



POLAND

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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AMNESTY
INTERNATIONAL



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1. INTRODUCTION

This submission outlines Amnesty International’s main concerns ahead of the United Nations Human Rights Committee’s (hereinafter, “the Committee”) review of Poland’s seventh periodic report during its 118th session in October 2016. Amnesty International welcomes the fact that since the Committee’s last review, Poland signed and ratified several international and regional human rights treaties. These include, in 2012, the ratification of the Convention on the Rights of Persons with Disabilities; the signing, in 2013, of the International Convention for the Protection of All Persons from Enforced Disappearance, which Amnesty International encourages Poland to ratify; and, in 2014, the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights (“the Covenant”) and Protocol No. 13 to the European Convention for the Protection of Human Rights concerning the abolition of the death penalty in all circumstances. Amnesty International also welcomes Poland’s ratification, in 2015, of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, noting with concern, however, the declaration and several reservations made.

Significant deterioration in several areas has been observed since Poland’s submission of its report to the Committee in 2015. Since the election on 25 October 2015 and the Law and Justice (PiS) party’s assumption of power, 148 new laws and legislative amendments have been enacted.¹ Certain developments outlined in Poland’s report have been reversed, for instance, the 2010 reform separating the positions of Minister of Justice and Prosecutor General.² Little progress has been made regarding hate crime and sexual and reproductive rights, areas which Amnesty International has been concerned about for several years.

¹ Data from Polish Parliament’s website: www.sejm.gov.pl/sejm8.nsf/agent.xsp?symbol=USTAWYALL&NrKadencji=8&NrPosiedzenia=23
² HRC, Seventh periodic reports of States parties due in 2015. Poland, received 26 October 2015, §4.

2. LEGAL AND INSTITUTIONAL HUMAN RIGHTS PROTECTION FRAMEWORK (ARTS. 2, 14 AND 26)

2.1 CONSTITUTIONAL TRIBUNAL

Since November 2015, the Polish government has undertaken significant legal reforms, in particular concerning the Constitutional Tribunal (“the Tribunal”), which has drawn the attention of several regional bodies (Venice Commission,³ Council of Europe Commissioner for Human Rights,⁴ European Commission⁵). The Constitutional Tribunal plays a vital role in protecting human rights in Poland, through adjudicating on laws’, judgments’, administrative decisions’ and state actions’ conformity with constitutional rights. The reforms, briefly outlined below, have seriously undermined the Tribunal’s ability to effectively carry out its mandate, and have created legal uncertainty and an environment where the human rights protections Poland has signed onto are structurally at risk. The speed of the reforms, with proceedings sometimes taking place at night, and the lack of adequate consultation with civil society have been widely criticised.

The crisis originated in the previous Parliament’s adoption of a Law on the Constitutional Tribunal on 25 June 2015,⁶ criticised by NGOs at the time.⁷ This law set out that the outgoing Parliament, led by the Civil Platform (Platforma Obywatelska) party, had the right to elect five Tribunal judges to replace five departing ones, including two whose term was only set to end after the Parliament’s term would end. Below is a timeline of the subsequent, most important, events:

8 October 2015: outgoing Parliament elects five Tribunal judges. The Polish President subsequently refuses, however, to swear them in;

25 October 2015: Law and Justice (PiS) wins general election;

³ European Commission for Democracy through Law (Venice Commission), Opinion no. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016.

⁴ Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, 15 June 2016.

⁵ European Commission, Opinion on the Rule of Law in Poland, 1 June 2016; Rule of Law Recommendation on the situation in Poland, 27 July 2016.

⁶ Law of 25 June 2015 on the Constitutional Tribunal (*Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym*) Journal of Laws 2015 item 1064.

⁷ Helsinki Foundation for Human Rights’ statement, 10 June 2015: www.hfhr.pl/wp-content/uploads/2015/06/oswiadczenie_kh_11062015.pdf

19 November 2015: new Parliament amends the Law on the Constitutional Tribunal, introducing, for instance, a provision enabling it to replace all five previously elected Tribunal judges;⁸

2 December 2015: Parliament elects five Tribunal judges to replace the ones elected on 8 October 2015. The President swears four of them in in the middle of the night;

3 December 2015: Constitutional Tribunal rules that two out of the five judges elected by the Civic Platform Parliament were elected in violation of the Constitution as their term was to end after the outgoing Parliament's;⁹

9 December 2015: Constitutional Tribunal rules that the majority of reforms in the 19 November Law are unconstitutional;¹⁰

22 December 2015: Parliament enacts another law, introducing further far-reaching changes to the Tribunal's procedure, requiring it, for instance, to hear the majority of cases at full bench and decide by a two-thirds, as opposed to a simple majority, and give Poland's President and the Minister of Justice the right to open disciplinary proceedings against Tribunal judges;

24 December 2015: the Senate decides, within two days, to accept the new Law, with no changes;

28 December 2015: only four days later, the President signs the Law;¹¹

13 January 2016: European Commission announces the beginning of a structured dialogue with Poland under the Rule of Law Framework;

9 March 2016: Constitutional Tribunal finds the Law of 22 December 2015 unconstitutional.¹² The Prime Minister refuses to publish the judgment in the Journal of Laws, however, and stops publishing Tribunal judgments from then on;

22 July 2016: the latest amendment to the Law on Constitutional Tribunal is enacted.¹³ It is challenged before the Tribunal by the Human Rights Commissioner, the National Bar Council and groups of MPs;

30 July 2016: the Polish President signs the 22 July 2016 Law;

11 August 2016: the Tribunal declares some of its provisions unconstitutional in a judgment.¹⁴ Some of these mirror the provisions introduced by previous amendments and include:

- the reinstatement of the publication of Tribunal judgments, excluding those on previous versions of the Law (thus excluding the judgment of 9 March);
- the requirement to allow the three judges elected by Law and Justice in December to adjudicate;
- examining cases in sequence of registration, with some exceptions, which would remove the Tribunal's power to decide which matters to consider as a priority. This provision could seriously paralyse the Tribunal's functioning, with matters of grave public importance, such as, for instance, amendments to surveillance legislation being in force for years, even if violating constitutional rights;
- making applications to the Prime Minister to have judgments published in the official Journal of Laws, transferring to the executive a decision making power exclusive to the judiciary;
- adjourning hearings at which the Prosecutor General's presence is required when he fails to attend;
- the suspension of the Tribunal's work for six months in order to bring pending applications in line with the new Law, coupled with the requirement to consider all pending applications within twelve months from the new Law's entry into force, thus potentially never having numerous motions on the recent legislative amendments considered;

⁸ Law of 19 November 2015 amending the Law on the Constitutional Tribunal (*Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym*) Journal of Laws 2015 item 1928.

