więźnia w czasie epidemii COVID-19*, <https://www.hfhr.pl/interwencja-hfpc-dotyczaca-operacji-wieznia-w-czasie-epidemii-covid-19/> (accessed on: 10.01.2021).

146 Letter from the Commissioner for Human Rights to the Minister of Justice of 19 October 2020, ref.: IX.517.665.2020.ED/JN, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20MS%20ws.%20rozm%C3%B3w%20przez%20Skype%20os%C3%B3b%20aresztowanych%2C%2019.10.2020.pdf> (accessed on: 10.01.2021).

147 *Prawa osób pozbawionych wolności...*

- ▶ extending access to radio and television in cell blocks by allowing longer hours of unrestricted access to electricity;
- ▶ adapting the offer of cultural and educational activities to the introduced restrictions.

## **Pandemic's impact on the National Centre for the Prevention of Dissocial Behaviours in Gostynin**

- ▶ The National Centre for the Prevention of Dissocial Behaviours in Gostynin, Poland has been operating since 2014. At the beginning of November 2020, the Centre had 92 patients (the facility is designed to accommodate 60 patients)<sup>148</sup>.
- ▶ According to media reports, the Centre's situation during the pandemic was very difficult. As reported by the Commissioner for Human Rights and Minister of Health, a large number of infections have been recorded in the NCPDB. The above information was also confirmed by HFHR clients staying in the Gostynin Centre. An HFHR client reported that he was not isolated from, and was in constant contact with, the infected<sup>149</sup>.
- ▶ In early November, 22 out of 24 patients of one of the NCPDB wards were infected with the coronavirus. At the same time, three patients, whose condition had severely deteriorated, were transferred to other hospitals. At the same time, 13 Centre's employees infected with the coronavirus were in home isolation, and 24 were quarantined<sup>150</sup>.
- ▶ According to press reports, a patient died of the coronavirus<sup>151</sup>.

## **The situation in guarded immigration centres**

There is no question that the epidemiological situation which objectively prevented the return of foreigners should not have an impact on prolonging the period of their deprivation of liberty by means of immigration detention<sup>152</sup>.

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148 Letter from the Commissioner for Human Rights to the Prime Minister of 3 November 2020, ref. IX.517.1702.2017. TRo/JN, <https://www.rpo.gov.pl/sites/default/files/WG%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20%20sytuacji%20epidemiologicznej%20w%20KOZZD%2C%203.11.2020.pdf> (accessed on: 10.01.2021).

149 HFPC *Interwencja ws. ochrony zdrowia osób w KOZZD w Gostyninie*, <https://www.hfhr.pl/ognisko-zakazen-koronawirusem-w-kozzd-w-gostyninie-interwencja-hfpc-ws-ochrony-zdrowia-osob-przymusowo-tam-umieszczonych/> (accessed on: 10.01.2021).

150 Letter from the Ministry of Health to the Commissioner for Human Rights of 7 November 2020, ref.: ZPP.6142.3.2020.TM, <https://www.rpo.gov.pl/sites/default/files/Reply%C5%BA%20MZ%20ws.%20KOZZD%2C%207.11.2020.pdf> (accessed on: 10.01.2021).

151 See <https://gostynin24.pl/index.php/item/4640-zmarl-pacient-z-kozzd-zakazony-koronawirusem>; <https://www.se.pl/plock/koronawirus-gostynin-nie-zyje-pacient-osrodka-dla-bestii-rpo-apeluje-do-morawieckiego-aa-tw1F-gJ53-PJpy.html> (accessed on: 10.01.2021).

152 Statement sent to the Minister of the Interior on the situation of foreigners in Poland in the context of the coronavirus pandemic: <https://www.hfhr.pl/wp-content/uploads/2020/03/Wyst%C4%85pienie-NGOs-do-MSWiA-2020.03.26.pdf> (accessed on: 13.01.2021).

- ▶ The rules on the admission of foreigners to guarded immigration centres **have not changed following the coronavirus outbreak**. What has changed is the practice of admissions.
- ▶ Originally, every foreigner was examined by a doctor before being placed in detention and if there were symptoms of an illness, further steps were taken, in particular, a Covid-19 test was carried out.
- ▶ However, the procedures were later changed and now **foreigners are admitted to a guarded centre only if they tested negative for the coronavirus** upon detention, which should be assessed positively, taking into account the wording of the legal provisions<sup>153</sup>. Then they stay for 7 days in a separate observation unit. At the end of that period, they take another test. Only those foreigners who tested negative undergo a standard medical examination and are placed in the general unit.
- ▶ **Due to the coronavirus pandemic, all visits to in guarded immigration centres have been suspended in order to minimise the risk associated with the spread of the SARS-CoV-2 virus**. Visits were only possible between 15 May and 10 October 2020 subject to compliance with sanitary requirements (masks, gloves). However, the Border Guard, which runs guarded immigration centres, **permanently provides the possibility of attending online “virtual visit” appointments**.
- ▶ On 10 October 2020, the Border Guard issued guidelines that **alternative measures to detention in the form of the foreigner’s obligation to report to the authority indicated in the decision should be implemented in a way that limits the possibility of direct contact**<sup>154</sup>, which should also be considered a sensible measure.

