

ANNEX: RULE OF LAW AND HUMAN RIGHTS CONCERNS IN POLAND

Amnesty International, FIDH, the Open Society European Policy Institute and Reporters without Borders are calling on the European Commission to activate Article 7 TEU. It's a call to hold Poland to account for its failure to respect rule of law and human rights and the other values referred to in Article 2 TEU. If activated, the procedure may result in Poland losing its voting rights in the European Council. The NGOs provided the Commission with evidence of continuous attempts to undermine the rule of law and restrict human rights, including freedom of expression and media freedom, freedom of assembly, the right to privacy and women's sexual and reproductive rights. Although these attempts have been met with a strong response by civil society, the government's reaction to protests further confirms its resolve to silence critical voices and hold a grip on democratic counter-powers. This document summarizes the main concerns in relation to the rule of law and human rights in Poland: the constitutional crisis and the independence of judiciary, freedom of assembly, attacks on civil society, freedom of expression and media and counter-terrorism and surveillance. This document is not an exhaustive list of our organisations' concerns regarding respect for the rule of law and human rights in Poland.

CONSTITUTIONAL CRISIS AND THE INDEPENDENCE OF JUDICIARY

Since November 2015, the Polish government has undertaken significant legal reforms, in particular concerning the Constitutional Tribunal, which has drawn the attention of several regional bodies, as well as the European Commission.

The Constitutional Tribunal plays a vital role in protecting human rights and freedoms in Poland, through adjudicating on laws' conformity with constitutional rights, many of which are part of international human rights law and are protected as fundamental rights within the legal system of the European Union. The reforms 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 are structurally at risk. The speed of the reforms, with proceedings sometimes taking place at night, and the lack of consultation with civil society have been widely criticised.

On 27 July 2016, the European Commission (EC) issued a recommendation under the Rule of Law Framework in which it found that there was a "systemic threat to the rule of law in Poland". The EC called on the Polish authorities to address this threat as a matter of urgency and to follow a set of recommendations that would ensure the effectiveness and legitimacy of the Constitutional Tribunal in particular and the independence of the judiciary in general. Amnesty International, FIDH, Open Society Initiative and Reporters without Borders consider that these recommendations have not been implemented by the Polish government to date.

In December 2016 the parliament adopted a package of new laws on the Constitutional Tribunal, including a new procedure for the election of the President of the Tribunal authorizing the President of Poland to appoint an "Acting President". The Polish Constitution only recognizes the President and Deputy President of the Constitutional Tribunal and thus does not provide a basis for this position.

On 20 December 2016, the President of Poland appointed Julia Przyłębska as an "Acting President". A day later, Julia Przyłębska in her capacity of "Acting President" called the General Assembly of Judges. Two candidates, including Julia Przyłębska, were elected by the

General Assembly for the Tribunal President post, the legality of which was questioned.¹ On 21 December 2016, the President of Poland chose to appoint Julia Przyłębska as the President of the Constitutional Tribunal. On the same day, the EC discussed the rule of law in Poland and issued a complementary Recommendation, calling on the authorities to ensure no appointment of the new President of the Constitutional Tribunal takes place as long as the contentious issues around its composition are clarified and until its judgments on the constitutionality of the amendments of the Law on Constitutional Tribunal adopted in March and August 2016 have been published and implemented.² The Polish President ignored this recommendation when appointing Julia Przyłębska.

In January 2017, the President of the Venice Commission stepped up the criticism of the government's interference into the independence of the judiciary stating that "practical steps are now taken with the apparent aim to ensure that the Tribunal act in accordance with the will of the current political majority."³

Apart from infringing the independence of the Constitutional Tribunal, the government has embarked on a trajectory of interference with the independence of the judiciary in general. Under the new Law on Prosecution of 28 January 2016, the functions of Prosecutor General and Minister of Justice have been merged.⁴ The Prosecutor General/Minister of Justice has now the power "to intervene at each stage of legal proceedings led by any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases. [He] can also revoke or modify decisions taken by prosecutors."⁵

The Prosecutor General's powers have also been broadened and include the authority to make information about selected cases and pre-trial proceedings available to public officials and the media, if this is considered to be "in the public interest".⁶ These reforms can have significant implications for the independence of the justice system. The authorities are now drafting an amended law on the Judiciary, which according to the media reports, would allow the minister of justice to dismiss presidents of county and appeal courts before their terms come to an end. The minister would also have the power to appoint new court presidents to replace them.

¹ Helsinki Foundation for Human Rights, statement issued on 5 January 2017. See: <http://www.hfhr.pl/en/chief-justice-of-polands-constitutional-court-elected-at-illegal-session/>

² http://europa.eu/rapid/press-release_IP-16-4476_en.htm

³ Poland: Statement by the President of the Venice Commission, 16 January 2017. See: <http://www.venice.coe.int/webforms/events/?id=2352>

⁴ Law on Prosecution of 28 January 2016 (Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze) Journal of Laws 2016 item 177.

