

POLISH LAWS ON AMICUS CURIAE SUBMISSIONS

Manual for foreign NGOs

Warsaw 2020



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AMICUS CURIAE BRIEFS – GENERAL INFORMATION

There are four elements that distinguish the amicus curiae brief¹ from other procedural submissions:

The submitting organization:

A non-governmental organization which is not involved in the given proceedings and is able to express an independent and an objective opinion on the subject-matter of the proceedings.

The purpose:

The amicus curiae brief is designed to assist the receiving body in the carrying out of a comprehensive analysis of the case.

The brief includes arguments and views which do not aim to advance the interests of a party to the proceedings but are expressed to advance public interest.

The subject-matter:

The questions addressed by the brief should:

- be important for the protection of rights and freedoms,
- relate to the general context of the case, and
- fall within the statutory objects of the submitting organization.

The receiving body:

A court or tribunal (national or international).

1. First published: K.Wiśniewska, Как неправительственные организации могут менять действительность? Практический взгляд на роль судебных процессов и заключений amicus curiae в защите прав с свобод человека в: Amicus curiae - справочник юриста, 2019

➤ Information included in the amicus curiae brief²

- Additional arguments that have not been presented to the court or tribunal, in particular those not raised by the parties. Remember, the amicus curiae brief should not to repeat the arguments already made known to the court, but add a human rights perspective to the case.
- Observations and recommendations relevant to the case under consideration and the underlying issue. They should be of practical relevance to the subject-matter of the upcoming ruling and expand the court's understanding of the wider context of the case at hand.

All provided information must be obtained from reliable sources, well-documented and thoroughly researched.

You do not need to refer directly to the case, but it is always better if you can demonstrate a bridge between e.g. international standards presented and the particular case discussed.

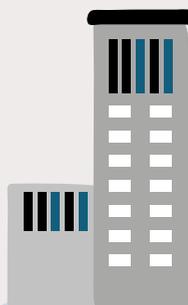
➤ Examples of the content of amicus curiae briefs submitted by NGOs³:

- A detailed analysis of international standards applicable to the case under consideration (references to legal norms, soft law, and the jurisprudence of international bodies).
- Identification of a systemic problem manifesting itself in the case. Here, the reasoning is often substantiated with references to NGOs own research, descriptions of similar cases, reports and analyses of national human rights bodies, international bodies and other non-governmental organizations.
- Insights based on comparative legal analysis.



2. Ibid.

3. Ibidem.



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AMICUS CURIAE BRIEFS AND THE POLISH LAW

There are three major types of court proceedings in Poland:

- civil proceedings governed by the rules of civil procedure;
- criminal proceedings falling under the ambit of the rules of criminal procedure;
- proceedings before administrative courts, subject to the judicial limb of the administrative procedure known as the “judicial administrative procedure”.

2.1 CIVIL PROCEEDINGS

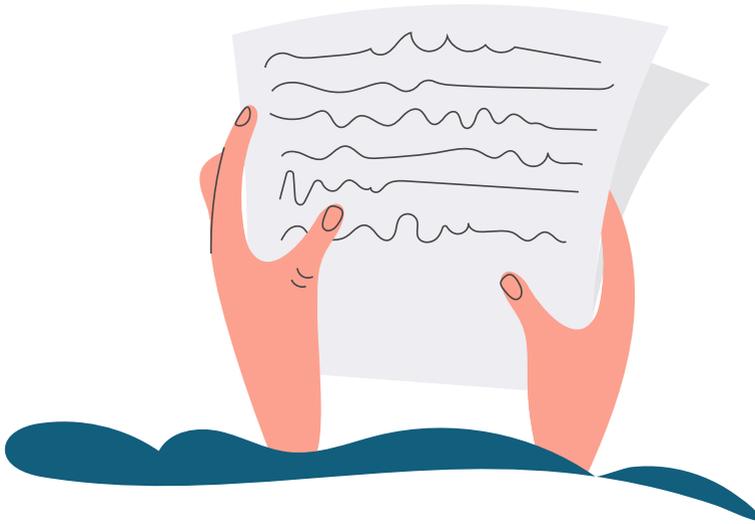
Among all judicial procedure laws in Poland, the Code of Civil Procedure creates the most comprehensive framework for the participation of the NGOs in court proceedings. Pursuant to the rules of civil procedure, NGOs not only may submit amicus curiae briefs but also have the standing to bring legal actions in their own right or intervene in pending proceedings.