## Conclusions

- ▶ The high population density and features typical of detention facilities are particularly conducive to the spread of the virus. The example of the NCPDB in Gostynin shows the importance of maintaining a proper sanitary regime.
- ▶ Precautions taken in certain detention facilities have proved insufficient. Epidemiologically speaking, the number of the coronavirus tests carried out (2,592) among the Polish prison population (ca. 70,000) is anything but satisfactory.

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153 Article 400 of the Foreigners Act of 12 December 2013 (Journal of Laws of 2013, item 1650) stipulates that a decision to place a foreigner in a guarded centre or to put them in immigration detention may not be issued if the issuance of the decision pose a threat to the life or health of the foreigner. Article 88a (3) (1) of the Act of 13 June 2003 on the granting of protection to foreigners in the Republic of Poland (Journal of Laws of 2003, No 128, item 1176) stipulates that persons applying for international protection or persons represented by persons applying for international protection may not be placed in a guarded immigration centre or held in immigration detention where this pose a threat to their life or health.

154 An e-mail from the Border Guard Headquarters dated 5.01.2021.

- ▶ The legislator took measures to reduce the prison population, which, over the course of 10 months, resulted in a decrease in the number of prison inmates by nearly 8,000. However, the reduction in the number of persons serving custodial sentences did not go hand in hand with more frequent use of the prison leave or parole.
- ▶ Statistics on pre-trial detention are also worrying. The most severe preventive measure has been applied even more frequently than before the pandemic, with the highest number of detained suspects being recorded in September 2020 (9,466 persons in pre-trial detention in September as compared to 8,535 in January 2020).

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### **Recommendation**

- ➔ The prison population should be reduced through the use of non-custodial penalties and preventive measures, as well as the more frequent application of the parole and prison leave.

## 10. Freedom of business activity





Freedom of business activity is guaranteed by the Constitution of the Republic of Poland and constitutes one of the foundations of Poland's economic system. It includes, among other things, the right of establishment understood as the right to start a business and choose the way of pursuing a business activity. The state is obliged to create institutional safeguards to protect this freedom.

### **The permissible scope of restrictions on the freedom of business activity and the COVID-19 pandemic**

- ▶ The COVID-19 pandemic is undeniably an example of a situation in which certain restrictions on the freedom of business activity are legally admissible to protect the life and health of the people of Poland.
- ▶ The Constitution of the Republic of Poland explicitly indicates that the freedom of business activity may be restricted, in proportion to the emerging threat, but even in a manner violating the essence of the freedom in question provided that the Council of Ministers introduces a specific extraordinary measure, namely the state of natural disaster. However, as of the date of publication of this report, no state of natural disaster has not been introduced.
- ▶ In a situation where none of the extraordinary measures has been introduced, any restrictions on the freedom of business activity may only be implemented in a law and subject to the conditions set out in Article 22 or Article 31 (3) of the Constitution of the Republic of Poland, in accordance with the principles of expediency and proportionality and in a manner that does not violate the essence of the freedom of business activity.
- ▶ The restrictions on human and civil rights and freedoms currently imposed by the Government through secondary (and not primary) legislation are, in consequence, unconstitutional. Regulations such as those currently enacted by the Council of Ministers may not introduce legal provisions of fundamental importance for the freedom of business activity<sup>155</sup>.

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155 What is more, on many occasions, the said regulations were issued in violation of the constitutional standard of proper legislation: business owners had very little time to learn about the new rules, despite the fact that these rules have imposed severe restrictions on their constitutional freedoms. In an extreme case, they had about one hour to familiarise themselves with the Regulation of 23 October 2020 before it entered into force.

## Restrictions introduced by the Polish Government

- ▶ The first restrictions on the activities of business undertakings were imposed already in March 2020<sup>156</sup>, and the current restriction period began in October 2020<sup>157</sup>.

