

HUMAN
RIGHTS
WATCH

Eroding Checks and Balances

Rule of Law and Human Rights Under Attack in Poland

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Printed in the United States of America

ISBN: 978-1-6231-35379

Cover design by Rafael Jimenez

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Summary

Since its election win in October 2015, Poland's ruling party, the right-wing Law and Justice Party (PiS), has used its majority in the Sejm (the Polish parliament) to seek to introduce laws and policies that have serious, negative implications for human rights and the rule of law.

This report provides analysis of the PiS government's legislative and policy measures that impact human rights and the rule of law in seven areas:

- Interference with the independence of the judiciary and the administration of justice;
- Interference with the independence of public media and undermine freedom of expression;
- Counterterrorism measures that weaken fundamental rights and due process, and unlawfully target Muslims and foreigners;
- Restrictions on women's reproductive rights;
- Limitations on the right to free assembly;
- Interference with civil society and freedom of association;
- Violations of the rights of asylum seekers.

First, the PiS government has jeopardized the independence of the judiciary and the administration of justice by introducing legislative changes that seek to give the executive control over the hiring and dismissal of judges at all court levels, and would effectively remove some sitting judges from their positions. The government has impeded the functioning of the Constitutional Tribunal, responsible for reviewing the compliance of laws with the constitution including fundamental rights guaranteed therein, by refusing to implement several of its judgments since November 2015, and further politicized appointments to the tribunal by failing to recognize duly appointed judges to the Tribunal while appointing its own preferred candidates instead. Combined, these measures have undermined the independence of the Constitutional Tribunal which is an important check on abuse of power by the government and critical to the protection of democratic institutions and human rights.

The government also introduced legislation that would allow the executive to remove all common court presidents for any reason. At the same time, the government sought to introduce legislation that would force judges to retire from the country's supreme court, unless the executive gives approval for them to continue in office. President Andrzej Duda vetoed this legislation. Instead, in September Duda submitted his own draft law proposal that still allows forced retirement of approximately 40 percent of the supreme court judges.

The government also adopted amendments to the Act on the National Judicial Council, the body responsible for overseeing courts and appointing judges, that would allow the legislature, rather than fellow judges, to appoint the judicial representatives to the Council. President Duda again vetoed this proposal, submitting his own draft in September that would still allow some political influence in electing judges to the Council.

Second, legislative changes introduced by the ruling PiS party have also curtailed media freedom. New media laws, among other things, allowed PiS to replace the management of public service media, and establish a new media regulator called the National Media Council with politically appointed council members.

Third, the government has introduced counterterrorism provisions that put human rights at risk. These measures grant extraordinary surveillance powers to the Internal Security Agency (ISA) without effective judicial review, allowing the ISA to target foreign nationals in Poland for surveillance, and enable courts to authorize the detention of terrorism suspects for up to two weeks before being charged. They also enable authorities to block websites without prior judicial authorization and increase the number of exceptions under which improperly obtained evidence can be admitted at criminal trials.

Fourth, although Poland already has one of the most restrictive abortion laws in Europe, in September 2016, MPs from the governing PiS party supported a bill that would have resulted in a near-total abortion ban. The Sejm rejected the bill following mass protests, but neither this nor monthly demonstrations by civil society groups prevented the parliament's adoption in June 2017 of a bill limiting sales of emergency contraception, the so-called "morning-after-pill," which can prevent pregnancy after unprotected sex, including in cases of rape. Girls and women can no longer purchase the pill over the counter at pharmacies, and must instead see a doctor in order to get a prescription. Such

restrictions are unnecessary and may lead to unsafe abortions that carry risks including infection, hemorrhaging, and death.

Fifth, the government introduced changes to the law on assemblies, enabling it to give priority to government-approved assemblies and ban counter demonstrations protesting against such government approved assemblies. Such restrictions will likely limit future protests critical of the government.

Sixth, legislative changes introduced or proposed by the government could hamper the work of civil society organizations. For example, the government is seeking to change the process whereby public funds are distributed to non-governmental organizations (NGOs) at the national level. If it succeeds, civil society organizations that challenge government policy could be denied government funding. Civil society organizations told Human Rights Watch in April that they had already experienced significant delays in receiving agreed government funding for which there had been no explanation. NGOs also fear that expanded surveillance and website-blocking powers could affect them.

Finally, Polish border guards routinely deny people access to the asylum procedure at the Poland-Belarus border and instead summarily return them to Belarus, in violation of EU and international law. Authorities have ignored binding European Court of Human Rights' orders to halt summary returns of asylum seekers to Belarus. A proposed amendment to the asylum law would allow for the automatic detention of all asylum seekers in closed transit zones.

The actions of the Polish government, in particular, its efforts to curb the independence of the Constitutional Tribunal have been the subject of considerable international criticism. The Council of Europe's Venice Commission issued authoritative opinions in 2016 on the proposed changes to the Constitutional Tribunal, expressing serious concerns about Poland's compliance with its obligations under international human rights law and including concrete recommendations to remedy the situation.

In January 2016 the European Commission (EC) activated its rule of law mechanism against Poland. It was the first time the EC had activated the mechanism, designed to respond to a systemic threat to the rule of law in a member state, since the mechanism was established

in 2014. Consequently, the EC has so far issued three sets of recommendations on the rule of law in Poland.

The Organization for Security and Co-operation in Europe (OSCE)'s Office for Democratic Institutions and Human Rights in March issued an opinion on the National Council of the Judiciary in Poland, noting serious concerns with respect to the separation of powers and the administration of justice. The United Nations Human Rights Committee in November 2016 urged Poland to take steps to protect the independence of the Constitutional Tribunal and the judiciary, and to define more precisely the offense of terrorism, to safeguard against abuse. The UN Special Rapporteur on the independence of the judges and lawyers in July expressed concerns over the state of the independence of the judiciary, which it stressed must be guaranteed by the state. A monitoring visit by the UN Special Rapporteur to Poland is expected to take place in October 2017.

To date, the Polish government has failed to act on most of the recommendations made by the EU, Council of Europe and the UN. Recently, the European Commission stated its readiness to trigger the procedure under Article 7(1) of the EU treaty if the Polish Government continues to ignore its key concerns. This would mean that, if approved by a majority of EU member states in the Council of the European Union, Poland's voting rights in that body could be suspended.

The Polish government has a duty to bring legislation and practice in line with its human rights obligations at the core of the EU, Council of Europe and international treaties. It is essential that the EU and its member states, the Council of Europe and the UN, put pressure on the Polish government to reverse the legislative changes discussed in this report. Absent such pressure the Polish government is likely to continue on its current track with long-lasting adverse effects on fundamental freedoms and human rights in Poland. Furthermore, failure of the EU to effectively protect human rights and rule of law standards in Poland would undermine EU efforts to promote respect for those standards in other EU member states, EU candidate countries and around the world.

Recommendations

To the Government of Poland

Independence of the Judiciary and the Rule of Law

- Publish and accept as legally binding all post-October 2015 judgments of the Constitutional Tribunal;
- Swear in the three Constitutional Tribunal judges appointed by the Sejm in October 2016;
- In order to minimize political influence, scrap the proposed law amending membership of the National Council of Judiciary and maintain the role of the judiciary in appointing the council's members;
- Repeal the law on the organization of the common courts and restore authority for judicial appointments to the common courts to the general assembly of judges;
- Restore the retirement age of all judges to 67 years and reappoint those forced into early retirement when the retirement age was lowered to 60 years for women and 65 for men;
- Scrap the proposed law on the Supreme Court to remove judges from the court unless they have been chosen by the executive and ensure that the executive has no role in future dismissals and appointments of judges to the court.

Freedom of the Media

- Publicly and unequivocally condemn interference with media freedom;
- Repeal the June 2016 law on the National Media Council which allows undue political interference with public service media;
- Implement the December 2016 Constitutional Tribunal ruling by adopting necessary legislative changes to restore the competences of the National Broadcasting Council to oversee public service media.