An amicus curiae brief may be submitted in civil proceedings based on Article 63 of the 1964 Code of Civil Procedure read in conjunction with Article 61 § 1 CCivP and Article 13 § 2 CCivP⁴ – see below.

An amicus curiae brief may be submitted to a civil court by an NGO which is not involved in the given proceedings. The brief will be considered if all of the following conditions are met:

- the amicus curiae brief is filed as a resolution or statement of a duly authorised body or officer of the organisation concerned,

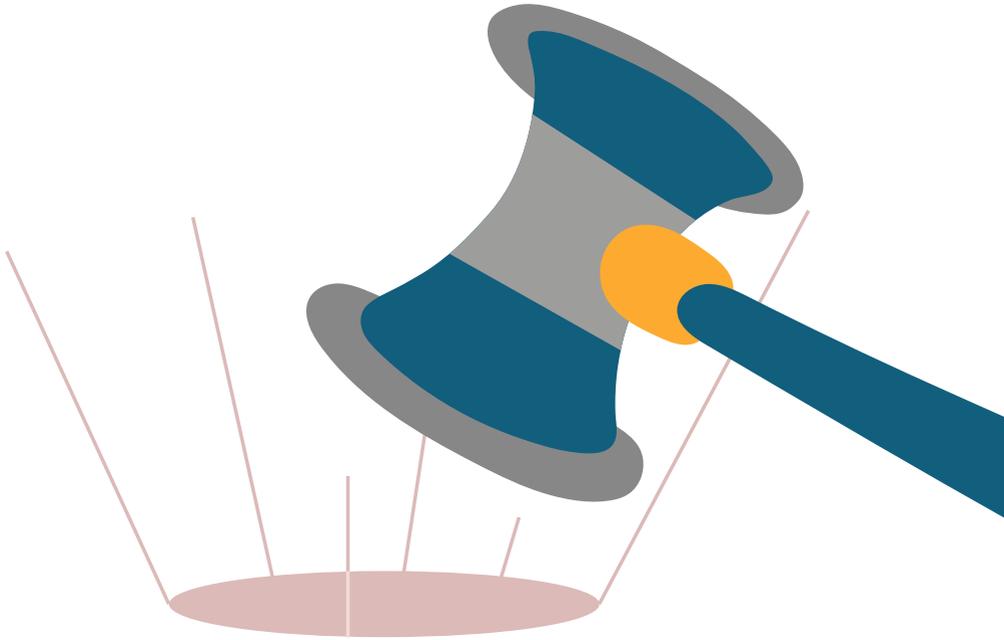
4. The Act of 17 November 1964 – the Code of Civil Procedure [Journal of Laws [Dz. U.] 2019.1460 of 05.08. 2019]



- the brief is relevant to the case at hand,
- the proceedings involve any of the following thematic areas:
 - spousal or child maintenance,
 - environmental protection,
 - consumer protection,
 - protection of industrial property,
 - protection of equality and non-discrimination resulting from the unreasonable, direct or indirect, diversification of the rights afforded to and obligations imposed on the citizens.

The above categories of cases permitting amicus curiae submissions may seem narrow, but, as the HFHR experience shows, the courts interpret the notion of “protection of equality and non-discrimination” in relatively broad terms, expanding its scope beyond the “classic” discrimination disputes⁵. It is thus possible to invoke this ground for the successful submission of an amicus curiae brief in proceedings that may involve violations of human rights. For instance, the HFHR has successfully submitted amicus curiae briefs in civil proceedings concerning:

5. E.g. the HFHR amicus curiae brief in case no. I C 1115/16, pending before the District Court in Warsaw, HFHR amicus curiae brief in case no. I Ns 185/19, pending before the District Court in Rzeszów.



- a person's involuntary placement in a social care home,
- the disfranchisement of a person under guardianship,
- a prohibition to organise an assembly,
- the violation of personal rights of a judge unfairly criticised by the Ministry of Justice,
- unfair competition practices allegedly perpetrated by a restaurant which organised a boycott of beer produced by a company whose owner made homophobic comments on social media,
- the violation of personal rights of a prisoner who was denied "the right to say goodbye" to his dying relative.