⁹ Constitutional Tribunal judgment K 34/15 of 3 December 2015, Journal of Laws 2015 item 2129.

¹⁰ Constitutional Tribunal judgment K 35/15 of 9 December 2015, Journal of Laws 2015 item 2147.

¹¹ Law of 22 December 2015 amending the Law on the Constitutional Tribunal, Journal of Laws 2015 item 2217.

¹² Constitutional Tribunal judgment K 47/15 of 9 March 2016, not published in Journal of Laws at the time of drafting.

¹³ Law of 22 July 2016 on the Constitutional Tribunal, Journal of Laws 2016 item 1157.

¹⁴ Constitutional Tribunal judgment K 39/16 of 11 August 2016, not published in Journal of Laws at the time of drafting.

- the provision giving Tribunal judges the ability to stall proceedings instead of dissenting for up to six months, if four judges disagree with the majority decision.

The Prime Minister refused to publish this judgment as well, again acting outside of her official competencies, ignoring the judgment of an independent tribunal and the highest authority in Poland on constitutional matters, and further exacerbating legal uncertainty. Refusing to publish judgments which the executive does not agree with is a clear threat to the integrity of the judiciary.

The new Law theoretically entered into force on 16 August 2016, with the exclusion of the unconstitutional provisions. However, the judgment of 9 March 2016 has still not been published in the Journal of Laws and the executive has thus clearly chosen not to accept the latest ruling and instead apply the new Law in its entirety. The Tribunal has so far continued to act independently and apply the law in accordance with its constitutional mandate but the current Tribunal President's term is coming to an end in December 2016 and there is a risk that his successor will be chosen in line with the ruling party's objectives.

On 27 July 2016, three days before Poland's President signed the latest amendment, the European Commission issued a recommendation to Poland, giving it three months to report on steps taken to remedy the crisis.¹⁵ It assessed that the rule of law in Poland has been under threat and recommended that the authorities take the following steps to enable the Constitutional Tribunal to function effectively:

- implement the judgments requiring that the three judges lawfully elected in October 2015 by the previous Parliament take office and the three judges elected by the current Parliament unconstitutionally do not take up the post;
- publish and fully implement the 9 March 2016 judgment, and subsequent ones, as well as ensure that future judgments' publication is automatic and not dependent on the executive or the legislature;
- ensure that any future reform of the relevant Law respects the relevant judgments and is in line with the Venice Commission's Opinion;
- ensure that the Tribunal's effectiveness in carrying out constitutional review is not threatened by new requirements.

As complaints to the Constitutional Tribunal do not have a suspensive effect, and as not all of the Tribunal's judgments are being implemented by the executive, the effectiveness of such a remedy has arguably been greatly restricted. Unconstitutional laws, creating conditions for human rights violations, may now be passed and applied in Poland. Challenges, such as, for instance, the Human Rights Commissioner's motion to have the constitutionality of the new Counterterrorism Law reviewed, have no immediate effect. The legislative reforms combined with the executive's disregard for the Constitutional Tribunal's judgments effectively dismantle the human rights protection system in Poland, remove an essential element of the right to an effective remedy and undermine the integrity and independent functioning of the justice system.

2.2 HUMAN RIGHTS COMMISSIONER¹⁶

The Human Rights Commissioner is an independent, statutory body, established in 1987, with a mandate to defend human rights as enshrined in the Polish Constitution, international and regional treaties and relevant domestic legislation. The Commissioner can take individual complaints from anyone within Poland's jurisdiction, investigate action and inaction by public authorities and take measures to address violations, including by bringing cases to the Constitutional Tribunal. The Commissioner has challenged the numerous legislative amendments introduced since autumn 2015. While proposals by the government to reduce the scope of his work have for now been dismissed, the institution's functioning is threatened by budget cuts. Its

¹⁵ European Commission, Rule of Law Recommendation on the situation in Poland, 27 July 2016.

¹⁶ The term "Human Rights Commissioner" started to be used in the office's English publications in 2016. The term "Human Rights Defender" was used previously and features in Poland's seventh report as well.

budget was reduced by approximately 3 million PLN (approximately 781,000 USD) in 2016 in comparison to 2015 (a reduction of almost 8 percent), despite the Commissioner's request to have it increased.

RECOMMENDATIONS

Regarding the Constitutional Tribunal:

Amnesty International recommends that the Polish authorities:

- Urgently resolve the constitutional crisis and implement the European Commission's recommendations of 27 July 2016;
- Respect, publish and fully implement the Constitutional Tribunal's judgments, including those of 9 March and 11 August 2016;
- Respect the Constitutional Tribunal's integrity and independence.

Regarding the human rights institutions:

Amnesty International recommends that the Polish authorities:

- Ensure that the Human Rights Commissioner's office has sufficient resources to function effectively and independently.

3. COUNTERTERRORISM AND SURVEILLANCE (ARTS. 2, 6, 7, 9, 14, 17, 19, 21 AND 26)

3.1 COUNTERTERRORISM LAW OF 2016

A new Counterterrorism Law was enacted on 10 June 2016, following a fast-track legislative process.¹⁷ It consolidates sweeping powers, including enhanced surveillance capacity, in the hands of the Internal Security Agency (ISA), with no independent oversight mechanism to prevent abuse and ensure accountability. Combined with other legislative amendments, such as those to the Police Act¹⁸ and the Criminal Procedure Code,¹⁹ it creates conditions for violations of the rights to life, liberty, privacy, fair trial, expression, peaceful assembly, and non-discrimination.

3.1.1 BROAD DEFINITION OF TERRORISM

In its Concluding Observations on Poland in 2010, the Committee raised concerns regarding the definition of a terrorism related crime in Article 115§20 of the Polish Penal Code.²⁰ It found it overly broad and not adequate in defining the crime's nature and consequences and urged Poland to ensure that the Code defines such crimes narrowly and in terms of their purpose.²¹

This issue was not addressed in Poland's seventh report and the recommendation has not been implemented. In fact, the Counterterrorism Law of 10 June 2016 applies to "terrorist crimes" as defined at Article 115§20 of the Penal Code. It also refers to "terrorist incidents", defined as situations suspected of having occurred as a result of a terrorism related crime or threats of such a crime occurring (Article 2§7). Incidents listed as "terrorist" in the Regulation of 22 July 2016 accompanying the Law include: a Polish citizen coming into contact with a person "feared" to be involved in terrorism related activity; travel to or from regions where an armed conflict involving organizations deemed to be engaged in terrorism related activity is

¹⁷ Law on Counterterrorism of 10 June 2016 (*Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych*) Journal of Laws 2016 item 904.