Counterterrorism

Amend overly broad provisions in counterterrorism legislation to:

- Narrowly define “terrorism” and “terrorist acts” in a manner that is fully consistent with international human rights, refugee, and humanitarian law. Such definitions

should, for example, exclude acts that lack the elements of criminal intent to cause death or serious bodily injury, or the taking of hostages;

- Require prior judicial approval and prompt judicial review of surveillance measures and blocking of websites by government authorities, including the Internal Security Agency (ISA);
- Reduce the pre-charge detention period for terrorism suspects from a maximum of 14 days to comport with international standards, which require “prompt” judicial review of detention—generally within 48 hours—to reduce the risk of torture and other ill-treatment;
- Ban the use of unlawfully obtained evidence in court procedures for suspects accused of terrorism or other offenses;
- Rescind provisions in the Counterterrorism Act of 2016 that disproportionately target Muslims and foreigners.

Women’s Reproductive Rights

- Repeal the law on emergency contraception and ensure there are no arbitrary regulations that create unjustified impediments to over-the-counter sales of morning-after-pills;
- Amend the law on abortions to facilitate access for women to abortions in line with international standards;
- Ensure that medical professionals citing personal or religious grounds as reason for declining to perform an abortion (the “conscience clause”) adhere to legal restrictions in doing so and, as per the law, refer a woman to an alternative provider or facility where she has the real possibility of obtaining an abortion;
- Implement timely appeals processes for women who are denied abortions.

Freedom of Assembly

- Respect the right to freedom of assembly by removing provisions prioritizing government approved cyclical assemblies from the current law on assemblies.

Civil Society

- Repeal the law on establishing a National Centre for the Development of Civil Society and ensure that distribution of public funds to civil society is carried out in a fair, impartial and transparent manner, ensuring pluralistic representation;

- Repeal provisions in the Police Act allowing arbitrary communication surveillance of private citizens;
- Ensure prompt, effective, impartial, and thorough investigations into all attacks and threats against civil society representatives, including cybercrimes, and hold those responsible to account.

Right to Seek Asylum

- Immediately halt summary rejections of arrivals who want to seek asylum at the border with Belarus and ensure that anyone who expresses an intention to seek asylum or international protection at Poland's borders gets full access to the Polish asylum procedure;
- Immediately implement binding orders by the European Court of Human Rights to halt the summary return of asylum seekers to Belarus;
- Allow access for independent organizations, including United Nations High Commissioner for Refugees (UNHCR), to the first-screening interviews conducted by border guards at the Terespol border station in order to monitor the procedure.

To the European Commission

- Maintain pressure on Poland to bring current legislation and practice into compliance with Poland's human rights obligations under international treaties, in particular the EU treaty, the Charter of Fundamental Rights, and the European Convention on Human Rights;
- Ensure that all of Poland's human rights practices are taken into account when considering further steps to hold the country to account for breaches against the fundamental values of the EU, in addition to those relating to the rule of law;
- Trigger action under Article 7(1) of the EU Treaty if Poland fails to comply with the Commission's rule of law recommendations within clearly defined deadlines.

To the Council of the European Union

- Establish a mechanism whereby EU cohesion funds are made conditional on compliance with fundamental principles of the rule of law and with the recommendations of the Commission under its rule of law mechanism and of the Venice Commission of the Council of Europe;

- Freeze funding for EU member states that do not comply with EU standards regarding the rule of law;
- Approve action on Poland under the Article 7(1) procedure if the Polish authorities fail to respond to the EU Commission's concerns and rule of law recommendations.

To the European Parliament

- Adopt a resolution calling on the European Commission to initiate proceedings under article 7(1) and press the Council to act on those proceedings; should the Commission fail to do so within a reasonable time, Parliament should initiate the proceedings itself.

To European Union Member States

- Publicly support the Commission and the Council in any actions taken to ensure that Poland brings its current legislation and practice into compliance with the EU Treaty, the Charter of Fundamental Rights and the European Convention on Human Rights;
- Support in the Council action on Poland under the Article 7(1) procedure if the authorities fail to respond to the EU Commission's concerns and rule of law recommendations.

To the Council of Europe

- Maintain pressure on Poland to bring its legislations and practices into compliance with its international and regional obligations and to implement the recommendations of the Venice Commission;
- The Parliamentary Assembly of the Council of Europe should publicly express its concern at the deteriorating situation in Poland and reinstate formal monitoring of the situation in Poland (“the monitoring procedure”) in light of the continued attacks by the Polish authorities on judicial independence, human rights and the rule of law.

To the United Nations

- The UN Special Rapporteur on the independence of the judges and lawyers, whose visit is scheduled in October 2017, should release preliminary conclusions as soon as possible after his visit assessing concerns with the independence of the judiciary and the administration of justice and presenting a roadmap to the government for the resolution of key outstanding issues;
- Other UN special procedures, including on freedom of opinion and expression, on freedom of peaceful assembly and of association, on human rights defenders, and on countering terrorism, should closely monitor the situation in Poland and request access for a country visit to Poland.

I. Independence of the Judiciary

Since its election in October 2015 the PiS government has jeopardized the independence of the judiciary and the administration of justice by introducing legislative changes that seek to give the executive control over the hiring and dismissal of judges and the appointment of court presidents at all court levels, including the Constitutional Tribunal and Supreme Court, and would lead to the forcible retirement of many sitting judges.

The Constitutional Tribunal

The Constitutional Tribunal supervises compliance of statutory law with the Polish constitution and resolves disputes on the constitutionality of actions by Poland's state institutions. As such the tribunal plays a critical role in upholding the rule of law and checking abuse of power.

However, since winning power in October 2015, the PiS government has interfered with the tribunal's work, sought to remove sitting judges and replace them with its own appointees and defied the tribunal's rulings. [See text box for timeline].

Timeline of Poland's Constitutional Tribunal Crisis

2013 — The Polish president proposes changes to the Constitutional Tribunal Act aimed at improving its efficiency and the process of appointing judges to the tribunal allowing a replacement judge to be chosen before a retiring judge's tenure ends.

June 2015 — The ruling Civic Platform (PO) party amends the Constitutional Tribunal Act so that when a judge on the court is set to retire, his or her replacement can be appointed beforehand.

October 2015 — PO uses its majority in parliament to appoint 5 judges to the Constitutional Tribunal to replace 5 who are retiring. Two judges set to retire in December 2015 after the scheduled elections are forced to leave office early. The terms of the other three had already expired earlier in the year.

October 2015 — The Law and Justice Party (PiS) wins a majority in parliamentary elections.

November 25, 2015 — The PiS-controlled parliament adopts resolutions to annul the October 2015 appointments of the five judges by the previous parliament.

December 2, 2015 — The PiS-controlled parliament appoints five other judges to the tribunal. They are sworn in by President Duda in a closed ceremony on December 3.

December 3, 2015 — The Constitutional Tribunal rules that the parliament acted incorrectly in October 2015 by forcing two judges into early retirement. It finds the appointments of the two judges to replace them unlawful, and affirms the other three October 2015 appointments.

December 9, 2015 — The Constitutional Tribunal rules that the new PiS government is entitled to appoint two judges to the tribunal.

December 15, 2015 — The PiS-controlled parliament approves changes to the Constitutional Tribunal Act, increasing the number of judges required to reach a decision to a two-thirds majority and giving the parliament, President, or the Department of Justice – all controlled by the ruling PiS party – the power to dismiss the court's judges. The changes are signed into law by President Duda on December 28.

January 7, 2016 — The Constitutional Tribunal says it is unable to rule on whether the five PiS-nominated judges were lawfully appointed in December, but reiterates its findings from December that 3 new judges were lawfully appointed in the previous parliament.