### 1. Introduced restrictions violate the essence of the freedom of business activity

- ▶ The currently applicable law<sup>158</sup> includes, among other things, prohibitions on conducting specific forms of business activity such as the operations of amusement and theme parks, discos and nightclubs, or the provision of physical fitness services.
- ▶ The undertakings carrying out the aforementioned forms of activity have been effectively deprived of the right to conduct their business, despite the fact that this right has not been revoked by individual decisions issued by public authorities.

### 2. The Council of Ministers exceeded the powers granted to it under a statutory authorisation

- ▶ Article 46b (2) of the Infectious Diseases Act sets out a statutory authorisation to establish, by way of a regulation, a **temporary limitation** of specific areas of business undertakings' activity.
- ▶ However, several regulations of the Council of Ministers<sup>159</sup> issued during the pandemic imposed restrictions “until further notice” thereby failing to specify a detailed temporal dimension of the imposed restrictions<sup>160</sup>.
- ▶ On the other hand, the regulation currently in force specifies the end date<sup>161</sup> of the applicability of the restrictions on the activities of business undertakings.

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156 See e.g. the Regulation of the Council of Ministers of 31 March 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 566).

157 The current restrictions (as of 18.01.2021) are imposed by the Regulation of the Council of Ministers of 21 December 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 2316, as amended).

158 Regulation of the Council of Ministers of 21 December 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 2316, as amended).

159 See e.g. The Regulation of the Council of Ministers of 31 March 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 566); Regulation of the Council of Ministers of 9 October 2020 establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 1758, as amended); Regulation of the Council of Ministers of 23 October 2020 amending the Regulation establishing certain restrictions, directives and prohibitions in connection with the occurrence of the state of pandemic (Journal of Laws item 1871).

160 <https://www.rpo.gov.pl/pl/content/rpo-do-premiera-najnowsze-nakazy-zakazy-nadal-sprzeczne-z-konstytucja> (accessed on: 18.01.2021).

161 As of 18.01.2021, the date is 31.01.2021.

- ▶ The Infectious Diseases Act provides only for the possibility of establishing *restrictions* as to the scope of activities of business undertakings. Thus, the imposition of *prohibitions* (rather than restrictions) in a regulation constitutes an obvious violation of the statutory authority<sup>162</sup>.
- ▶ It should also be noted at this point that the Constitution of the Republic of Poland prohibits the establishment of the so-called “blanket provisions” in a law; a blanket provision is understood as leaving an extensively wide margin of appreciation to the issuing authority. At the same time, the statutory authorisation expressed in Article 46 (2) of the Infectious Diseases Act does not contain any detailed guidelines, thus granting the Council of Ministers almost total discretion in establishing restrictions on the activities of business undertakings. Therefore, it does not meet the constitutional requirement of being sufficiently clear<sup>163</sup>.

## **The practical dimension of restrictions on freedom of business activity in the face of the COVID-19 pandemic**

To some business undertakings, the restrictions on the freedom of business activity related to the current epidemiological situation in Poland amounted to a complete ban on their activities. The affected types of business activity include:

- ▶ the operation of amusement and theme parks;
- ▶ the operation of discos and nightclubs;
- ▶ the carrying out of activities relating to the display of films or video recordings in cinemas (with the exception of activities which may be carried out by means of direct distance communication);
- ▶ the provision of physical fitness services;
- ▶ the operation of swimming pools, water parks, gyms, fitness clubs and centres (excluding those operating in entities performing medical activities for patients or those performing services for members of national teams of Polish sports associations).

Other types of business activities (including restaurants, hotels and other providers of tourism and hospitality services) have been subjected to far-reaching restrictions of their activities.

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162 See Judgment of the Provincial Administrative Court in Opole of 27.10.2020., case no. II SA/Op 219/20, LEX no. 3093916.

163 Judgment of the Provincial Administrative Court in Szczecin of 11 December 2020, case no. II SA/Sz765/20; see also <https://www.rpo.gov.pl/pl/content/raport-rpo-dla-premiera-nt-prawa-w-stanie-epidemii> (accessed on: 14.01.2021).

## The pushback from business owners

The discussed restrictions had a negative impact on the situation of business undertakings in Poland. In recent months, business owners have responded to the Government's policies by engaging in different forms of protest such as:

- ▶ several street demonstrations<sup>164</sup>;
- ▶ the *otwieramy* (“we are opening”) action as part of which business owners open their restaurants, hotels, ice rings or go-kart tracks despite the applicable restrictions<sup>165</sup>;
- ▶ groups of business undertakings, including those from the entertainment and tourism industry, are launching collective actions alleging the State Treasury's liability for damage caused by unlawful actions taken by the Council of Ministers and individual ministries in connection with the COVID-19 pandemic and for the failure to introduce the state of natural disaster<sup>166</sup>.