Lodging an amicus curiae brief in civil proceedings – a practical guide

1. **Can a foreign NGO be a “friend of court?”** The Code of Civil Procedure established no requirements as to the submitting organisation’s domicile, so we may assume that international and foreign NGOs are entitled to submit their briefs. Notably, several international organisations have already lodged their amicus curiae briefs before the Polish Constitutional Court⁶.

01) The case and the justification – you need to show a justification why your brief should be considered, in other words, demonstrate that your submission is relevant to an aspect of the case concerning any of the above issues. Bear in mind that your amicus curiae brief may discuss both the context of the case and the applicable law.

02) No leave needed – under the Code of Civil Procedure you do not need the court’s leave or a party’s consent to lodge your amicus curiae brief. Just remember that by submitting the brief you do not obtain the status of a party to the proceedings.

03) The content – while drafting your amicus curiae brief, you may want to follow the basic structure of briefs submitted by the HFHR, which usually consist of five key sections:

- **Introduction.** In this section, you should briefly describe your organisation and explain to the court why you consider the case important. It is always a good idea to provide a short summary of the brief’s content.
- **Legal interest.** You need to demonstrate that your organisation has a legal interest in submitting the amicus curiae brief. In our

6. Amicus curiae brief lodged by Open Society Justice Initiative before the Polish Constitutional Court in case no. K 19/11, <https://www.justiceinitiative.org/uploads/3b1366b3-1a83-4106-9895-1e0a40f56aab/domestic-lipowicz-amicus-brief-pol-20111205.pdf> [accessed on: 30.10.2019], Amicus curiae brief lodged by Article 19 before the Polish Constitutional Court in case no. SK 54/13, https://www.article19.org/data/files/medialibrary/38074/PolishSupremeCourt_AMICUS-BRIEF_PL.pdf [accessed on: 30.10.2019].

briefs, we usually describe who we are, point to the focal areas of our work, and above all explain why we are interested in the case in question. We also mention similar cases or actions that we were involved in and make a reference to a specific provision of the HFHR Statute pertaining to the subject-matter of the case. Last but not least, do not forget about showing the legal basis for your submission! At the HFHR, we usually do that by referring to the “protection of equality and non-discrimination” element of the proceedings concerned.

- **Statement of facts.** In this section, give a brief summary of the most relevant facts of the case.
- **The key points.** In this crucial part of your brief, you should discuss in detail the relevant international standards that should be considered in the case. If applicable, describe the systemic nature of the underlying issue and offer insights based on comparative legal analysis.
- **Conclusion.** The brief should be concluded with a summary of the information provided. Just remember that by submitting the amicus curiae brief you do not try to persuade the court to arrive at a certain decision but rather merely offer the court assistance in the understanding the broader context of the case at hand.

04) Research and fact-based evidence. Before submitting the brief, consider whether you have the knowledge and information that would meaningfully contribute to the just and equitable outcome of the proceedings. If you want to present arguments based on data, legal standards or relevant case law or case studies, carefully collect, describe and classify such information.

05) The proper form. In accordance with the rules of civil procedure, amicus curiae briefs are considered pleadings (Polish: *pisma procesowe*) and as such must comply with specific formal requirements. This means that your amicus curiae brief must include the following elements: the place and date of its execution, the name and address of the receiving court, the reference to the parties to the proceedings

and the case number (*sygnatura sprawy*). The brief should be signed by a duly authorised officer of your organisation. You may provide information about the actual drafter(s) of the brief, but the brief itself must always be signed by the duly authorised officer.

06) The language. Your amicus curiae brief must be submitted in Polish.

07) The volume. As for all pleadings in civil proceedings, the law sets no words or page limit for an amicus curiae brief presented before a Polish court.

08) Appendices. In order to comply with the formal requirements laid down in the Polish Code of Civil Procedure, you need to enclose the following appendices to your amicus curiae brief:

- A printout corresponding to a current copy of an entry in the National Court Register. The National Court Register (*Krajowy Rejestr Sądowy*, KRS) is a Polish public register of legal entities such as companies, foundations or NGOs, operated by selected district courts and the Ministry of Justice. A KRS entry contains basic information about a registered organization, including the identity of its officers authorised to represent it under law. Foreign NGOs that not registered in the KRS are nevertheless required to enclose an official document that proves that the brief's signatories are duly authorised to act on behalf of the submitting organisation. Please remember that all official documents issued by foreign authorities that you submit in court proceedings in Poland must be translated to Polish by a sworn translator.
- The constitutional document of the organisation: any such document (Charter, Statute, Articles, Bylaws, etc.) should also be translated to Polish by a sworn translator.
- The signed copies of the amicus curiae brief for each party to the proceedings.