March 2016 — Constitutional Tribunal rules that the December 2015 changes to the tribunal's rules are unconstitutional. The government ignores this ruling, relying on the circular logic that the decision was itself not based on the rules introduced by the December 2015 law.

July 2016 — The PiS-controlled parliament adopts a new Constitutional Tribunal Act, which does not include the offending provisions that allow the parliament, President, or Minister for Justice power over dismissal of judges.

January 2017 — The prosecutor general, who is minister of justice, makes a motion to the Constitutional Tribunal questioning the constitutionality of the appointment of three of its judges in 2010 under the previous government. The case is currently pending before the Tribunal.

The PiS government has refused to accept any of the five judges appointed to the tribunal in October 2015 by the previous Civic Platform government, instead passing parliamentary resolutions that purportedly nullified them, while President Andrzej Duda, who has ties to the ruling party, has refused to swear them in.

Two of those appointments were controversial because the previous government did not have the competence to appoint judges whose terms of office did not expire during PO's term in office. The Constitutional Tribunal later ruled that only the other 3 appointments were valid.

In December, the government had appointed 5 of its own judges to the tribunal, and had them sworn in by President Duda. It has refused to accept the rulings of the Constitutional Tribunal to recognize the 3 judges correctly appointed under the previous government, or to remove the two judges it appointed incorrectly.

The government has not simply defied the tribunal and the previous parliament over the judicial appointments issue. It has interfered with the tribunal's rules and sought to control future appointments and to remove sitting judges in ways that harm its independence and effectiveness as a check on the executive. It also appointed a handpicked judge to be president without following the correct procedure.

In mid-December 2015, the PiS-controlled parliament amended the Act on the Constitutional Tribunal increasing the number of judges required to reach a decision from a simple majority to a two-thirds majority.¹ Amendments also made mandatory the participation of at least 13 judges, instead of nine, on the 15 judge-panel in all cases. The amendments also severely impede the independence of the Constitutional Tribunal by allowing the parliament, President, or the Department of Justice – all controlled by the ruling PiS party – to dismiss its judges.

The bill was approved a week after it was introduced and signed into law by President Duda on December 28, 2015. The Constitutional Tribunal in March 2016 ruled the changes to the tribunal under the December law unconstitutional, but the PiS government argued

¹ Act concerning the Constitutional Tribunal, December 13, 2015, <http://dziennikustaw.gov.pl/du/2015/2217> (accessed October 6, 2017).

that the ruling should be ignored, relying on the circular logic that the tribunal's decision was not taken in accordance with the new rules introduced by the December 2015 law.² The government also refused to publish the ruling in the official journal, a formal requirement for its legal validity, so the General Assembly of the Supreme Court adopted a resolution stating that the Constitutional Tribunal judgements are binding even if not published. Following this controversy, the Sejm in July 2016 adopted a new version of the Act on the Constitutional Tribunal, which removed the power to dismiss Constitutional Tribunal judges from the parliament, president and the Department of Justice, to the General Assembly of the Constitutional Tribunal.

When the term of the president of the Constitutional Tribunal expired in December 2016, the government engineered the appointment of its preferred candidate as president without following the correct procedure. The judge in question was first appointed as acting president, under a new law adopted by the parliament. The acting president then convened all the judges in the tribunal, allowing the three unlawfully appointed judges to participate. Despite the lack of a properly adopted resolution, the acting president was nominated as permanent tribunal president, and appointed by the Polish President Duda the following day.

In early January 2017, the government sought to remove three sitting judges on the tribunal. The prosecutor general, who is also minister of justice, made a motion to the Constitutional Tribunal questioning the constitutionality of the appointment of three of its judges in 2010 under the previous government.³ The case is currently pending before the tribunal.

By interfering with the independence and functioning of the Constitutional Tribunal and impeding it from exercising its role as a check on the executive, the government has undermined the rule of law.

² Judgment of the Constitutional Tribunal, March 9, 2016, case number K47/15, https://www.rpo.gov.pl/sites/default/files/K%204715%20-%20tekst_o.pdf. This judgment has not been officially published by the government, which refuses to recognize it. It was initially published on the court website but removed by the new president of court. It is published on the ombudsman's website (accessed September 29, 2017).

³ Motion of the Prosecutor General to the Constitutional Tribunal, U1/17, January 12, 2017, <http://trybunal.gov.pl/sprawy-w-trybunale/art/9530-wybor-sedziow-trybunalu-konstytucyjnego/> (accessed September 29, 2017).

Undermining the Wider Independence of the Judiciary

In July 2017, the parliament adopted amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland.⁴ President Duda vetoed the act and sent it back to parliament. He was quoted in the media saying that the reform in its current form will not increase people's feeling of justice and security.⁵ The act would give the executive considerable control over the National Council of the Judiciary, the body responsible for overseeing courts and appointing judges. It would also reorganize the Council's internal structure and change the procedure for the assignment of judges and trainee judges to particular courts.

Crucially the law would mean that the 15 judges who sit on the 25-member National Council of the Judiciary would be appointed by the legislature rather than by fellow judges as is the case at present. The other members are the representative of the Office of the President of Poland's, the minister of justice (who is also the general prosecutor), six members of parliament, the first president of the Supreme Court of Poland, and the first president of the Supreme Administrative Court of Poland.

In late September, President Duda submitted his own draft proposal for amendments to the National Council of the Judiciary to parliament. Duda's draft does not differ significantly from the July PiS draft law and does not adequately address rule of law concerns. His draft proposes that judges are elected by a parliamentary three-fifths majority instead of a simple majority proposed by the government, but not by fellow judges as is currently the case. If the three-fifth majority cannot be reached, the president, currently Duda himself, will either select judges himself or each candidate will be voted on by the parliament where each MP is granted one vote.

Proposed changes by both the ruling party and President Duda would increase rather than decrease political involvement in judicial appointments and give the government (and any future government with a parliamentary majority) effective control over the National Council of the Judiciary. It undermines judicial independence.

⁴ Rządowy projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw, no 1423, <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=D1EC05A3F1400EB1C12580ED00286A5E> (accessed September 28, 2017).

⁵ James Shotter, Evon Hubern and Arthur Beesley, "Poland's president to veto controversial laws on judges," *Financial Times*, July 24, 2017, <https://www.ft.com/content/158db6e6-7048-11e7-aca6-c6bdo7df1a3c> (accessed September 29, 2017).

In July, the parliament also adopted amendments to the Act on the Organization of Common Courts. The President signed this Act into law the same month. The Act gives increased powers to the minister of justice in appointing and dismissing the presidents of the common courts within six months of its entry into force.⁶ The minister of justice will no longer be required to take into account the opinion of the general assembly of judges of each affected court before appointing a president. The minister of justice can also dismiss any president of any court for any reason. The law also lowers the retirement age for judges – 60 for women and 65 for men, creating vacancies that the government could have filled with its preferred judges had the National Judicial Council Act not been vetoed by President Duda. Previously the retirement age for all judges was 67 years.

The act also includes the possible dismissal of all presidents and vice-president of first and second instance courts and subsequent appointment of new presidents by the government. Taken together this adds up to a serious interference by the executive in the judicial independence of the lower courts.

At least one judge who has ruled against the government has already been subject to adverse action. In 2012, a judge ruled against the now minister of justice in a defamation case lodged by the now minister. The judge in question fined the now minister at the time.

The minister then subsequently ordered the judge be removed from an unrelated case citing the judge's inefficiency. Subsequently, the Ministry of Justice issued a press release criticizing the judge, describing her as inept and incapable of conducting a very simple court case. The affected judge sued the ministry under provisions regulating protection of privacy rights and the case is pending before the court.⁷

The Supreme Court

In July, the government used its majority to fast-track an act through parliament that would curb the independence of the Supreme Court. The act would terminate the mandate of existing Supreme Court judges, except those chosen by the executive, and lead to a court

⁶ Act on the Law on Common Courts, July 12, 2017, <http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=1491> (accessed September 28, 2017).