⁵ See the Report of the Commissioner for Human Rights of the Council of Europe, 15 June 2017: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806db712>

⁶ Law on Prosecution of 28 January 2016, Articles 12§1 and 12§2.

Currently the appointment and dismissal of judges is made on the recommendation by the National Council of the Judiciary but the current draft amendment removes this safeguard.⁷

In May 2016, the Minister of Justice presented a proposal to amend the Law on the National Council of the Judiciary which may have significant implications for the right to a fair trial.⁸ If enacted, the Law 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). Under the amendment, the members of the National Council of the Judiciary, constitutional organ safeguarding independence of courts and judges, should be elected by the parliament. The amendment raised also concerns over constitutionality: under the Constitution, the Council comprises of the President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of Poland. The remaining 21 members should be selected from among the judges of the Supreme Court, the general courts, the administrative courts and the military courts. According to the Constitution, only *four* Council members are members of by the lower chamber of the parliament (Sejm) and two are members of the Senate.

In June 2016, the President of Poland refused to appoint nine judges promoted to higher-level courts and a judge candidate who expected to receive his first appointment.⁹ On 29 December 2016, the Provincial Administrative Court in Warsaw dismissed the complaints of three of the judges against the President's refusal.¹⁰ The Helsinki Foundation for Human Rights appealed the decision to the Supreme Administrative Court.

FREEDOM OF ASSEMBLY

The government's actions in relation to the Constitutional Tribunal, independence of judiciary, access to sexual and reproductive rights, access of media to the parliament and respect for human rights in general provoked a strong response of the public. Warsaw as a well as other cities around the country experienced large-scale demonstrations when thousands of people protested against government and its policies in February, March, May, June, October and December 2016. The government responded with a set of measures that raise concerns over infringement of the right to freedom of assembly.

In January 2017, the Warsaw police opened a call on public to identify demonstrators on the images from protests on 16 and 17 December 2016.¹¹ During the events, demonstrators

⁷ Gazeta Wyborcza, 11 February 2017, See in Polish, <http://wyborcza.pl/7,75398,21359505,ziobro-nowelizuje-sady-chce-odwolac-sedziow-nastepnych-mianuje.html>

⁸ Amnesty International. Poland: Submission to the UN Human Rights Committee. 27 October 2016. <https://www.amnesty.org/en/documents/eur37/4849/2016/en/>

⁹ President's decision no. 1130.9.2016 of 22 June 2016, Official Journal of 21 July 2016 item 696.

¹⁰ Helsinki Foundation for Human Rights, statement issued on 5 January 2017: <http://www.hfhr.pl/en/first-instance-administrative-court-dismisses-complaints-of-judges-denied-appointments-hfhr-to-file-a-complaint-in-cassation/>

¹¹ <http://www.policja.waw.pl/pl/dzialania-policji/aktualnosci/41147,Kto-rozpoznaje-te-osoby.html>

blocked the Polish parliament in a protest against the new regulation restricting the access of media to the parliament (see: Freedom of expression and the media). According to the police statement, people pictured on the images are being investigated in relation to the “public disturbances” during the protests. On 24 January, Polish NGO, Helsinki Foundation for Human Rights sent a letter to the Police President, requesting a removal of the participants’ images from the police website on the basis that it may amount to a violation of the right to freedom of Assembly under the European Convention for Human Rights.¹² The NGO also expressed concerns over “chilling effect” of the publication of images on any future protests as people would fear a risk of being charged with a criminal offence.¹³

In November 2016, the government adopted an amendment of the Law on Assemblies that introduces a category of “cyclical demonstrations” organized by the same entity on the same location several times a year. Organizers of “cyclical demonstrations” would have a priority over anybody else on a given location. Under the draft, assemblies organized by the State or Church would also have priority over other assemblies. The proposal raised serious concerns over a possible breach of the freedom of assembly under Article 11 of the European Convention on Human Rights.¹⁴ On 7 December, the Polish Senate adopted two changes to the amendment of the Law on Assemblies. They have removed the provisions favouring the State and Church over other assembly organizers. In December, President of Poland referred the amendment to the Constitutional Tribunal which hasn’t issued a decision on it by the time of writing this briefing.

Hundreds of thousands of people took part in the 3 October 2016 women’s strike and Black Protest (#CzarnyProtest), against the proposed near complete ban on abortions. Following the large demonstrations, two motions have been made to prosecute the protests’ organisers for unlawfully using and altering the ‘Solidarity’ logo and a Warsaw Uprising symbol. The prosecution office later said it will not be launching an investigation regarding the use of the Solidarity logo. In February 2017, it was reported by the media that the Schools Authority in Katowice initiated disciplinary proceedings against ten teachers who wore black clothes to work thus participated in the Black Protest (#CzarnyProtest).¹⁵ Although the Schools Authority discontinued the proceedings, the case raised concerns over chilling effect of such actions on the right to protest.