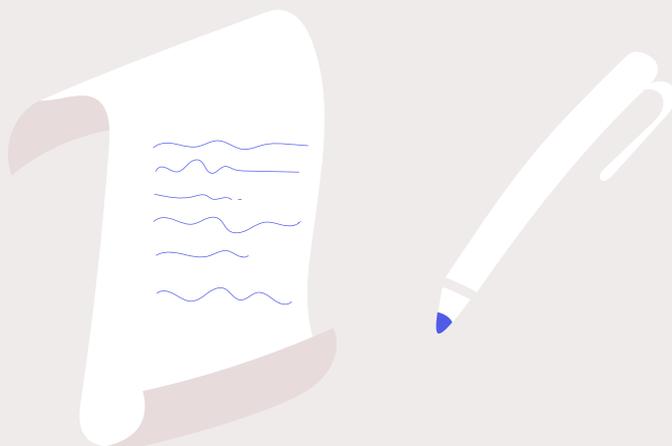
09) Service of process. There are two ways to submit your brief:

- By post. Remember to send your brief by a registered letter with the acknowledgement of receipt. Courts will not accept briefs sent only via fax or by e-mail.
- Personally. The brief, together with its appendices, must be filed with the registry office of the court where the proceedings take place.

10) Timeframes. The Code of Civil Procedure sets out no specific timeframe for lodging amicus curiae briefs. This means that it is the submitting organisation who must choose the right time to act. However, remember that your amicus curiae brief must be submitted before the end of the final hearing. Usually, the HFHR tries to submit its amicus curiae briefs sometime before the final hearing so that each party to the proceedings is given enough time to absorb the information provided in the brief.

11) The probative value. The Polish literature maintains the view that an amicus curiae brief is not a means of evidence but rather an expression of an assessment of the facts of the case made by a social actor.

12) Effect. The court should make a reference to your brief in the statements of grounds of its decision. However, the courts sometimes include no direct reference.



The above rules apply to all types of civil proceedings, including appellate proceedings before a court of the second instance, as well as cassation appeal proceedings pending before the Supreme Court.

Legal basis: The Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws [Dz. U.] 2019.1460 of 05.08. 2019)⁷

Article 13

- § 1. The court hears cases in proceedings, unless otherwise provided for in this Act. In matters provided for in this Act, the court hears cases according to the provisions concerning separate proceedings.
- § 2. Provisions relating to proceedings apply accordingly to other types of proceedings regulated in this Code, unless otherwise provided for in specific provisions.

Article 61

- §1. Non-governmental organizations may, within the scope of their statutory duties, bring actions on behalf of a natural person, subject to his written consent, in matters concerning:
 - 1) maintenance benefits;
 - 2) environmental protection;
 - 3) consumer protection;
 - 4) industrial property protection;
 - 5) protection of equality and non-discrimination by directly or indirectly differentiating the rights and obligations of citizens in an unjust manner.
- §2. In the cases referred to in § 1, non-governmental organizations may, within the scope of their statutory duties and subject to a written consent of a natural person, join the individual in pending proceedings.
- §3. Subject to the written consent of an entrepreneur who is a natural person, the non-governmental organization of which the entrepreneur

7. Translation of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws [Dz. U.] 2019.1460 of 05.08. 2019), LEX.

is a member may bring an action on his behalf or join him in pending proceedings in a dispute with another entrepreneur concerning claims arising from the economic activities being pursued.

§4. A complaint or letter whereby a non-governmental organization joins a natural person in proceedings shall be accompanied by the natural person's written consent.

Article 63

The non-governmental organizations referred to in the preceding Articles that do not participate in a case may submit their opinion to the court, if it is of relevance for the case concerned, in the form of a resolution or statement issued by duly authorised bodies.

Article 126

§1. Each pleading shall contain the following:

- 1) name of the court to which it is addressed, names and surnames or business names of the parties, their legal representatives and agents;
- 2) type of pleading;
- 3) body of a petition or statement and evidence to prove the facts alleged;
- 4) signature of the party or its legal representative or agent;
- 5) list of enclosures.