⁷ "What are the limits of Justice Minister's freedom to express his opinion on judges?" Helsinki Foundation for Human Rights, May 31, 2017, <http://www.hfhr.pl/en/what-are-limits-of-justice-ministers-freedom-to-express-his-opinions-on-judges/> (accessed September 28, 2017).

in which all judges will effectively be selected by the government.⁸ The Supreme Court plays a vital role in Poland. It supervises the work of lower courts, confirms the validity of parliamentary and presidential elections, and issues opinions on draft legislation. It has assumed greater importance since 2016 because the governing party's weakening of the country's highest court, the Constitutional Tribunal, and undermined its ability to review the constitutionality of laws.

The act was vetoed and sent back to parliament in July by President Duda at the same time as he vetoed the National Judicial Council Act. Duda stated that he was troubled by the provisions giving the chief prosecutor, who is also minister of justice, the power to elect Supreme Court judges. In late September, President Duda submitted his own draft act on the Supreme Court. His proposal does not sufficiently address the issue of curbs on the independence of the court. Instead of terminating the mandate of all Supreme Court justices, Duda's proposal introduces an age limit of 65 for Supreme Court judges, which would force nearly 40 percent of the court's justices to retire by the end of 2017 unless they were deemed medically fit to continue. Instead of the chief prosecutor as outlined in the PiS July draft, the president, meaning Duda himself at present, would decide whether judges could work longer. Given President Duda's close ties to the ruling PiS party, there is a risk that appointments would be politicized.

⁸ Act on the Supreme Court, July 20, 2017, <http://sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1727> (accessed September 28, 2017).

Interference with Freedom of Expression and the Media

Since December 2015, the government has pushed through laws and taken actions to put public service media under its control and interfere with journalistic freedom.

An amendment to the Broadcasting Law in December 2015, the so-called “small media law” because of its temporary nature, allowed the PiS government to replace the management of public service media.⁹

The amendment gave the Treasury (Finance) Ministry the power to appoint the management and boards of directors in public service media, removing the role from the National Broadcasting Council, the regulatory body previously responsible for such appointments. The 2015 December amendment also terminated transparent and public competition for decision making positions in public service media and removed fixed terms of office for board members.

The Constitutional Tribunal ruled the law partially unconstitutional in December 2016 for excluding the National Broadcasting Council from the decision-making process in appointing senior managers of public service media and members of the supervisory board. However, the government has taken no steps to abide by the ruling.¹⁰

The law expired on June 30, 2016 and is set to be replaced by a comprehensive law regulating public media, the so-called “big media law”. An initial draft published in April 2016 was criticized by Council of Europe experts, resulting in Polish authorities halting adoption until suitable changes are introduced to the draft that reflect the Council of Europe recommendations.¹¹

⁹ Law amending the Broadcasting Law, December 30, 2015. Published in Official Journal on 7 January 2016.

¹⁰ Constitutional Tribunal judgment, December 13, 2016, K13/16, <http://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=17154&dokument=14922&cid=1> (accessed September 28, 2017).

¹¹ Council of Europe, *Opinion of Council of Europe Experts Mr. Jean-Francois Fumemont and Dr Eve Salomon on the three draft Acts regarding Polish public media service*, June 6, 2016, <https://rm.coe.int/168065e7a4>, (accessed September 28, 2017). More on the Council of Europe recommendations below.

Meanwhile, a temporary “bridge” law, adopted in June 2016, establishing a new media regulator, called the National Media Council, is in force. Its major task is to appoint and dismiss members of public service media boards and the Polish Press Agency over which it has supervisory control.¹² It also has a supervisory role over public broadcasters. The Council has five members, three appointed by parliament from PiS candidates and two by the President of Poland from candidates presented by the opposition parties.

The Polish journalists’ association claims that between 2016 and August 2017, 228 journalists and editors in public media organizations were dismissed or, in some cases, resigned due to management changes in public radio and TV.¹³

In November 2016, journalist Pawel Soltys was fired from public broadcaster Polish Radio 3 after having expressed solidarity on social media with two other journalists at another media outlet who alleged they had been demoted for reporting critically on the government. Soltys sued the radio station and in an August settlement with the employer, Soltys was reinstated in his former position at the radio station and awarded damages.¹⁴

In at least one case, the government brought criminal proceedings against a journalist. In July, the Ministry of Defence filed a criminal complaint against journalist Tomasz Piatek, alleging that in his new book he threatened public officials and engaged in public insults or humiliation of a constitutional body. The offence is punishable by up to three years in prison. The OSCE’s Representative on Freedom of the Media, Harlem Desir, in August expressed his concerns to the Polish Ministry of Foreign Affairs, urging authorities not to use the courts to silence the media.¹⁵

The proposed amendment to the Law on the National Remembrance Institute, a government body conducting legal and historical research on 20th century Polish history and investigations into Nazi and Communist crimes committed in Poland between 1939

¹² Act on the National Media Council, June 22, 2016, <https://epra3-production.s3.amazonaws.com/attachments/files/2893/original/Ustawa%20o%20Radzie%20Medi%C3%B3w%20Narodowych%20eng.pdf?1469116200> (accessed September 29, 2017).

¹³ Polish Journalist Association, “Dobra zmiana” w mediach, <http://towarzystwodziennikarskie.org/> (accessed September 28, 2017).

¹⁴ Helsinki Foundation for Human Rights, Zwolniony dyscyplinarnie dziennikarz „Trójki” wraca do radia, January 8, 2017, <http://www.hfhr.pl/zwolniony-dyscyplinarnie-dziennikarz-trojki-wraca-do-radia/> (accessed September 28, 2017).

¹⁵ OSCE, “OSCE media freedom representative concerned about complaint filed against journalist by Poland’s Defence Ministry,” August 3, 2017, <http://www.osce.org/fom/333951> (accessed September 28, 2017).

and 1989, would criminalize acts deemed to ascribe responsibility to the Polish nation or state for crimes against humanity committed by the Nazis during the Second World War. There is no exception under the law for media organizations. The law also introduces civil sanctions for statements deemed to violate the reputation of Poland or the Polish nation. If adopted, the threat of criminal sanctions is likely to have a chilling effect on freedom of expression including media freedom by discouraging public discussion on certain aspects of Poland's history.¹⁶

¹⁶ Helsinki Foundation for Human Rights, "The HFHR on draft amendment to National Remembrance Institute Act," November 17, 2016, <http://www.hfhr.pl/en/the-hfhr-on-draft-amendment-to-national-remembrance-institute-act/> (accessed September 28, 2017).

II. Overbroad Counterterrorism Powers

Between January 2016 and February 2017, the Sejm approved counterterrorism measures that profoundly weakened fundamental rights such as privacy, freedom of assembly and due process, and unlawfully target Muslims and foreigners. Of particular concern are the new counterterrorism laws adopted in June 2016, amendments to the Police Act, and amendments to Poland's Code of Criminal Procedure. These measures widened the competences of the Internal Security Agency, ISA, to use surveillance and access communications without the essential safeguard of effective judicial oversight.¹⁷

The counterterrorism law also allows the ISA to target foreign nationals for surveillance, including tourists, business visitors, and residents, based solely on a non-specific "fear" that they may be involved in terrorism-related activities.¹⁸ It allows the ISA to wire-tap and monitor foreigners' electronic communications and telecommunications devices for up to three months, without judicial review, thereby permitting indiscriminate and mass secret surveillance. When that period expires, the ISA may continue the surveillance for a maximum of three months if it obtains a court order. The law also grants the authorities unprecedented access to personal data and other information on Polish citizens and others present on Polish territory.