## Conclusions

- ▶ Restrictions on the freedom of economic activity have been affected by various legal irregularities and shortcomings. They included, inter alia, the use of a legal act of improper rank for the purpose, the enactment of an unconstitutional statutory authorisation, the overstepping by the Council of Ministers of the powers conferred by the aforementioned authorisation, and the fact that certain legal restrictions violate the essence of the freedom of business activity.
- ▶ Given the shape of the Government's measures ultimately imposed to tackle the pandemic, a negative assessment must be expressed regarding the Council of Ministers' failure to introduce the state of natural disaster. There is a reasonable suspicion that the country leadership's refusal to introduce the state of natural disaster may have been

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164 See e.g.: <https://next.gazeta.pl/next/7,151003,26696439,akcja-otwieramy-rusza-w-poniedzialek-przedsiębiorcy-buntuja.html>; <https://www.money.pl/gospodarka/protest-przedsiębiorców-w-warszawie-przepychanki-gazi-lzy-6511216090929281a.html>; <https://wyborcza.pl/7,155287,26438138,rewolucja-jest-przedsiębiorca-strajki-wylewaja-sie-na-ulice.html>; (accessed on: 18.01.2021).

165 One of the reasons for initiating the action was a ruling of the Provincial Administrative Court in Opole of 27 October 2020, in which the Court held that the statutory authorisation given under the Infectious Diseases Act does not include an authorization to introduce prohibitions on conducting a business activity in a regulation; Judgment of the Provincial Administrative Court in Opole of 27.10.2020., case no. II SA/Op 219/20, LEX no. 3093916.

166 E.g.: the collective action brought on 14 January 2021 by a group of claimants represented by Explosion Club sp. z o.o. sp. k. against the State Treasury represented by the Council of Ministers represented by the Prime Minister, the State Treasury represented by the Minister of Health and the State Treasury represented by the Minister of the Interior and Administration; the collective action brought on 7 January 2021 by a group of claimants represented by Alina Dybaś-Grabowska against the State Treasury represented by the Council of Ministers represented by the Prime Minister, the State Treasury represented by the Minister of Health and the State Treasury represented by the Minister of the Interior and Administration.

caused by the desire to restrict citizens' ability to claim damages from the state. This suspicion is all the more valid given that the Prime Minister and the Speaker of the Sejm have submitted requests for the constitutional review of Article 417<sup>1</sup>, another possible basis for claiming damages in the discussed context.

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## **Recommendation**

- Legislative action should be taken immediately to (i) remove from legal circulation any unconstitutional legal acts; (ii) enact laws governing the restrictions on the freedom of business activity necessary due to the epidemiological situation, in accordance with the framework established by Article 22 and Article 31 (3) of the Constitution of the Republic of Poland; (iii) guarantee that those citizens whose freedom of business activity has been restricted in a manner contrary to applicable law may exercise the right to an effective remedy.

# Summary



Every serious social crisis needs to be addressed by a swift and decisive action of public authorities. A modern, well-governed state should be prepared to deliver such a response, both strategically and procedurally. However, the effective tackling of the crisis nowadays requires not only the implementation of effective counter-measures but also thoughtful consideration and strict observance of fundamental human and civil rights. Otherwise, even the noblest intentions can be thwarted by societal resistance. The actions of the authorities should hence be preceded by a deep reflection on the introduction of the necessary restrictions and a precise determination of which restrictions are really necessary. If those in power fail to engage in such reflection, they may (and will) make wrong decisions. And such mistakes, undermining people's trust in the government, apart from providing no assistance in overcoming the crisis, *permanently* lower the standard of human rights protection. The introduction of prohibitions which are nonsensical in the eyes of the public can be counterproductive, all the more so if people become convinced that restrictions introduced at their expense serve not only the declared purpose of averting a crisis situation but also "incidentally" aim to deal with other matters.

Unfortunately, the coronavirus pandemic in Poland revealed, and sometimes clearly highlighted, many deficiencies in the operation of the state. First of all, it is important to point to the vulnerability of the state infrastructure designed to mitigate the effects of the pandemic as well as the ineffectiveness of the prohibitions imposed to tackle the health emergency. These deficits forced the authorities to resort to one of the few instruments they had – legislative changes. Polish parliament passed as many as 16 laws aimed at counteracting the economic effects of the COVID-19 pandemic, reducing or suspending some bureaucratic obligations and adjusting the state's activities to the conditions of the pandemic. It also quickly turned out that legislation can be prepared and enacted even quicker than before. The haste, combined with the complexity of the addressed matters and the absent (or truncated) public consultations, translated into the low quality of the enacted laws. It also resulted in errors.