§2. If a pleading is the first pleading in a case, it should moreover identify the matter at issue and:

- 1) an indication of the place of residence or the registered office and the addresses of the parties or, where a party is an entrepreneur entered in Centralna Ewidencja i Informacja o Działalności Gospodarczej [Central Registration and Information on Business] - the correspondence address entered in Centralna Ewidencja i Informacja o Działalności Gospodarczej,
- 1¹) an indication of the place of residence or the registered office and the addresses of the parties' statutory representatives and attorneys,
- 2) the registration number in the Universal Electronic System for Registration of the Population (PESEL) or tax number (NIP) of a plaintiff

who is a natural person, if he is obliged to have one or if he has one even without being obliged to, or

3) the registration number in the National Court Register or, if unavailable, the number in another relevant register or tax number (NIP) of a plaintiff who is not a natural person and is not obliged to be entered in a relevant register, if he is obliged to have one.

§2¹. Subsequent pleadings shall, apart from the elements referred to in § 1, also contain the case file number.

§3. If a pleading is filed by an attorney who has not yet submitted their instrument of authorisation, such an instrument of authorisation should be enclosed with that pleading or a certified copy thereof. If the attorney has selected to file pleadings via the ICT system, the certified copy of the instrument of authorisation shall be submitted through the system.

§3¹. The provisions of § 3 shall not apply to pleadings filed in electronic proceedings by writ of payment.

§4. If a party is incapable of signing, a pleading shall be signed by a person authorised by that party to do the same, whereupon the reason why the party did not sign themselves shall be explained.

§5. A pleading filed via the ICT system shall be affixed with a qualified electronic signature, a trusted signature or a personal signature.

§6. The Minister of Justice, in consultation with the minister competent for informatization, shall determine, by way of a regulation, the procedure of creating and rendering an account in an ICT system to file pleadings, taking into account the efficiency of the proceedings, protection of the rights of the parties, and a possibility of filing many pleadings at once.

Article 128

§1. A pleading should be accompanied by copies thereof and copies of enclosures thereto to be served to the participants in a case and, if originals of enclosures were not submitted to the court, one copy of each enclosure to be enclosed with the court files

§2. A pleading filed via the ICT system shall be accompanied by certified electronic copies of enclosures.

2.2 Criminal proceedings

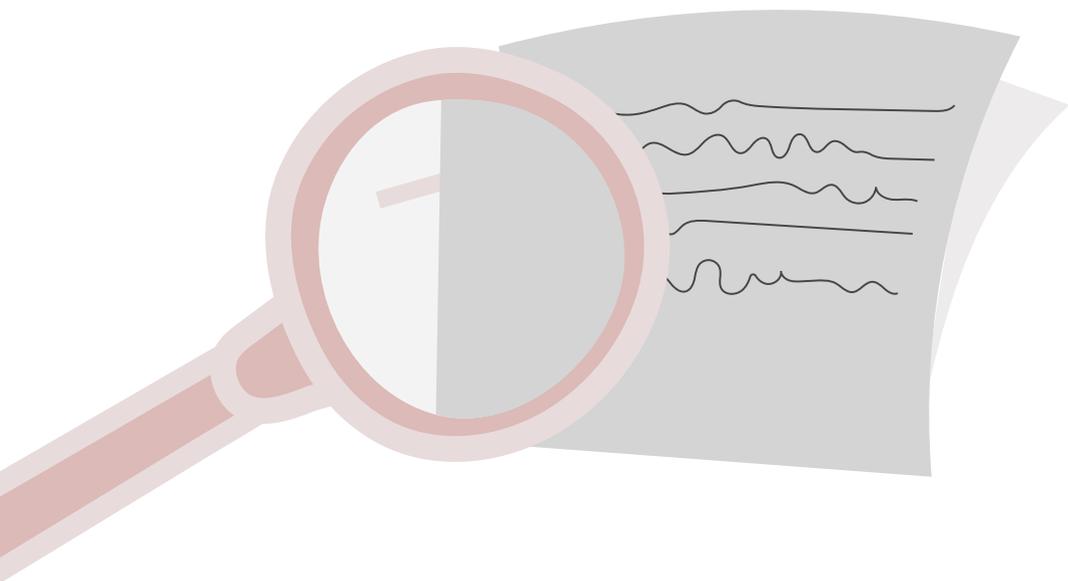
The Code of Criminal Procedure⁸ explicitly provides that NGOs may only participate in criminal proceedings as “representatives of the community”. A representative of the community may join proceedings before the criminal court if “there is a need to protect an interest of the community or that of an individual and the protection of that interest falls within the statutory purview of the organization concerned, in particular liberty and human rights”⁹. The court may allow an NGO to participate in the proceedings as a representative of the community provided that at least one of the parties consents to it. If the court considers that the participation of an NGO advances the interests of justice, the court may grant the NGO leave to join the proceedings even without the consent of a party. Pursuant to the Code of Criminal Procedure, a representative of the community can “participate in the trial, express their points of view and make statements in writing”¹⁰. Therefore, an NGO admitted to the proceedings as a representative of the community is expected to approach the case in a more pro-active manner, and should not limit itself to the submission of written comments.