¹⁸ Act of 15 January 2016 amending the Police Act and certain other acts (*Ustawa z dnia 15 stycznia 2016 r. o zmianie ustawy o Policji oraz niektórych innych ustaw*) Journal of Laws 2016 item 147.

¹⁹ Act of 11 March 2016 amending the Criminal Procedure Code and certain other Acts (*Ustawa z dnia 11 marca 2016 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw*) Journal of Laws 2016 item 437.

²⁰ Penal Code of 6 June 1997 (*Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego*) Journal of Laws 1997 no. 89 item 555 as amended.

²¹ HRC, Concluding observations, Poland, 15 November 2010, §4.

ongoing, or even loss of ID documents by a Polish citizen abroad.²² It is worth noting that its previous version, of May 2016, listed, for instance, “plans to establish Islamic universities” or visits of Muslim clerics to prisons.²³ The definition of terrorist incidents in the Law and the Regulation is broad and imprecise and does not comply with the principle of legal certainty, as well as allows for unnecessary and disproportionate interference with human rights. While States have an obligation under international human rights law to ensure protection of people’s right to life, ill-defined and overly broad laws are open to arbitrary application and abuse.

3.1.2 CONCENTRATION OF INTERNAL SECURITY AGENCY POWERS

The Law expands and consolidates the powers of the ISA, with no independent oversight mechanism to review its operations. Under the new Law, the ISA maintains a list of persons involved in terrorism related activities and those reasonably suspected of being involved and can access data on terrorism related threats from several government agencies (e.g. the police, the Border Guard, the Social Insurance Institution, local authorities), as well as private property owners. It can also share this data and its list with other agencies and access and carry out closed-circuit television recordings of public locations. Decisions regarding security and intelligence operations of alleged terrorism suspects are left solely to the ISA in consultation only with the Minister-Coordinator of the Secret Service. Most operations are conducted entirely in secret, severely increasing the risk of abuses of power. The Law has no provision for notifying people at a relevant point regarding their placement on the above-mentioned list, permitting challenges to such placement, or the process to get one’s name removed from it.

3.1.3 FOREIGN NATIONALS TARGETED

Foreigners in Poland are particular targets of the new Counterterrorism Law. Under Article 9§1, they can be subjected to a range of covert surveillance measures, including wire-tapping, monitoring of electronic communications, telecommunication networks and devices without any judicial oversight for the first three months (after which surveillance can be extended via a court order). Such measures can be employed if there is a “fear”, not even a reasonable suspicion, that a foreigner may be involved in terrorism related activities. Singling out foreign nationals in this manner is discriminatory, and, especially given the secret nature of surveillance, could lead to racial and ethnic profiling. The Law does not provide procedural safeguards to ensure that a person, should she or he be made aware of surveillance, can challenge it and have access to an effective remedy against unlawful surveillance. It also impacts on Polish citizens communicating or living with foreigners under investigation.

The Law permits intelligence, police and Border Guard officers to take fingerprints, photos and human biological material from foreign citizens suspected of entering and/or remaining in Poland illegally; where there are doubts as to their identity or the declared purpose of their stay in Poland; or, where there is a mere suspicion that they could be associated with a “terrorist incident”, which, as noted above, is extremely vaguely and broadly defined. According to the 22 July 2016 Regulation, examples of terrorism related incidents involving foreigners, include: marriage by a Polish citizen to a foreigner engaged in terrorism related activity or “feared” of being so and discontinuation of studies in Poland after a foreigner has obtained a student residence permit. The existence of a “threat” to foreigners in Poland who, due their ethnicity or religion are “at a particular risk of terrorist incidents” [sic] is also in and of itself listed as a terrorism related incident.²⁴ No explanation is provided as to how an individual’s ethnicity or religion puts them at particular risk of terrorism incidents.

²² Regulation of the Minister of the Interior and Administration of 22 July 2016 on the Catalogue of Terrorist Incidents (*Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 22 lipca 2016 r. w sprawie katalogu incydentów o charakterze terrorystycznym*), Journal of Laws 2016 item 1092, 1.4.

²³ www.legislacja.rcl.gov.pl/docs/2/12284561/12348757/12348758/dokument220228.pdf

²⁴ Regulation of the Minister of the Interior and Administration of 22 July 2016 on the Catalogue of Terrorist Incidents.

In addition to the possible concerns regarding foreigners' right to privacy and presumption of innocence, the differentiation between Polish and non-Polish citizens is unjustified and therefore violates the right to be free from discrimination.

3.1.4 EXPANSION OF SURVEILLANCE POWERS

The new Counterterrorism Law is coupled with a range of expanded surveillance powers under the Police Act amended on 15 January 2016.²⁵ Courts are allowed to authorise secret surveillance, including the content of communications, for a period of three months, which can be extended to eighteen, on the basis of a broad list of crimes and without having to consider proportionality. The amendment also allows security services and police broad access to telecommunications data, including internet data. Metadata, which can be equally or possibly more revealing of personal information than content, can be accessed directly by police, without a court order. Confidentiality of information covered by professional privilege (e.g. information available to defence solicitors) is also significantly compromised, as secret surveillance of lawyers' communications is not prohibited.

As surveillance is covert, it is difficult to imagine in what circumstances a person would be able to challenge it. The new Police Act has been challenged before the Constitutional Tribunal by the National Bar Council and the Human Rights Commissioner, which has had little real effect given the current Constitutional Tribunal crisis and the Act remains in force.

The combined powers enshrined in the Police Act and in the Counterterrorism Law raise serious concerns that the right to privacy will be infringed in the course of police and ISA operations, with little or no recourse to remedy for those subjected to unlawful surveillance. Further, unlawful surveillance undermines the right to freedom of expression, potentially leading to self-censorship and limiting the right to seek and impart information.

3.1.5 ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE

The potential for human rights violations resulting from the consolidation of the ISA's powers and its permitted surveillance of foreigners without judicial oversight for up to three months becomes even clearer when examined together with the amendment to the Criminal Procedure Code.²⁶ Under Article 168a of the Code, amended on 11 March 2016, evidence in criminal proceedings cannot be considered inadmissible solely on the basis of having been obtained unlawfully, except in cases where evidence has been obtained by way of committing a homicide or intentional harm to health or deprivation of liberty by a public official. This provision allows for illegally obtained evidence to be accepted in criminal proceedings in almost all cases. Consequently, evidence obtained by the ISA, via, for example, surveillance of a Polish citizen without a court order (thus, in contravention of the Counterterrorism Law and the Police Act), would be admissible in court, in violation of fair trial rights, equality of arms and the right to privacy.