The counterterrorism law also provides that a court can order detention for up to 14 days before a person is charged, upon demonstrating the commitment, attempt or preparation to carry out "acts of a terrorist nature."¹⁹ However the regulation accompanying the law sets out an extraordinary and dangerously broad and vague list of what kind of information can be used to determine if the person may be justifiably suspected of involvement in "terrorist" acts under the law. The list includes the expression by religious groups of sentiments perceived under the law to be fundamentalist slogans; information about the intent of a foreign national arriving in Poland for academic studies or training; information about foreign nationals attending conferences, meetings or seminars in Poland; plans to establish Islamic universities in Poland; the activity of Polish nationals on "radical

¹⁷ Law on Counter-terrorist activities and the amendments to other acts, June 10, 2016, <http://www.legislationline.org/documents/id/2003> (accessed September 28, 2017).

¹⁸ See Article 8, of the Law on Counter-terrorist activities and the amendments to other acts.

¹⁹ See Article 26 of the Law on Counter-terrorist activities and the amendments to other acts.

extremist websites” or social media platforms; and visits by Islamic clerics or representatives of Muslim organizations to detention or prison facilities.²⁰

Amendments to the Criminal Procedure Code, introduced on counterterrorism grounds, increase the possibility to use illegally obtained evidence at criminal trial. While Supreme Court jurisprudence and legislation previously prohibited the use of illegally obtained evidence in courts, the ruling PiS party in 2016 through amendments to the Criminal Procedure Code ensured that evidence could not be excluded solely on the basis that it was illegally obtained.

The potential damage from the measures outlined above is increased by Article 115 of the Penal Code, which since 1997 has carried an overly broad definition of a “terrorist crime.” Under Article 115, a terrorist offense is an act “committed in order to: 1) seriously intimidate many persons; 2) to compel public authority of the Republic of Poland or of the other State or of international organization agency to undertake or abandon specific actions; 3) cause serious disturbance to the constitutional system or to the economy of the Republic of Poland, of the other State or international organization – and a threat to commit such an act.”²¹

Under this definition an act can be designated a terrorist offence even if it does not cause or intend to cause death or serious physical injury to one or more persons, or involve the intentional taking of hostages. This definition allows the authorities to classify as “terrorist” a vast array of peaceful activities, including those that primarily involve the exercise of freedom of expression and rights association, and assembly, protected under international human rights law.

In February 2016 the parliament adopted amendments to the Police Act, giving state agencies the power to gain access to internet data, including the communication content.²² Under the act, courts can now authorize secret surveillance for up to three

²⁰ Regulation of the Minister of Interior and Administration on the Catalogue of Terrorist Incidents, Journal of Laws 2016, Item 1092, 1.4., July 22, 2016, <http://dziennikustaw.gov.pl/du/2016/1092/1> (accessed September 28, 2017).

²¹ Article 115 of the Penal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego), Journal of Laws 1997 no. 89, item 555 as amended, June 6, 1997, [https://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-L\(2013\)2ANN_en.pdf](https://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round4/PL4-L(2013)2ANN_en.pdf) (accessed September 28, 2017).

²² Ustawa o zmianie ustawy o Policji i niektórych innych ustaw, druk sejmowy 154, January 15, 2016, <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=154> (accessed September 28, 2017).

months – which can be extended to a maximum of 18 months – on the basis of a broad list of suspected crimes and without a requirement to consider whether the surveillance request is necessary or proportionate in the context.²³ The amendments also allow for metadata to be accessed directly by the police without a court order.

Confidentiality of information covered by professional privilege is also compromised. For example, the amendments do not bar surveillance of communications between clients and their criminal defense lawyers.

The counterterrorism law and the Act on the Internal Security Agency allow the ISA director to block websites for five days before seeking judicial authorization. Authorities can also ban public assemblies and public protests if a terror alert system established under the counterterrorism law reaches “high.”

In July 2016, Polish Human Rights Commissioner Bodnar challenged the counterterrorism law before the Constitutional Tribunal. In October 2017 the case was pending before the tribunal.

Human Rights Watch is not aware of anyone, as of October 2017, being charged under the new counterterrorism legislation.

²³ Act on the Police, April 6, 1990, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19900300179>, (accessed September 28, 2017).

III. Restriction of Women’s Reproductive Rights

Even before the PiS came to power in 2015, Poland had one of the most restrictive abortion laws in Europe and women face severe difficulties in accessing safe and legal abortions.

Access to abortion is criminalized except in cases of proven risk to the mother’s life or health, severe fetal abnormality, or rape. Access to abortion is further limited by medical professionals’ use of the so-called “conscience clause.” Under article 39 of the Doctor and Dentist Professions Act, health care providers may refuse to conduct an abortion on grounds that it conflicts with their personal values or beliefs. In May 2014, 3,000 people, mainly medical professionals, signed a “Declaration of Faith” asserting the “primacy” of religious over state law and saying they consider abortion and other reproductive health services to run counter to their faith.²⁴ Both the UN Human Rights Committee and the committee that oversees the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) have noted concern about ongoing, extensive, and inappropriate use of the conscience clause and lack of timely appeals processes for women who are denied abortions.²⁵

Soon after its election victory, the PiS proposed a draft bill that would have instituted a near-total ban on abortion and sought to criminalize women and girls who undergo abortion as well as those assisting or encouraging abortions.²⁶ In October 2016, following mass protests across Poland, the parliament rejected the bill.

Under the pretense of ensuring quality health care, the Polish government in June 2017 introduced a bill to limit sales of emergency contraception, the so-called “morning-after-

²⁴ “The Doctors’ Declaration of Faith,” *Economist*, June 27, 2014, <https://www.economist.com/blogs/easternapproaches/2014/06/polish-catholicism> (accessed September 28, 2017).

²⁵ Human Rights Committee, “Concluding observations on the seventh periodic report of Poland,” CCPR/C/POL/CO/7, November 23, 2016, para. 23, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en (accessed September 4, 2017); Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Poland, CEDAW/C/POL/CO/7-8, November 14, 2014, para. 36, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fPOL%2fCO%2f7-8&Lang=en (accessed September 4, 2017).

²⁶ Draft Act on Family Planning, Protection of the Human Foetus and conditions for allowing termination of Pregnancy, no 784, October 6, 2016, <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=6EDFF98AE25263E5C125801400298427> (accessed September 28, 2017).

pill,” which can prevent pregnancy after unprotected sex, including in cases of rape.²⁷ In reality, the law seeks to further limit reproductive choice. Prior to the new law, such contraception was available for purchase at pharmacies by women and girls over the age of 15. The new law requires women and girls to see a doctor first and obtain a prescription.

Such restrictions are risky and unnecessary as emergency contraception works within a limited timeframe, and is most effective when taken quickly after unprotected sex, so rapid access is essential. Faced with restricted abortion access, some women and girls are likely to resort to unsafe abortions that carry risks, including infection, hemorrhage, and death.²⁸

The World Health Organization deems the morning-after-pill safe and says it should be available as part of a necessary reproductive health care.²⁹ The pills have also been deemed safe by the European Union, which approved over-the-counter sales in member states.³⁰

²⁷ Act on Emergency Contraception, May 25, 2017, [http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1319_u/\\$file/1319_u.pdf](http://orka.sejm.gov.pl/opinie8.nsf/nazwa/1319_u/$file/1319_u.pdf) (accessed September 28, 2017).

²⁸ “Preventing Unsafe Abortion,” Fact Sheet, World Health Organization, June 2017, <http://www.who.int/mediacentre/factsheets/fs388/en/> (accessed September 28, 2017).

²⁹ “Emergency contraception,” Fact Sheet, World Health Organization, June 2017, <http://www.who.int/mediacentre/factsheets/fs244/en/> (accessed September 28, 2017).

³⁰ “Commission Implementing Decision of January 7, 2015 amending the marketing authorisation granted by Decision C(2009)4049 for “ellaOne – ulipristal acetate”, a medicinal product for human use,” (C2015)51, January 7, 2015, http://ec.europa.eu/health/documents/community-register/2015/20150107130448/dec_130448_en.pdf (accessed September 28, 2017).