On the other hand, the Code of Criminal Procedure does not set out any rules on the submission of amicus curiae briefs. In practice, criminal courts accept amicus curiae briefs submitted by NGOs. In the past, the HFHR has submitted briefs in cases concerning, for example, the extension of pre-trial detention or criminal sanctions for defamation. Given the absence of any specific rules on amicus curiae submissions, the whole process is, to a large extent, de-formalised. However, when drafting and submitting your brief you should follow the above rules applicable to civil proceedings. In short, your amicus curiae brief should:

8. The Act of 6 June 1997 – the Code of Criminal Procedure [Journal of Laws [Dz. U.] Dz.U.2020.30]

9. Article 90 § 1 of the Code of Criminal Procedure.

10. Article 91 of the Code of Criminal Procedure.



- be written in Polish;
- have a clear structure comprising the four key elements (legal interest, statement of facts, key points of law, conclusions).
- focus solely on the legal dimension of the case (rather than on persuading the court to decide the case in one way or another);
- be signed by the authorized officer of your NGO;
- be submitted by post or in person, before the end of the final hearing.

Remember that criminal proceedings in Poland have two stages: preparatory (pre-trial) and judicial (trial). An amicus curiae brief may be submitted in the judicial phase or, in certain circumstances, in the pre-trial phase (for example, briefs concerning pre-trial detention). On the other hand, it is not possible to submit an amicus curiae brief in the pre-trial proceedings conducted before a prosecutor.

2.3 Judicial administrative proceedings

The Act on the procedure applicable to the administrative courts¹¹ allows NGOs to apply to the court for leave to join the proceedings provided that the proceedings involve a subject-matter which falls within the scope of their statutory activities. The negative decision of the administrative court may be challenged via an interlocutory appeal. If the court grants the leave, an NGO may act in the proceedings as a party and has all rights and obligations of a party. Therefore, the NGO may participate in the hearing, submit pleadings, lodge a cassation appeal to the Supreme Administrative Court, etc.

Similarly to criminal procedure rules, the rules on the judicial administrative procedure are silent on the question of submissions of amicus curiae briefs by parties external to the proceedings. However, Polish organisations have successfully submitted their briefs in proceedings before Regional Administrative Courts and the Supreme Administrative Court. In the past, the HFHR submitted amicus curiae briefs in cases concerning, for example:

- the excessive length of administrative proceedings,
- the right to compensation for the property lost as a result of the change of the Polish borders after World War Two;
- denial of access to classified case files that served as a basis for a foreigner's removal from Poland,
- taxation of monetary awards of compensation for the excessively lengthy proceedings.

Unfortunately, administrative courts very rarely refer to arguments presented in amicus curiae briefs. While drafting and submitting briefs for administrative courts, the HFHR follows the rules applicable to civil proceedings.

11. The Act of 14 June 1960 – the Act on the procedure applicable to the administrative courts [Journal of Laws [Dz. U.] Dz.U. 2020.256].

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Helsinki Foundation for Human Rights

The 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 standards and the 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 HFHR promotes the development of human rights through educational activities, legal programmes and its participation in the development of international research projects.

Since 2004 the HFHR has been operating **the Strategic Litigation Programme**. As part of this Programme, the Helsinki Foundation for Human Rights joins or initiates court and administrative proceedings of strategic importance. International human rights bodies are a key focus of the Programme’s activities. Through its participation in strategic litigation cases, the Programme aims to obtain ground-breaking judgments, which change practices or laws on specific legal issues that raise serious human rights concerns.