3.1.6 EXTENDED PRE-CHARGE DETENTION

The Counterterrorism Law also includes a provision for 14-day temporary detention without charge of persons suspected of "terrorist crimes" based on the above-noted broad definition. Since such arrests can be made on the basis of information obtained via surveillance, the suspect and their lawyer may be denied

²⁵ Act of 15 January 2016 amending the Police Act and certain other acts. On 13 June 2016, the Venice Commission issued an opinion on the Act, accompanied by an English translation of parts of it: [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e)

²⁶ Act of 11 March 2016 amending the Criminal Procedure Code and certain other Acts.

access to the evidence against them. Their right to contest the legality of detention and seek release, protected under Article 9 of the Covenant, is therefore severely undermined.

3.1.7 USE OF FORCE AND THE RIGHT TO LIFE

The new Counterterrorism Law amends the 2013 Act on the Use of Force and Firearms,²⁷ removing some of the safeguards around permissible use of lethal force. It allows for “special use of force” as part of counterterrorism-related activities, when “necessary” for the prevention of a direct, unlawful and violent threat to the life or health of a person or for releasing a hostage. It can be employed by police, Border Guards, ISA officers, the Military Gendarmerie and the Army, if they are part of a “counterterrorism group”, and is to be based on a decision by the person directing the group’s activities.

The 2013 Act on the Use of Force and Firearms contains a safeguard, at Article 7§1, whereby force or firearms can be used in a manner that causes the least possible harm. Article 48 lays down several steps that need to be taken before a firearm can be used, for instance, issuing a warning and demanding the target to drop their arms, cease violent behaviour or flight, and, if these fail, issuing another warning and firing a warning shot. These steps may be omitted if they would result in a direct threat to the life or health of the person authorised to use the firearm or of another person. However, the Counterterrorism Law removes these safeguards entirely in the context of counterterrorism-related activities.

This measure is incompatible with the protection of the right to life under Article 6 of the Covenant, which cannot be derogated from even in time of public emergency.²⁸ It contravenes the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, according to which, if lawful use of force and firearms is unavoidable, officials shall exercise restraint and act in proportion to the seriousness of the offence and the legitimate objective to be achieved, as well as minimize injury.²⁹ According to the European Court of Human Rights’ (“ECtHR”) jurisprudence, exceptions can only be made when it is “absolutely necessary” and “a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is ‘necessary in a democratic society’.”³⁰ The Counterterrorism Law not only removes the safeguards contained in the Act on the Use of Force and Firearms but also appears to allow the use of lethal force in circumstances not reaching the threshold of necessity required under the European Convention of Human Rights (“ECHR”).³¹

3.1.8 FREEDOM OF EXPRESSION

Under the Counterterrorism Law, the Director of the ISA can order an immediate block on websites with no prior judicial authorization if he or she considers that a delay could result in a “terrorist incident” (Article 32c §4). Such a provision compromises the right to freedom of expression, including the right to seek, receive and impart information. If a court does not confirm that the block is justified within five days, the block must be lifted. The head of the ISA and the Prosecutor General can appeal such a decision, based on vague national security grounds. The Law is silent regarding whether other persons or organizations can appeal website blockages. Blocking the content of an entire website raises significant freedom of expression related concerns, particularly if it takes place without prior judicial authorization. Judicial scrutiny after the fact is insufficient and the 5-day time lapse permitted would result in content being removed without any prior judicial determination regarding whether its removal is necessary and proportionate.

²⁷ Act on the Use of Force and Firearms of 24 May 2013 (*Ustawa z dnia 24 maja 2013 r. o środkach przymusu bezpośredniego i broni palnej*) Journal of Laws 2014 items 628, 1165, 24, 1199.

²⁸ HRC, General Comment 14, §1.

²⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, §5.

³⁰ *McCann and Others v UK* 18984/91 [1995] ECHR (27 September 1995) §149.

³¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, issued 4 November 1950, entry into force 3 September 1953.

3.1.9 FREEDOM OF PEACEFUL ASSEMBLY

Freedom of peaceful assembly is also under threat under the Counterterrorism Law. The Law establishes a terror alert system, which - if it reaches level three or four - allows the authorities to ban or terminate assemblies and large-scale events in particular locations. The vague definition of terrorism and the lack of transparency in the operation of the alert system - including the fact that much of the intelligence that informs it is secret - could lead to violations of the right to peaceful assembly and freedom of expression. It also raises concerns that the government could use the terror alert system as an excuse to ban peaceful public protests against its policy on a range of issues, for example abortion or Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) rights.

3.2 INVESTIGATION OF POLISH AUTHORITIES' INVOLVEMENT IN CIA RENDITION AND DETENTION PROGRAMMES

In 2015, the ECtHR found that the Polish government colluded with the US Central Intelligence Agency (CIA) to establish a secret prison at Stare Kiejkuty, which operated between 2002 and 2005. In *Al Nashiri v Poland*³² and *Husayn (Abu Zubaydah) v Poland*,³³ in which Amnesty International was among the third party interveners, the Court found Poland in violation of the European Convention on Human Rights (ECHR) due to, among other things, its failure to investigate the applicant's claims; their torture and other ill-treatment, secret detention and transfer to other places where they were at risk of further human rights violations. Further information can be found in Amnesty International's 2013 report "Unlock the truth. Poland's involvement in CIA secret detention" and joint interventions.³⁴

3.2.1 DOMESTIC INVESTIGATION

The domestic criminal investigation into the Polish authorities' involvement in CIA rendition and detention programmes has been pending since 2008. In March 2016, the Prosecutor General's Office and the Regional Prosecutor's Office in Kraków responded to Amnesty International's requests for information by stating that proceedings are ongoing.

3.2.2 IMPLEMENTATION OF EUROPEAN COURT OF HUMAN RIGHTS' JUDGMENTS

In October 2014, the Polish authorities sought diplomatic assurances from the United States that Abd al-Rahim Al Nashiri would not be subjected to the death penalty and that both applicants would not be deprived of the right to a fair trial, before the two ECtHR cases became final. The authorities were

³² *Al Nashiri v Poland*, 28761/11 [2015] ECHR (16 February 2015).