IV. Restriction of Freedom of Assembly

In December 2016 the parliament adopted amendments to the Law on Public Assemblies, putting in place excessive and unwarranted limitations on the right to free assembly. This followed mass protests in October 2016 against the near-total abortion ban. It also followed monthly demonstrations during 2016 in which civil society groups protested against government policies.

The amended law introduces a category of so called “regular/cyclical assemblies” devoted to patriotic, religious and historic events which take priority over other assemblies. It applies to assemblies organized on an annual basis within the last three years or at least four times per year. Local authorities are tasked with deciding whether a particular assembly should be deemed cyclical. Under the new law, all cyclical assemblies will be granted priority over other assemblies, including spontaneous assemblies and counter-demonstrations.

According to the law, the authorities can also ban counter-demonstrations. The law essentially gives preference to assemblies organized by the state and religious institutions and risks restricting the right to hold counter-demonstrations and spontaneous demonstrations.

Over 200 civil society organizations appealed to the president to veto the law in December 2016, warning that the restrictions proposed were contrary to the constitutionally protected right to freedom of assembly and that the authorities could abuse their power under it. The act entered into force in April 2017, after a Constitutional Tribunal ruled the amendment constitutional.³¹ To date, nobody has been fined for breaching the law.

³¹ Constitutional Tribunal judgment, case no KP 1/17, March 16, 2017.

V. Interference with Civil Society and Freedom of Association

The PiS government has introduced legislative measures and proposals that civil society organizations fear could undermine their ability to carry out their work. They include already adopted changes to the Law on Police, the counterterrorism law, and the establishment of a National Centre for the Development of Civil Society which could reduce or hamper access to state funding for critical civil society groups. Some civil society groups have already complained about increased difficulties obtaining renewal of state funding.

Legislative Threats

A law adopted in September established a National Centre for the Development of Civil Society in which the mandate to disburse state-funding to civil society would be vested.³² Previously, decisions on the allocation of public funds to civil society organizations was shared between different ministries and local governments, a system that facilitated distribution of resources to multiple beneficiaries. The National Centre will now be controlled by the Prime Minister through a nominated plenipotentiary, giving the government the power to decide on the composition of the Center's governing bodies, the Director and Council, and to outline programs for civil society development. The Director will be in charge of proposing thematic project areas, which the Council will approve without any meaningful consultation of civil society. According to the law, funds will be allocated following a competition. The government did not consult with civil society groups prior to adopting the law in September.

Civil society organizations currently in receipt of state funding who are known to be critical of the government are justifiably concerned that the law could lead to them being denied financial support in future. Human rights organizations told Human Rights Watch in April that they are already facing difficulties accessing public funds to which they are entitled,

³² Draft Act on establishing a National Center for the Development of Civil Society, October 31, 2016, <http://wiadomosci.ngo.pl/files/wiadomosci.ngo.pl/public/filespublic/projekt-narodowe-centrum-rozwoju.pdf> (accessed September 28, 2017).

as a result of unexplained delays in transfers. The organizations concerned work primarily on women's rights, LGBT rights, asylum seekers' and migrants' rights.

In 2016, the Ministry of Justice denied funding to several women's rights organizations, including the Women's Rights Center, which had been receiving annual funding since 2012. The Minister of Justice justified the decision by saying that because the Women's Rights Centre focuses only on women it discriminates against male victims of domestic violence.³³ In April, the Association for Legal Intervention, working on rights of asylum seekers and refugees, told Human Rights Watch that they had not received funds in nine months from the ministry responsible despite a funding agreement.³⁴ They had received no information on the reasons for the delay or when to expect the transfer of funds.

The government has introduced a number of laws that raise concerns for civil society groups. These include the February 2017 Police Act and the June 2016 counterterrorism law, which expand government authority to surveil internet communications and foreign nationals. The counterterrorism law also expands government authority to block websites, and bans the purchase of anonymous prepaid phone-cards. Human rights groups, in particular, are concerned that these powers could be used against them in their work, including by impeding their ability to protect the confidentiality of their sources. Human Rights Watch is not aware of any human rights groups that have been targeted under the new legislation.

Undermining the Work of the National Human Rights Institution

Officials from the PiS ruling party have been publicly criticizing the Office of the Commissioner for Human Rights, Poland's National Human Rights Institution, and made efforts to restrict its work.

In September 2016, PiS party officials called for the dismissal of Human Rights Commissioner Adam Bodnar because he intervened in a court case of a printer who refused to provide services to representatives of an LGBT organization. In June 2017, PiS

³³ "Dlaczego niektóre organizacje pozarządowe nie mogą liczyć na dotacje? – Minister Sprawiedliwości odpowiada RPO," Commissioner for Human Rights, September 9, 2016, <https://www.rpo.gov.pl/pl/content/dlaczego-niektore-organizacje-pozarządowe-nie-moga-liczyc-na-dotacje-minister-sprawiedliwosci> (accessed September 28, 2017).

³⁴ Human Rights Watch interview with representative of the Association for Legal Intervention, Warsaw, Poland, April 27, 2017.

government officials called on Bodnar to resign due to a statement he made about the Polish nation's complicity in the Holocaust. In addition, the budget of the office of the commissioner was cut by two million EUR in 2016.³⁵ Also in 2016 the Parliament adopted a law making it easier to lift the commissioner's immunity from prosecution.³⁶

³⁵ "Interview with dr. Adam Bodnar for Gazeta Wyborcza," Commissioner for Human Rights, March 1, 2016, <https://www.rpo.gov.pl/en/content/interview-dr-adam-bodnar-gazeta-wyborcza> (accessed September 28, 2017).

³⁶ Act Amending the Act on the Commissioner for Human Rights of Poland, December 3, 2015.

VI. Violating Asylum Seekers' Rights

Asylum seekers arriving at the Polish-Belarus border crossing (the majority of whom originate from the Russian republic of Chechnya and Central Asia) are routinely denied the right to access the Polish asylum system and are instead summarily returned to Belarus.³⁷

After conducting cursory interviews with asylum seekers arriving by train at the Terespol border station from the Belarus city of Brest, Polish border guards usually deny entry to all but a handful. The written decisions refusing entry handed to asylum seekers usually refer to the failure of the person to show an entry visa or residency permit with no acknowledgement or consideration of the person's protection claim and desire to seek asylum. Those denied access to the asylum system are put back on the train to Belarus the same day.

Under Polish law, the Office of Foreigners, Poland's asylum authority, is responsible for deciding on asylum applications, not the Border Guard Services.³⁸ But asylum seekers at the Poland-Belarus border told Human Rights Watch that border guards, in practice, carry out superficial interviews for as little as two minutes and rarely more than ten, and then refuse the vast majority access to the asylum system.

Poland's human rights commissioner issued a report in September 2016 which found that border officials' cursory interviews at Terespol failed to adequately identify asylum seekers.³⁹ A November 2016 report by the Polish Helsinki Foundation for Human Rights also found that Poland was summarily rejecting asylum seekers at the Terespol border station and returning them to Belarus.⁴⁰ The Helsinki Foundation confirmed in July 2017 that the summary refusals and returns are ongoing.⁴¹

³⁷ "Asylum Seekers Blocked at Border," Human Rights Watch news release, March 1, 2017, <https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border>.

³⁸ Act on Foreigners, December 12, 2013, http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/EN%20-%20Poland%20act_on_foreigners_en_o.pdf (accessed September 28, 2017).

³⁹ "Inspection of the railway border crossing in Terespol," Commissioner for Human Rights, September 21, 2016, <https://www.rpo.gov.pl/en/content/inspection-railway-border-crossing-terespol> (accessed September 28, 2017).