ATTACKS ON CIVIL SOCIETY

¹² HFPC letter, 24 January 2017 (in Polish): <http://www.hfhr.pl/wp-content/uploads/2017/01/List-KSP-wizerunki-2017-01-24.pdf>

¹³ See in Polish: <https://amnesty.org.pl/oswiadczenie-w-zwiazku-z-publikacja-zdjec-osob-ktore-braly-udzial-w-demonstracji-pod-sejmem/>; and in English:

<http://www.hfhr.pl/en/hfhr-protests-against-online-publication-of-sejm-protesters-images-on-police-website/>

¹⁴ http://www.hfhr.pl/wp-content/uploads/2016/11/HFPC_opinia_29112016.pdf

¹⁵ See in Polish: http://www.dzienniklodzki.pl/strona-kobiet/a/za-czarny-protest-pod-sad-bo-przyszly-do-pracy-ubrane-na-czarno,11773745/?utm_source=social-media-facebook&utm_medium=przycisk-gora

In 2016 civil society organizations have become the target of a massive campaign by in particular public media and pro-government journalists. Polish NGOs that defend human rights, transparency and rule of law became victims of allegations and smear campaigns damaging their reputation and image. Civil society organisations were accused of “unclear connections” and suspicious flows of finances.

Above that, the government has imposed certain limiting administrative decisions, ranging from funding cuts to administrative controls on human rights organisations.¹⁶

Moreover, the government is currently working on the law on the National Centre for Civil Society Development.¹⁷ One of the aims of the law is to centralise the procedure of managing the public funds for NGOs as well as to reform the current procedure of collaboration between the public authorities and civil society. The draft law is heavily criticized by civil society for its unclear aim and the process has so far not included any genuine public consultations.

FREEDOM OF EXPRESSION AND THE MEDIA

The Polish authorities have been restricting media freedom since the Law and Justice party came to power in October 2015. Many of the measures undertaken by the authorities violate freedom of expression. These attacks took several forms and included bringing public media under political control of the government, economic pressure on the privately-owned media and restricting media access to the parliament.

As a result of the media law passed in December 2015, a number of the directors and supervisory councils of the public TV and radio stations were dismissed. In the meantime, the Treasury minister appointed new directors without consultation of the independent National Broadcasting Council. The public media thereby became government-controlled which led to criticism from the independent media and the opposition that they serve as propaganda tools.

Following the adoption of the Act on the National Media Council, the National Media Council (CNM) was hastily created at the end of June 2016. The Council is dominated by the government party MPs who drafted the Act. Its powers include appointing and dismissing the heads of the national media – Telewizja Polska (TVP), the national radio and the PAP news agency. The law on CNM is the first part of “big media law package”. It has been criticised by the Council of Europe for entrusting the CNM with powers that may interfere with the editorial independence of these media.¹⁸

Around 150 journalists, including trade union leaders, were dismissed, forced to resign or to accept less senior positions until May 2016, and around 100 other journalists working in local

¹⁶ <http://www.autonomia.org.pl/index.php?id=aktualnosci&ajdi=190>

¹⁷ <http://www.spoleczenstwoobywatelskie.gov.pl/projekt-ustawy-o-narodowym-centrum-rozwoju-spoleczenstwa-obywatelskiego>

¹⁸ Conclusions of an expert dialogue between the Polish Government and the Council of Europe, 6 June 2016 http://www.coe.int/en/web/freedom-expression/home/-/asset_publisher/RAupmF2S6voG/content/communique-on-conclusions-of-an-expert-dialogue-between-the-polish-government-and-the-council-of-europe?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2F

positions in the public media have been affected by a wave of dismissals and voluntary departures.¹⁹

Economic measures targeting private media include a ban for government bodies to renew *Gazeta Wyborcza* subscriptions. Other independent print media outlets, *Polityka* and *Newsweek-Polska*, have been targets of similar bans. State advertising in these newspapers has also been slashed, reducing their income.

In December 2016, the ruling Law and Justice party announced measures to restrict media movement and journalists' access to parliament. The move led to a major political crisis and an opposition sit-in in the parliament. Although, in face of mass protests, the authorities eventually refrained from implementing the restrictions, there are reports that journalists still face difficulties to access the parliament.²⁰

On 25 January 2017, reporters covering the parliament were told by the security guards at an entrance that was previously freely accessible that they now need lawmakers' consent to conduct interviews. On 27 January, parliament security guards prevented a journalist from *Gazeta Wyborcza* from reporting and filming a protest in front of the Parliament building. His press card was seized and he was asked to leave.