³³ *Husayn (Abu Zubaydah) v Poland* 7511/13 [2015] ECHR (16 February 2015).

³⁴ Amnesty International, *Unlock the truth. Poland's involvement in CIA secret detention* (Index: EUR 37/002/2013). *Al Nashiri v Poland*: Written submissions on behalf of Amnesty International and the International Commission of Jurists, 5 November 2012, www.amnesty.org/en/library/info/EUR37/002/2012/en; Supplementary submissions, 15 February 2013, www.amnesty.org/en/library/info/EUR37/003/2013/en; *Husayn (Abu Zubaydah) v Poland*: Written submissions, 17 October 2013, www.amnesty.org/en/library/info/EUR37/007/2013/en.

subsequently urged by the Committee of Ministers of the Council of Europe to take such steps in March 2015. In February 2016, Poland informed the Committee of Ministers that the United States refused their requests. The Committee thus recommended urgent follow up by Poland with the United States at the highest political levels in March and again in June 2016.

Correspondence from Poland's Ministry of Foreign Affairs to the Head of the Department for the Execution of Judgments of the ECtHR on 19 July 2016 indicates that the authorities have been acting on the Committee's recommendations. According to the letter, they have renewed their requests for diplomatic assurances, communicated this time by the Secretary of State of the Chancellery of the Polish President.³⁵

While these efforts and the engagement with the Committee of Ministers are commendable, it is vital that the dialogue with the United States remains a priority and that Poland takes all available steps until the necessary assurances are obtained and the applicants' rights to life and fair trial guarantees are secured.

It is imperative that the root causes raised in the judgments are addressed in order to prevent further human rights violations. In *Abu Zubaydah*, the Court noted that "the protection of human rights ... requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations."³⁶ Such concerns are particularly pertinent in the context of the expanded surveillance and counterterrorism measures introduced in 2016. It is paramount that Poland ensures that appropriate safeguards against abuses of power in the context of covert operations are present in legislation and effective in practice, and prevents violations such as those committed against Al-Nashiri and Abu Zubaydah from reoccurring.

RECOMMENDATIONS

Amnesty International recommends that the Polish authorities:

- Amend the Counterterrorism Law and bring it in line with international human rights standards and ensure that counterterrorism operations are conducted in full conformity with these standards;
- Ensure that foreign nationals are not profiled based on nationality, race, ethnicity, or religious grounds, nor targeted for surveillance and monitoring simply based on their citizenship;
- Guarantee that persons deprived of their liberty are charged within a reasonable time or released, given the possibility to contest the legality of their detention and have access to counsel of their choice at the outset and during all interrogations. They should also have access to family members, adequate medical care, and other guarantees and safeguards in conformity with Poland's international human rights obligations;
- Review and amend legislation relating to surveillance and establish an independent and effective system of authorisation and control, including with regard to collection of metadata, in addition to existing judicial pre-authorisation of surveillance under the Police Act;
- Introduce a proportionality test with regard to secret surveillance, including access to metadata;
- Ensure that professional privilege is not violated by surveillance measures;
- Ensure that the use of evidence does not violate the affected person's human rights;
- Complete the domestic investigation into the CIA detention sites without delay, ensuring that those responsible for crimes under international law are brought to justice in fair trials;
- Implement the ECtHR judgments in the cases of *Al-Nashiri* and *Abu Zubaydah* urgently and take all available steps to obtain assurances from the United States that the applicants' right to life and fair trial guarantees are secured;

³⁵ www.coe.int/en/web/execution/submissions-poland

³⁶ *Husayn (Abu Zubaydah)* §492.

- Ratify without further delay the UN Convention for the Protection of All Persons from Enforced Disappearance.

4. PROTECTION FROM DISCRIMINATION AND HATE CRIMES (ARTS. 2, PARA 1; 20, 26 AND 27)

4.1 INTRODUCTION

While making some important progress in addressing hate crimes against some groups, Poland has entirely left behind others, creating a two-tier system and a significant protection gap in law and in practice. Polish criminal law specifically provides for the investigation and prosecution of hate crimes motivated by race, ethnicity, nationality, religion and political affiliation. But it does not establish that age, disability, gender, gender identity and expression, sexual orientation and social or economic status are also grounds to investigate and prosecute hate crimes.

Amnesty International commends Poland's adoption of the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment.³⁷ However, its scope of protection for LGBTI people and on the grounds of disability and religion is limited. Amnesty International welcomes the application submitted by the Human Rights Commissioner to the Constitutional Tribunal on 31 March 2016 seeking to have the limited protection of certain individuals under the Act declared unconstitutional,³⁸ while bearing in mind the current Constitutional Tribunal crisis.

4.2 RACE, ETHNICITY, NATIONALITY AND RELIGION

In September 2015, Amnesty International published a report on hate crimes in Poland,³⁹ concluding that members of ethnic minorities, refugees, asylum-seekers and migrants continue to experience discrimination and violence, despite provisions in Polish law criminalizing violence or unlawful threats against people on the basis of their race, ethnicity, nationality or religion. Most of the civil society organizations and victim support groups Amnesty International interviewed agreed that the authorities' responses to racist crimes had improved in recent years. However, in some cases the authorities responded effectively only where incidents

³⁷ Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) Journal of Laws 2010 no. 254 item 1700.

³⁸ www.rpo.gov.pl/sites/default/files/Wniosek_do_Trybunalu_Konstytucyjnego_ws_zakresu_stosowania_ustawy_o_rownym_traktowaniu.pdf

³⁹ Amnesty International, *Targeted by hatred, forgotten by law. Lack of a coherent response to hate crimes in Poland*, September 2015, EUR 37/2147/2015.

occurred in the context of an escalation of racist violence. In many cases, an earlier and quicker response could well have prevented some of the attacks.

According to the Ministry of the Interior and Administration's latest report, in 2015 police initiated 962 investigations into hate crimes, as compared to 698 in 2014.⁴⁰ It is not clear whether this indicates an increase in hate crimes, an increase in victims reporting them or is a result of the police being better equipped to investigate such crimes. In 2014, the Ministry recorded 315 cases,⁴¹ nearly twice as many as 2013, when 175 cases were recorded.⁴² Of the cases recorded in 2014, 45 involved physical violence and more than three quarters (251) involved incitement to violence or hatred or discriminatory insults. More than two thirds (223) of the cases recorded were hate crimes motivated by race, ethnicity and nationality.⁴³ Further, according to data from the Office of the Prosecutor General, which collects disaggregated data at different stages of the criminal justice process, 1,062 new investigations were launched in 2014, an increase of 50% compared with 2013 when 719 new investigations were initiated.⁴⁴ This increase is partly due to improvements in recording and prosecuting hate crimes.