⁴⁰ "A Road to Nowhere," Helsinki Foundation for Human Rights, October 2016, <http://www.hfhr.pl/wp-content/uploads/2016/11/A-road-to-nowhere.-The-account-of-a-monitoring-visit-at-the-Brze%C5%9B%C4%87-Terespol-border-crossing-point-FINAL.pdf> (accessed September 28, 2017).

⁴¹ Human Rights Watch Skype interview with representative of Helsinki Foundation of Human Rights, July 31, 2017.

Polish authorities have ignored binding European Court of Human Rights interim orders to halt the removal of asylum seekers to Belarus.⁴² Human Rights Watch believes that Belarus cannot be considered a safe third country for three reasons: first, it lacks a functioning asylum system; second its open border with Russia puts asylum seekers from Russian republics at risk of persecution by their authorities inside Belarus; and third there is a real risk that Belarusian authorities would return asylum seekers from Chechnya or central Asian countries to their own countries putting them at risk of torture or ill-treatment.

In January 2017, Poland's Minister of Interior proposed amendments to the Law on Foreigners that include mandatory detention of asylum seekers without the possibility to challenge their detention.⁴³ The amendments would also allow rejected asylum seekers to be deported without the possibility to appeal their deportation decisions.

The draft also introduces the possibility for the government to establish a list of safe countries of origin and safe third countries. There is a real concern that Belarus and Ukraine could be designated as safe third countries and the Russian Federation designated as a safe country of origin. Such possible designations could result in the authorities ruling all asylum claims inadmissible without considering the merits of the claims.

At this writing, the amendments had yet to be adopted.

⁴² Copy of ECtHR interim order of June 8, 2017 on file with Human Rights Watch; copies of remaining ECtHR interim orders on file with local Polish lawyer. See also "Poland Ignores European Court Over Return of Asylum Seeker," Human Rights Watch news release, June 15, 2017, <https://www.hrw.org/news/2017/06/15/poland-ignores-european-court-over-return-asylum-seeker>.

⁴³ Draft amendment of the Act on Foreigners, January 30, 2017, <https://bip.mswia.gov.pl/bip/projekty-aktow-prawnyc/2017/24478,Projekt-ustawy-o-zmianie-ustawy-o-udzielaniu-cudzoziemcom-ochrony-na-terytorium-.html> (accessed September 28, 2017).

VII. Regional and International Criticism

European Union

In July 2016 the European Commission issued recommendations to Poland under its Rule of Law framework, citing a systematic threat to the rule of law. This marked the first time that the 2014 framework had been used. The Commission issued a second set of recommendations in December 2016.⁴⁴

The concerns identified in the two recommendations relate to the Polish government's interference with the Constitutional Tribunal. The July recommendation included concerns about the constitutionality of the then-recently adopted counterterrorism law in relation to its compliance with fundamental rights.⁴⁵

The Polish government did not address the Commission's recommendations. Following continued attacks on the independence of the judiciary, manifested through amendments to the act on the National Judicial Council, the Law on the Supreme Court (both now vetoed by the president), the Law on Common Courts and the Law on the National School of Judiciary, the Commission in July 2017 adopted further recommendations. These called on the Polish authorities not to take any measures to dismiss or forcibly retire Supreme Court judges, and warned that if the government failed to act on its recommendations, "the Commission is ready to immediately activate the mechanism set out in Article 7(1) of the Treaty of the European Union."⁴⁶ Article 7(1) allows the Council of the European Union, composed of member states' foreign ministers, to give a formal warning to a member state accused of violating fundamental rights. Failure to address rule of law and fundamental rights concerns may trigger sanctions and ultimately suspends a state's voting rights in the Council.

⁴⁴ "Commission Recommendation of 27.7.2016 regarding the rule of law in Poland," C(2016) 5703, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf; "Commission Recommendation of 21.12.2016 regarding the rule of law in Poland," C(2016) 8950, http://ec.europa.eu/newsroom/document.cfm?doc_id=40988 (accessed September 28, 2017).

⁴⁵ "Commission Recommendation of 27.7.2016 regarding the rule of law in Poland," C(2016) 5703 paragraph 70, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf (accessed September 28, 2017).

⁴⁶ "European Commission acts to preserve the rule of law in Poland," EC press release, Brussels, 26 July 2017, http://europa.eu/rapid/press-release_IP-17-2161_en.htm (accessed September 28, 2017).

Also in July 2017, the Commission launched an infringement procedure about a possible breach of EU law concerning the Law on Common Courts, arguing discrimination on the basis of gender as the retirement age is lower for female judges (60) than for male judges (65), contrary to article 157 of the EU Treaty and Directive 2006/54 on gender equality in employment.⁴⁷

During 2016, the European Parliament adopted two resolutions focused on the rule of law crisis in Poland. In an April 13 resolution, the European Parliament called on the Polish authorities to comply fully with the recommendations by the Council of Europe's Venice Commission from June 2017 (see below) regarding Poland's Constitutional Tribunal and to guarantee respect for the rule of law.⁴⁸ In a September resolution, the European Parliament urged the Polish government "to solve the country's constitutional crisis and find a "compromise" in accordance with the European Commission's recommendations.⁴⁹

The European Commission in its July 2016 recommendation regarding the rule of law in Poland, expressed concerns about the media laws, calling on the Polish authorities to improve the legislation.⁵⁰ Polish authorities ignored calls to cooperate. In its July 2017 additions to the July 2016 rule of law recommendation, the Commission failed to make explicit references to the threat to media freedom as part of its rule of law concerns.⁵¹ In deciding on future action, the Commission should take into account the entirety of the Polish government's record on human rights in addition to looking at matters related to the rule of law.

⁴⁷ "European Commission acts to preserve the rule of law in Poland," EC press release, Brussels, July 26, 2017, http://europa.eu/rapid/press-release_IP-17-2161_en.htm (accessed September 28, 2017).

⁴⁸ "European Parliament resolution of 13 April 2016 on the situation in Poland," 2015/3031 (RSP), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0123+0+DOC+XML+Vo//EN> (accessed September 28, 2017).

⁴⁹ "European Parliament resolution of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union," 2016/2774 (RSP), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0344+0+DOC+XML+Vo//EN> (accessed September 28, 2017).

⁵⁰ "Commission Recommendation of 27.7.2016 regarding the rule of law in Poland," C(2016) 5703, July 27, 2016, http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf (accessed September 28, 2017).

⁵¹ "European Commission acts to preserve the rule of law in Poland," EC press release, July 26, 2017, http://europa.eu/rapid/press-release_IP-17-2161_en.htm (accessed September 28, 2017).

In May, at an EU General Affairs Council debate on the rule of law situation in Poland, ministers stressed the importance of continuing the dialogue between the European Commission and Polish authorities.⁵²

During the EU summit in Brussels in June 2017, French President Emmanuel Macron made strong statements with respect to member states failing to adhere to core values of the EU, singling out Poland and Hungary, saying that the European Union is not a “supermarket” where member states can pick and choose which parts of the EU membership they like while disregarding fundamental EU values.⁵³

Council of Europe

The Council of Europe’s Venice Commission has issued two opinions on the rule of law in Poland. In March 2016, it expressed concerns about amendments to the Act on the Constitutional Tribunal. It stressed that the amendments undermined the efficiency of the court and criticized the Polish government for its refusal to publish its judgments. Taken together, the Venice Commission found that the amendments constituted a threat to the rule of law and the independence of the judiciary; it called on Polish authorities to implement the Tribunal’s judgments.⁵⁴ In a June 2016 opinion on the Police Act and Other Laws, the Venice Commission stated that procedural safeguards in the Police Act for implementing secret surveillance “are [...] insufficient to prevent its excessive use and unjustified interference with the privacy of individuals”.⁵⁵ It recommended that Polish authorities improve the act, *inter alia*, by: strengthening the principle of proportionality with respect to ordering surveillance/metadata collection in only the most serious cases; prohibiting surveillance of lawyer-client privilege based communications; limiting the duration of metadata monitoring; and establishing an effective independent oversight body with investigative powers for appropriate legal remedies.⁵⁶

⁵² Council of the European Union, General Affairs Council Meeting, May 16, 2017, <http://www.consilium.europa.eu/en/meetings/gac/2017/05/16/> (accessed September 28, 2017).