At the same time, it has transpired that the hastily introduced "anti-crisis shield" was a perfect measure for fixing day-to-day problems of the ruling camp and introducing solutions that had been planned for a long time but postponed due to the fear of popular backlash. The people saw that, which only strengthened their (understandable) reluctance to submit to the restrictions. Chaos emerged during the first months after the outbreak, exacerbated by the presidential election and then-ongoing electoral campaign. The ruling parliamentary majority struggled to answer the question of how seriously they should take the looming threat. Should the pandemic be presented as a serious problem, which would make the

case for postponing the elections and imposing the state of natural disaster, or should it be downplayed and ignored? Not surprisingly, the lack of a consistent narrative on the part of the country's leadership was noted by the people. Even worse, the authorities' uncertainty about the ends was accompanied by hesitation over the means. For obvious reasons, the ruling coalition did not want to introduce the state of natural disaster, a constitutional measure designed to be used in such circumstances. Instead, they embraced the concept of limiting individuals' rights through legal enactments, often of belonging to the category of secondary legislation. Exploiting the deficiencies of the 2008 Infectious Diseases Act, the Council of Ministers issued as many as 43 regulations significantly interfering with fundamental human rights and freedoms. It happened that five amendments were made to a pandemic regulation a mere 14 days. In most instances, these regulations have not been more widely consulted. Citizens learned about the soon-to-be-introduced restrictions from media conferences of the Prime Minister. Displayed slides of presentations accompanying the Government leader's statements were used as aids to interpret the adopted regulations. The latter became effective on the next day, without a *vacatio legis* period. The justification for the introduction and amendments of the regulations were sketchy and devoid of any scientifically-proven rationale. Finally, too often the statements made at the conferences did not match the actual wording of the legal enactments. Directives turned into recommendations, requests became prohibitions.

The confusion amplified the impact of the practical application of the new rules. It was becoming increasingly clear that people's rights and freedoms were dependent on the benevolence of local decision-makers (police officers, court presidents, heads of detention facilities, etc.) and their interpretation of the newly enacted laws. Even more worryingly, the rules seemed to have been enforced less stringently against those in power. This enforcement disparity led to, among other things, the above-described cases of abuses of public authority, as well as unreasonable differentiation in the approach to the introduced restrictions. This created a sense of inequality and injustice among people and contributed to the mounting resistance against even the most expedient rules.

From day one, the approach adopted by the authorities has been raising considerable concerns as to its compatibility with the rule of law principle. The impact of restrictions gradually diminished, especially since it became apparent that the courts are likely to challenge the lawfulness of the executive's actions and the irrational nature of certain measures was fully felt. These developments resulted in respect for the state and the state-made law having been undermined and did not encourage the popular adherence to the restrictions and commitment to mounting other defences against the spread of the virus. Against that background, the Government was unable to improve the situation by introducing measures that had a rational justification.



Mass demonstrations held as part of the Women's Strike and the rebellion brewing among business owners show that a pandemic can only be tackled effectively through dialogue and with respect for all parties to the public discourse. Also, it is now evident that a public health emergency may be managed only by imposing such restrictions on individual rights that are lawful, proportionate, necessary and justified by scientific knowledge. Only such restrictions will be accepted by the public and be effective in combating the coronavirus pandemic. A human rights-based approach can only help to achieve that objective. We hope that the conclusions and recommendations presented in the report (preceded by a discussion about the events of the last ten months) will bring about an appropriate change of course taken by the authorities in the next stages of the pandemic and contribute to repealing defective laws, especially those introduced under the false pretences of tackling coronavirus. Last but not least, we are hopeful that a balance will be struck between restrictions on human rights and the effective containment of the pandemic.

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## The Helsinki Foundation for Human Rights

**T**he Helsinki Foundation for Human Rights (HFHR) is a non-governmental organisation established in 1989 by members of the Helsinki Committee in Poland. Its mission is to develop human rights standards and a culture of human rights in Poland and abroad. Since 2007, the HFHR has had consultative status with the UN Economic and Social Council (ECOSOC). The Foundation promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

From April 2020 to January 2021, the HFHR implemented the project **Safety versus Freedom. Human Rights during the Pandemic**, financed by a grant from the Henryk Wujec Civil Fund. As part of the project, the Foundation monitored legislative action taken “to combat COVID-19” and engaged in day-to-day legal intervention in situations of suspected violations of civil rights and freedoms by public authorities.

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