The Ministry of the Interior's latest report identifies a significant increase in 2015 in crimes directed at Arabs and Muslims specifically.⁴⁵ In its List of Issues, the Committee requested information on measures taken to address the reported increase of verbal and physical attacks against Muslims, Roma and people of African origin, including steps to promote tolerance and combat prejudice.⁴⁶ Given the increase in hate crimes directed towards Arabs and Muslims, Amnesty International notes with concern public statements made by the Polish Minister of the Interior, Mariusz Błaszczak, including a statement the day after the 2016 terrorist attack in Nice, France, that the attack was "a consequence of multicultural politics and political correctness".⁴⁷ In relation to reported pushbacks of refugees on Poland's border with Belarus on 31 August 2016, he stated that their attempts to claim asylum are in order "to create a new migratory route for Muslims into Europe" but that "Poland will not subject itself to terrorist threats".⁴⁸ Amnesty International considers that such statements by a public official indicate that Poland's efforts to promote tolerance and combat prejudice, especially towards Muslims, asylum seekers and refugees are seriously lacking. Nonetheless, while there are flaws in the implementation of policies and laws combatting hate crimes, the increase in prosecutions and reporting of hate crimes signal important progress.

The Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance was abolished through an order of the Prime Minister on 27 April 2016.⁴⁹ Further, in June 2016, the use of a training handbook on hate crimes for police officers referenced in Poland's seventh report⁵⁰ was discontinued following complaints from the ultra far-right group All-Polish Youth (Młodzież Wszechpolska).

4.3 SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION

Serious gaps remain in Poland with regard to hate crimes and discrimination motivated by gender identity and expression and sexual orientation. According to a 2013 survey by the European Union Agency for Fundamental Rights, 21% of Polish LGBT individuals interviewed said they had been discriminated against in school and 18% when looking to rent or buy a flat in the previous year. The comparable figures for transgender people were 25% and 19%.⁵¹ In 2014, the Campaign Against Homophobia (Kampania Przeciw

⁴⁰ Ministerstwo Spraw Wewnętrznych i Administracji, *Analiza przestępczości z nienawiści*, May 2016, p 5.

⁴¹ Before 2015, Ministry of Interior statistics were based on reports from media and civil society organizations and not police statistics.

⁴² Amnesty International, *Targeted by hatred, forgotten by law*, Chart 1, Appendix 3.

⁴⁴ Amnesty International, *Targeted by hatred, forgotten by law*, Chart 2, Appendix 3.

⁴⁵ Ministerstwo Spraw Wewnętrznych i Administracji, *Analiza przestępczości z nienawiści*, p 21.

⁴⁶ HRC, List of issues prior to submission of the seventh periodic report of Poland, §6.

⁴⁷ www.polsatnews.pl/wiadomosc/2016-07-15/blaszczak-to-konsekwencja-dziesiatek-lat-polityki-multi-kulti-i-poprawnosci-politycznej/, www.ft.com/fastft/2016/07/15/polish-minister-blames-multiculturalism-for-nice-attack/

⁴⁸ www.tvp.info/26757965/blaszczak-nie-dopuszcza-abym-polska-byla-zagrozona

⁴⁹ Order no. 35 of 27 April 2016 abolishing the Council on for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance.

⁵⁰ HRC, Seventh periodic reports of States parties due in 2015. Poland, §92.

⁵¹ LGBT survey data explorer, www.fra.europa.eu/DVS/DVT/lgbt.php

Homofobii), the main LGBTI organization in Poland, recorded some 120 cases of homophobic and transphobic hate crimes, the overwhelming majority of which targeted people on grounds of their sexual orientation (90%). About 50 of the cases reported involved violence.

Poland's seventh report to the Committee states that the authorities support the idea of introducing a special type of discriminatory offence on grounds of sexual orientation, gender identity and expression.⁵² However, efforts to reform the Penal Code have stalled, despite support for this process expressed to Amnesty International in March 2015 by the then Minister of Justice. The previous Parliament did not pass the legislative amendments before the general election on 25 October 2015. A new proposal has since been submitted by the opposition party Nowoczesna on 15 July 2016.⁵³

As mentioned above, despite suffering widespread discrimination, LGBTI people are not sufficiently protected under the 2010 Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment. Its scope is very limited and protects lesbian, gay and bisexual people only in the area of employment. Transgender and intersex people are not explicitly protected from discrimination on grounds of gender identity and expression.

RECOMMENDATIONS

Amnesty International recommends that the Polish authorities:

- Introduce a draft bill to Parliament amending the Penal Code so that crimes motivated by discrimination on any grounds, including age, disability, gender, gender identity and expression, sexual orientation and social or economic status, are investigated and prosecuted as hate crimes;
- Introduce a draft bill to Parliament amending the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment so that discrimination on any grounds, including age, disability, religion, gender, gender identity and expression, sexual orientation and social or economic status, is prohibited in all areas of life including education, access to goods and services, housing, health and social protection;
- Reinstatement of the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance.

⁵² HRC, Seventh periodic reports of States parties due in 2015. Poland, §56.

⁵³ [www.orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-270-2016/\\$file/8-020-270-2016.pdf](http://www.orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-270-2016/$file/8-020-270-2016.pdf)

5. SEXUAL AND REPRODUCTIVE RIGHTS (ARTS. 6, 7 AND 17)

5.1 ACCESS TO SAFE AND LEGAL ABORTION

The current legal framework governing abortion in Poland is one of the most restrictive in Europe. Women and girls in Poland continue to face obstacles in accessing safe and legal abortion, as previously indicated, for instance, in Amnesty International's submission for the 13th session of the Universal Period Review made in 2012.⁵⁴

In their report to the Committee submitted jointly with other Polish NGOs on 21 July 2016, the Federation for Women and Family Planning (Federacja na Rzecz Kobiet i Planowania Rodziny) refers to widespread difficulties faced by women in accessing legal abortion in Polish hospitals, based on research conducted between April 2015 and February 2016.⁵⁵ A Commissioner for Patients' Rights' ("CPR") communication on 11 August 2016 to the Human Rights Commissioner echoes these findings. The CPR observes that refusals to provide legal abortions are often not formally recorded as related to the "conscience clause" or in fact recorded at all in patients' medical documentation. The CPR also notes that patients have reported doctors refusing to perform diagnostics that could reveal medical grounds for legal terminations, thereby restricting the patients' right to information.⁵⁶

Since the Committee's last review of Poland in 2010, the ECtHR has heard two cases, *R.R. v Poland*⁵⁷ and *P. and S. v Poland*,⁵⁸ in which it has found that obstacles and delays in women and girls' access to safe and legal abortion under the current framework in Poland constitute violations of the ECHR. The ECtHR found that the lack of access to legal abortion in these cases violated the applicants' right to a private and family life, as well as their right to be free from torture and other inhuman and degrading treatment. In *R.R.*, where the applicant was denied timely access to genetic testing and her child was born with Turner Syndrome, the ECtHR held that her treatment amounted to humiliation, and that, as the domestic law allowed for abortion in cases of foetal malformation, a pregnant woman should have access to full and reliable information on the foetus' health. In *P. and S.*, it found that Poland had also violated the right of a 14 year-old rape victim to be free from inhuman and degrading treatment due to obstacles, harassment and delays that impeded her access to safe and legal abortion.