In addition to these restrictions, Poland continues to criminalise defamation which has been criticized by the European Court for Human Rights.²¹ In January 2017, the Helsinki Foundation for Human Rights asked the Committee of Ministers of the Council of Europe to address the implementation of a number of defamation cases that Poland lost at the European Court. Defamation remains a criminal offence in Poland punishable with a prison sentence and so does the implicit threat of its use against government critics. In the past, the defamation provisions were used mainly by the local politicians against local media or bloggers.

COUNTERTERRORISM AND SURVEILLANCE

A new Counterterrorism Law was enacted on 10 June 2016, following a fast-track legislative process.²² It consolidates extensive 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

¹⁹ See: <https://mappingmediafreedom.org/plus/index.php/2016/05/09/polands-political-cleansing-of-journalists/>

²⁰ Dziennikarze w Sejmie bez pełnego wstępu na korytarz przy biurach PiS i PO, 25 January 2017
In Polish: <http://www.wirtualnemedial.pl/artykul/dziennikarze-sejm-ograniczenia-pis-po>

²¹ For example: *Maciejewski v Poland*, *Koniuszewski v Poland*, *Lewandowska-Malec v Poland*, *Dabrowski v Poland* and others.

²² Law on Counterterrorism of 10 June 2016 (*Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych*) Journal of Laws 2016 item 904.

as those to the Police Act²³ and the Criminal Procedure Code,²⁴ it may facilitate violations of the rights to life, liberty, privacy, fair trial, expression, peaceful assembly, and non-discrimination. The government's response to criticism of the Counterterrorism Law was that it is one of the instruments that keeps Poland safe and will therefore remain in effect.²⁵

The 2016 Counterterrorism Law is based on a set of "terrorist crimes" that are broadly and imprecisely defined in the Law and the accompanying Regulation.²⁶ Such ill-defined and overly broad laws are ripe for arbitrary application and abuse. In 2010, the UN Human Rights Committee had found the definition of the nature and consequences of "terrorist crimes" in Polish law overly broad and inadequate. It urged Poland to ensure that the law defines such crimes narrowly and in terms of their purpose; Poland has so far failed to do so.

Surveillance powers have also been expanded under the amended Police Act. Courts are allowed to authorise secret surveillance, including of the content of communications, for three months and prolong this to a maximum of 18 months, on the basis of a broad list of crimes and without a requirement to consider proportionality. Metadata, which is equally or possibly more revealing than content, can be accessed by police directly, without a court order. Confidentiality of information covered by professional privilege (for example, available to defence solicitors) is also compromised as surveillance of lawyers' communications is not prohibited.

On 13 June 2016, the Council of Europe's Venice Commission said that the "procedural safeguards and material conditions set in the Police Act for implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals".

Foreigners in Poland are particular targets of the new Counterterrorism Law, which allows for their covert surveillance, including through wire-tapping, monitoring of electronic communications, telecommunication networks and devices without judicial oversight for three

²³ 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.

²⁴ 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.

²⁵ Statement of the Minister of Interior, 18 January 2017:
<http://wiadomosci.gazeta.pl/wiadomosci/7,114884,21261187,amnesty-international-krytykuje-polska-ustawe-antyterrorystyczna.html>

²⁶ 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 terrorist activity; travel to or from regions where armed conflict involving terrorist organizations is ongoing or even loss of ID documents by a Polish citizen abroad. 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.

months (after which it may be extended by a court order).²⁷ These measures can be employed if there is a “fear”, not even a reasonable suspicion, that the person may be involved in terrorism-related activities.²⁸ Singling out foreign nationals in this manner is discriminatory and could lead to racial and ethnic profiling, especially given the secret nature of surveillance.

The Counterterrorism Law introduces several other provisions which may facilitate human rights violations. These include admissibility of illegally obtained evidence in criminal proceedings,²⁹ extension of pre-charge detention to 14 days, and removal of certain safeguards around permissible use of lethal force in the context of counterterrorism operations.³⁰

At a press conference on 30 January 2017, the Minister of Interior presented a proposal of an amendment of the Law on Foreigners that ostensibly aims to increase the security of the country at the expense of the rights of refugees and migrants. It introduces automatic, group-based detention of asylum-seekers as well as the provisions on safe country of origin and safe third country lists which restrict access to the regular asylum procedure have discriminatory consequences for groups of asylum seekers originating from “safe countries”.

²⁷ Law on Counterterrorism of 10 June 2016, Article 9§1.

²⁸ Law on Counterterrorism of 10 June 2016, Article 9§1.

²⁹ The Counterterrorism Law amends the Act of 11 March 2016 amending the Criminal Procedure Code and certain other Acts in this respect.

³⁰ The Counterterrorism Law modifies the relevant provisions of the 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.