DFF Digital Freedom Fund

The Digital Freedom Fund (DFF) supports partners in Europe to advance digital rights through strategic litigation. This is one of a series of case studies, which highlight the work of DFF's grantees working to protect digital rights.

Key actor

ePaństwo Foundation (ePaństwo)

ePaństwo's aim is to build citizen engagement, promote open and transparent public authorities, and ensure democratic processes. ePaństwo plays a vital role upholding access to information, particularly by obtaining public data and then making it freely available to the public.

ePaństwo is concerned about the use of algorithms by governmental bodies and is seeking to ensure that their use is made open and transparent. They are bringing this case against the Ministry of Justice because they consider that algorithmic decision-making (in this case with respect to the appointment of judges to individual cases) is a matter of public interest, deserving openness and careful scrutiny.

> **There is a serious problem in the region when it comes to transparency of automated systems. Our case is strategic for the larger region, and we hope it will set an example for our colleagues in other countries.**
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> Krzysztof Izdebski, ePaństwo Foundation

ePaństwo Foundation v. Ministry of Justice of Poland
Case facts at a glance

Court
Supreme Administrative Court, Warsaw

Case goal
ePaństwo wants the court to decide that an algorithm used by the Ministry of Justice for randomly allocating judges to court cases should be disclosed as it constitutes public information.

Background to the case

In 2018, the Polish Ministry of Justice began using an algorithmic decision-making system to randomly allocate judges to court cases. But concerns were soon raised about whether the system could be manipulated to achieve political ends, and the extent to which it could potentially undermine the independence of the judicial system.

ePaństwo began by making a freedom of information request, but the government refused to share any information about how the system was built and what data it uses. ePaństwo went on to challenge the refusal to respond to the freedom of information request. They argued that their request was to obtain public information that should be available to citizens. They have also based their argument on the right to a fair trial, given that this system determines how judges are assigned to individual cases.

In September 2018, the Regional Administrative Court in Warsaw (a court of first instance) dismissed ePaństwo's claim. ePaństwo is now appealing the decision before the Supreme Administrative Court of Warsaw, seeking a decision that upholds the view that the algorithm is public information, deserving of open scrutiny.

> **For a long time, a lot of judges were in favour of implementing a technical solution for allocating cases. But when the system was introduced, the government had been trying to undermine judicial independence. The judges were as unhappy about the new tool as we were.**
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> Krzysztof Izdebski, ePaństwo Foundation

Raising public awareness about 'black box' algorithms

ePaństwo is using the litigation to draw public attention to the need for transparency in algorithmic decision-making in the public sector. They are raising awareness about how algorithms operate like a 'black box' – i.e. with inputs and outputs, but with complete opacity around the internal workings. ePaństwo are also keen to ensure that the appeal court judges are familiar with the underlying issues and recognise the potential flaws in using algorithms to make decisions that potentially impact on individuals' rights.

ePaństwo is also raising awareness in the media and among MPs. This public advocacy helps to illustrate why there is urgent need for regulation of algorithms used by the public sector. ePaństwo has also conducted comparative research in other jurisdictions where governments are denying access to algorithms. A positive decision in this case would help organisations in other countries to make similar arguments in comparable cases.

> ❝ **At the moment Poland lacks any regulation on a national level that directly concerns algorithms or algorithmic decision-making. Although several important case studies of the use of ADM (automated decision-making) can be observed at different levels of government, there doesn't seem to be any attempt to regulate this issue or to define standards.**
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> Alek Tarkowski, sociologist

Alek Tarkowski quotes sourced from: *Automating Society: Taking stock of automated decision-making in the EU* (2019) A report by AlgorithmWatch in cooperation with Bertelsmann Stiftung, supported by the Open Society Foundations.

The urgent need to develop minimum standards for algorithmic transparency

Algorithmic decision-making is becoming a widespread phenomenon in our society. Governments are increasingly turning to automated systems as a way of reaching decisions, whether that is for predicting the risk of fraud (such as in the SyRI case) or to allocate judges to cases, as in this litigation.

At its heart this case raises fundamental questions about what happens when we hand over crucial decisions to a machine. There are currently no minimum standards for algorithmic transparency in Poland. This makes it very difficult to assess how efficient the system is, and to be able to hold the government to account for decisions made on the basis of outputs from a machine. This lack of transparency means that errors, faults and potential bias can go unnoticed and unchecked.

The independence of the judiciary is a founding principle of any democracy. But this is called into question when there is no avenue for accountability, or proper scrutiny as to which judges are assigned to cases. This litigation, and the advocacy that surrounds the case, is shining a light on the urgent need for regulation of algorithmic decision-making that has a direct impact on citizens' lives.

> ❝ **In mid-2018, the Ministry admitted that the system has faults and, in the case of some judges, assigns cases unequally. The Ministry promised to introduce changes to the algorithm, yet its exact functioning remains unclear and controversial.**
>
> Alek Tarkowski, sociologist

DFF's support

Financial assistance

DFF provided financial support that enabled ePaństwo to take on this litigation

DFF workshops on digital rights litigation

The DFF workshops provided an opportunity for ePaństwo to meet other organisations working on digital rights litigation in order to share ideas and approaches. This case was discussed at DFF's 'Litigating Algorithms in Europe' workshop in November 2019, which brought together litigators from the US, Europe and Latin America who were working on cases concerning automated decision-making.

Making connections

DFF connected ePaństwo to other digital rights organisations who have been able to provide advice and support in relation to the litigation.

> ❝ **DFF have supported us and have stayed engaged throughout our litigation and advocacy efforts. DFF share our mission and vision, which means they act as partners, supporting us to achieve success. This is demonstrated by the workshops, events and other support they've offered to help us develop our competencies in digital rights litigation.**
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> Krzysztof Izdebski, ePaństwo Foundation