Amnesty International is deeply concerned that women and girls continue to face these human rights violations in Poland and that the Committee's 2010 recommendation to urgently review the restrictive law has not been implemented.

⁵⁴ Amnesty International, *Poland. Involvement in US-led rendition and secret detention programmes and women's access to sexual and reproductive rights. Amnesty International Submission to the UN Universal Periodic Review, May-June 2012*, p 6.

⁵⁵ Federacja na rzecz Kobiet i Planowania Rodziny, *Dzień dobry, chcę przerwać ciążę... O procedurach dostępu do legalnej aborcji w polskich szpitalach. Raport z monitoringu*, Warsaw 2016: http://www.federa.org.pl/dokumenty_pdf/raporty/kontrola_praw_kobiet.pdf

⁵⁶ www.rpo.gov.pl/sites/default/files/Odp.%20RPP%2019.8.16%20%282%29.pdf, p 5.

⁵⁷ *R.R. v Poland*, 27617/04 [2011] ECHR (26 May 2011).

⁵⁸ *P. and S. v Poland*, 57375/08 [2013] ECHR (30 January 2013).

5.2 SEXUAL AND REPRODUCTIVE RIGHTS – DEVELOPMENTS

A new bill proposing to further restrict sexual and reproductive rights in Poland was submitted to Parliament on 5 July 2016. It originated as a citizens' initiative, spearheaded by a think tank, Ordo Iuris, and an anti-choice group Fundacja Pro, and proposes amendments to the Act on Family Planning⁵⁹ and to the Penal Code.⁶⁰ An alternative citizens' initiative bill on Women's Rights and Conscious Parenting was submitted to Parliament on 4 August 2016, proposing, amongst other things, to allow for access to abortion in all circumstances up until the 12th week of pregnancy. Following the submission, opposition parties' MPs publically stated that they would not support it but rather vote for the law to remain unchanged. Parliament may consider both proposals simultaneously or separately with proceedings due to begin on 21 September 2016.

The restrictive proposal would ban access to abortion in all circumstances except for when it is found to be the only means available to save a woman's life. It would also criminalize women and girls who are considered to have sought or obtained an abortion, and anyone assisting or encouraging them to do so. Under this bill, the maximum prison term for people who perform abortions with the woman's consent would increase from three years to five.

If passed into law, the amendments would violate several rights enshrined in the Covenant and other human rights treaties, namely, the right to life, health and to be free from torture and other inhuman or degrading treatment or punishment, as well as the right to privacy, information, equality and non-discrimination. The enactment of the proposal would have negative implications for the rights and ability of health professionals to provide life-saving and health preserving services that women and girls need and have a right to access. For instance, it can be anticipated that health professionals would be reluctant to carry out prenatal testing for fear of inadvertently causing the death of a foetus and incurring criminal responsibility.

Poland has already been found in breach of the ECHR in cases regarding women's and girls' right to access safe and legal abortion services within its current legislative framework. Further limiting access to services would defy ECtHR rulings and bring Poland in violation of several international and regional human rights obligations. In addition to breaching multiple human rights standards, the reforms proposed could constitute a retrogressive measure, not justified under international law.⁶¹ Further, taking into account the Constitutional Tribunal crisis, the right to an effective remedy and redress following any violations resulting from the bill's enactment and implementation would be compromised. As applications to have the constitutionality of laws reviewed by the Tribunal do not have a suspensive effect, any such motions regarding the new law, if enacted, would not suspend its implementation and the rights of millions of women and girls, as well as medical professionals, would be affected.

RECOMMENDATIONS

Amnesty International recommends that the Polish authorities:

⁵⁹ The Act on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion of 7 January 1993 (*Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży*) Journal of Laws 1993 no. 17 item 78.

⁶⁰ Citizens' proposal on amendments to Act on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion of 7 January 1993 and the Penal Code of 6 June 1997 (*Obywatelski projekt ustawy o zmianie ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz ustawy z dnia 6 czerwca 1997 r. - Kodeks karny*), www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=784

⁶¹ As stated by the UN Committee on Economic Social and Cultural Rights in the General Comment No. 14 on the Right to the Highest Attainable Standard of Health (article 12, para 32): "[R]etrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources."

- Ensure that safe and legal abortion can be accessed in practice by creating clear, legally binding regulations for the implementation of the 1993 Act on Family Planning;
- Fully and effectively implement the ECtHR's judgments on access to abortion;
- Repeal the Penal Code provisions related to doctors, in particular Article 152, paragraphs 1 and 2, performing or assisting in the performance of an abortion that does not meet the conditions set out in the 1993 Act on Family Planning;
- Ensure access to an effective remedy and timely review of appeals against a refusal of an abortion where provided for in law;
- Reject the reforms proposed by Ordo Iuris and Fundacja Pro as they would amount to an unauthorised retrogressive measure that has serious implications for women and girls in Poland, violating their human rights, including the right to the highest attainable standard of health.

6. INDEPENDENCE OF THE JUDICIARY (ARTS. 2 AND 14)

6.1 MERGER OF THE FUNCTIONS OF PROSECUTOR GENERAL AND MINISTER OF JUSTICE

Under the new Law on Prosecution of 28 January 2016, the functions of Prosecutor General and Minister of Justice have been merged, reversing the reform reported in Poland's seventh report to the Committee.⁶² The same person who, as Prosecutor General, can select investigations to be undertaken by prosecutors and interfere in cases, is now also a politician, with administrative oversight of courts as the Minister of Justice.

Merging the functions of Prosecutor General and Minister of Justice, combined with the broadening of the Prosecutor General's powers under the amended Law, has significant implications for the right to a fair trial and the independence of the judiciary.

6.2 BROADENING OF PROSECUTOR GENERAL'S POWERS

The new Law on Prosecution broadens the competencies of the Prosecutor General / Minister of Justice significantly without including sufficient safeguards against abuse of power. As Prosecutor General, the Minister of Justice has the power to intervene in legal proceedings carried out by other prosecutors, revoke or modify their decisions and take charge of individual cases. By merging the two functions and expanding the scope of Prosecutor General / Minister of Justice's ability to interfere in other prosecutors' cases, the new Law on Prosecution effectively requires all prosecutors to take instructions from a politician.

Under the new Law, the Prosecutor General / Minister of Justice, the State Prosecutor and other prosecutors, with his consent, have the right to disclose information about selected cases and pre-trial proceedings to public officials and in some circumstances, other entities, if "justified in the interest of state security and its proper functioning" (Article 12§1). The Prosecutor General / Minister of Justice and the directors of prosecution offices can also make such information (apart from that which is classified) directly available to the media, or authorize another prosecutor to do so, if it would be "in the public interest" (Article 12§2). Such disclosure can be made without the consent of the prosecutor conducting the investigation and without any judicial oversight. The circumstances in which disclosure of such information is permissible are vague and thus allow for undue interference with the right to privacy, the presumption of innocence and the right to a fair trial, especially in the context of the Prosecutor General role being held by a Government Minister.

⁶² Law on Prosecution of 28 January 2016 (*Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze*) Journal of Laws 2016 item 177.

6.3 CREATION OF A NEW DEPARTMENT WITHIN THE PROSECUTION OFFICE

The Law on Prosecution creates a new, autonomous department within the Prosecution Office with a mandate to investigate and prosecute “most serious crimes committed by” prosecutors and judges.⁶³ A definition or list of “most serious crimes” is not provided. The provision appear to ignore the fact that a successful application to have the immunity of a prosecutor or a judge lifted needs to first be made in order to bring a charge against them. Combined with the Prosecutor General’s / Minister of Justice’s broadened powers and the lack of clarity, oversight and safeguards around these powers, the unit’s creation could have significant negative consequences for the independence of the justice system.

6.4 NON-APPOINTMENT OF JUDGES BY POLAND’S PRESIDENT

On 22 June 2016, Poland’s President Andrzej Duda refused to appoint nine judges nominated for promotion to higher instance courts and to appoint one judge nominated for office by the National Council of the Judiciary (hereinafter, “the Council”), without providing any justification.⁶⁴ As such, the President acted outside of his competencies under the Polish Constitution, undermining a constitutionally determined process of independent and thorough judicial selection. Secondly, the absence of any expressed rationale for the decision raises questions as to its potential arbitrariness and political motivation. The President’s action severely undermines judicial independence and has the potential to have a chilling effect on the judiciary. One of the judges affected made a complaint to the Human Rights Commissioner, who wrote to the President’s office regarding the matter on 18 August 2016.⁶⁵

Further reforms affecting the judiciary are expected to be discussed in autumn 2016. A proposal to amend the Law on the National Council of the Judiciary was put forward on 2 May 2016.⁶⁶ If enacted, it would end the terms of all current Council members before their terms in office are due to expire and require the Council to nominate two candidates for any judicial office in the future (except for judges of the Constitutional Tribunal), giving the President the ability to select his preferred candidate and forcing the Council to make two nominations even if it considers only one candidate to be qualified. Such amendments would also threaten the independence of the judiciary and potentially undermine fair trial rights.

The consequences of the Prosecutor General / Minister of Justice merger and the other reforms outlined in this section manifested themselves in July 2016 in the Prosecutor General / Minister of Justice’s documented efforts to exert pressure on a judge. On 25 July 2016, a District Court in Łódź ruled in the first instance that a printing company that refused a service to an LGBTI foundation (LGBT Business Forum Foundation) acted unlawfully. On 26 July 2016, the Prosecutor General / Minister of Justice published a statement on the Ministry of Justice’s website criticising the judgment and stating that, as Prosecutor General, he decided that the Circuit Prosecutor’s office in Łódź would join the proceedings. He called the ruling “a dangerous precedent” and stated that it undermined freedom of thought and opinion and violated the right of the printing company’s employees to freedom of conscience by privileging a foundation that represents “sexual minorities”.⁶⁷

⁶³ Law on Prosecution of 28 January 2016, Article 19§4.

⁶⁴ President’s decision no. 1130.9.2016 of 22 June 2016, Official Journal of 21 July 2016 item 696.

⁶⁵ www.rpo.gov.pl/sites/default/files/do%20szefowej%20Kancelarii%20Prezydenta.pdf

⁶⁶ Bill of 2 May 2016 on the National Council of the Judiciary:
www.legislacja.rcl.gov.pl/docs//2/12284955/12350829/12350830/dokument219698.pdf

⁶⁷ www.ms.gov.pl/pl/informacje/news,8476,oswiadczenie-ministra-sprawiedliwosci-prokuratora.html

As confirmed in General Comment 32 on the right to a fair trial, “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”⁶⁸

When the Minister of Justice is at the same time a Prosecutor General and has the power to become involved in a case, the independence of the judiciary is severely threatened. The potential for violations of international human rights standards is exacerbated by the Prosecutor General’s / Minister of Justice’s power to investigate or prosecute judges for undefined “most serious crimes” and to make information about such investigations public without judicial oversight. Such actions on behalf of the Prosecutor General / Minister of Justice are additionally troubling in the context of the President’s refusal to appoint judges, as described above.

RECOMMENDATIONS

Amnesty International recommends that the Polish authorities:

- Draft and introduce into Parliament a legislative proposal amending the Law on Prosecution, separating the functions of Prosecutor General and Minister of Justice and putting in place sufficient safeguards against abuses of power, thus protecting the independence of the judiciary and the right to a fair trial;
- Cease attempts to exert pressure on prosecutors and judges;
- Not enact the bill on the National Council of the Judiciary.
- Comply with the President’s constitutional duties with respect to the appointment of judges nominated by the National Council of the Judiciary.

⁶⁸ HRC General Comment 32§19. Communication No. 468/1991, *Oló Bahamonde v Equatorial Guinea*, §9.4.

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POLAND

SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE
118TH SESSION, 17 OCT - 04 NOV 2016

This submission outlines Amnesty International's main concerns ahead of the United Nations Human Rights Committee's (hereinafter, "the Committee") review of Poland's seventh periodic report during its 118th session in October 2016.

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