⁵³ Gabriela Baczyńska “Poland, Hungary scold Macron after his warning on values,” Reuters, June 22, 2017, <https://www.reuters.com/article/uk-eu-summit-macron-easteurope-idUKKBN19D2HK> (accessed September 28, 2017).

⁵⁴ Council of Europe Venice Commission, Opinion on the amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Opinion no. 833/2015, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) (accessed September 28, 2017).

⁵⁵ Council of Europe Venice Commission, Poland - Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), Opinion No. 839/2016 p. 31, [http://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) (accessed September 28, 2017).

⁵⁶ *Ibid*, [http://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).

In a June 2016 opinion, two Council of Europe media law experts stated that appointments to the National Media Council should be more transparent, and that candidates should be independent of political influence.⁵⁷ They also raised concerns regarding provisions that may reduce pluralism and editorial independence.⁵⁸ At this writing, a dialogue between the Council of Europe and the Polish government on improvements to the draft is underway.

In a joint statement concerning the amendments to the December law on freedom of assembly, the Council of Europe's Human Rights Commissioner Nils Muiznieks, and Michael Georg Link, the director of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE), stated that the proposed amendments risked undermining the right to freedom of assembly and urged the Polish parliament to reconsider the amendments and consult with affected civil society groups.⁵⁹

In an information note released in April 2017, the co-rapporteurs of Parliamentary Assembly of the Council of Europe voiced their concerns about the “political and constitutional crisis” since the 2015 parliamentary elections.

UN and OSCE

In May, the OSCE expressed concerns that the then draft law on the National Judicial Council would have a negative impact on the independence of the council, and by extension, on the judiciary and called on Polish authorities to reconsider the “the draft act in its entirety and that the legal drafters not pursue its adoption.”⁶⁰

A February 2016 OSCE/ODIHR opinion raised serious concerns regarding an amendment to the Act on the Commissioner for Human Rights. The OSCE stated that the then draft act

⁵⁷ “Conclusions of an expert dialogue between the Polish government and the Council of Europe,” Council of Europe press release, June 6, 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, (accessed September 28, 2017).

⁵⁸ Ibid.

⁵⁹ “European human rights officials voice serious concerns over changes to Polish laws on freedom of assembly,” Council of Europe Commissioner for Human Rights, December 5, 2016, <http://www.coe.int/en/web/commissioner/-/european-human-rights-officials-voice-serious-concerns-over-changes-to-polish-laws-on-freedom-of-assembly> (accessed September 28, 2017).

⁶⁰ OSCE/ODIHR, Final Opinion on draft amendments to the act on the national council of the judiciary and certain other acts of Poland, May 5, 2017, p 5., <http://www.osce.org/odihr/315946?download=true> (accessed September 28, 2017).

lacked sufficient safeguards to protect the commissioner and his/her staff from civil, administrative and criminal liability for statements made in their official capacities.⁶¹ The act entered into force in June 2016 without Polish authorities taking any of the OSCE/ODIHR concerns or recommendations into account.

In August, the OSCE/ODIHR raised concerns about the then draft act to establish the National Center for the Development of Civil Society, stating that no meaningful consultation had taken place with relevant civil society stakeholders and urged lawmakers to provide safeguards limiting potential government interference in the future center's work. The OSCE further recommended that distribution of public funds should be decentralized and free from government influence, rather than centralized.⁶²

Also in August, in an opinion on the draft act on the Supreme Court, the OSCE/ODIHR, noted that the proposed provisions raised serious concerns about the separation of powers and the independence of the judiciary in Poland and stated they were “inherently incompatible with international standard and OSCE commitments on the independence and impartiality of the judiciary and should not be adopted.”⁶³

In the May 2017 UN Human Rights Council's “universal periodic review” of Poland, a number of member states, including EU governments Germany, France, Spain, the Netherlands, Sweden, Denmark, Austria, Belgium and the Czech Republic, expressed their concerns about the negative impacts of legislative reforms on the Constitutional Tribunal. Several states urged the Polish authorities to protect the independence of the Tribunal and its judges, publish its judgments, refrain from obstructing it in its work and take immediate steps to protect the independence of the judiciary and ensure it can operate without interference.⁶⁴

⁶¹ OSCE/ODIHR, Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland, February 16, 2016, <http://www.osce.org/odihr/223436?download=true> (accessed September 28, 2017).

⁶² OSCE/ODIHR, Opinion on the Draft Act of Poland on the National Freedom Institute – Centre for the Development of Civil Society, August 22, 2017, <http://www.osce.org/odihr/336546> (accessed September 28, 2017).

⁶³ OSCE/ODIHR, Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland, August 30, 2017, paragraph 15.

⁶⁴ Human Rights Council Working Group on the Universal Periodic Review, 27th session, Compilation on Poland: Report of the Office of the United Nations Highs Commissioner for Human Rights, A/HRC/WG.6/27/POL/2, February 22, 2017, paragraph 33, https://www.upr-info.org/sites/default/files/document/poland/session_27_-_may_2017/a_hrc_wg.6_27_pol_2_e.pdf (accessed September 28, 2017).

Several members of the UN Human Rights Council, including France, Sweden, Norway, Canada, and Australia, noted the need for protection of women’s reproductive rights, including access to abortion and contraception.⁶⁵

In July 2017, the United Nations Special Rapporteur on the independence of the judges and lawyers, Diego Garcia-Sayan, expressed concerns with the state of the independence of the judiciary and stressed that the independence of the judiciary must be guaranteed by the State.⁶⁶ The Special Rapporteur is scheduled to pay a monitoring visit to Poland in October 2017.

The UN Human Rights Committee in November 2016 recommended that Poland ensure that the Penal Code not only defines terrorism-related crimes in terms of purpose, but also narrowly defines their nature and includes a precise definition of “terrorist incidents.”⁶⁷

In December 2015, the then-OSCE representative on freedom of the media, Dunja Mijatovic, expressed her concerns about the amendments to the broadcasting law and urged Polish authorities to withdraw the proposal.⁶⁸

⁶⁵ Ibid., para. 61; UPR Info, Responses to Recommendations – Poland, Third Review, Session 27, May 9, 2017. paras. 120.128-120.135, https://www.upr-info.org/sites/default/files/document/poland/session_27_-_may_2017/recommendations_and_pledges_poland_2017.pdf (accessed September 28, 2017).

⁶⁶ “Poland must safeguard judicial independence - UN Special Rapporteur,” OHCHR press release, July 26, 2017, <http://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=21912&langid=e> (accessed September 28, 2017).

⁶⁷ Human Rights Committee, “Concluding observations on the seventh periodic report of Poland,” CCPR/C/POL/7, November 23, 2016, p. 2., http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en (accessed September 28, 2017).

⁶⁸ “OSCE media freedom representative urges Poland’s government to withdraw proposed changes to the selection of management in public service broadcasters,” OSCE press release, December 30, 2015, <http://www.osce.org/fom/213391> (accessed September 28, 2017).

Acknowledgments

This report was authored by Lydia Gall, researcher on Balkans and Eastern Europe in the Europe and Central Asia Division, based on research conducted in 2017. The report was reviewed by Benjamin Ward, deputy director in the Europe and Central Asia Division, Philippe Dam, advocacy director in the Europe and Central Asia Division, Bill Frelick, director in the Refugee Program, Letta Tayler, senior Terrorism/Counterterrorism researcher in the Emergencies Division, Nadim Houry, director in the Terrorism/Counterterrorism Division, Hillary Margolis, researcher in the Women's Rights Division, Aisling Reidy, senior legal counsel, and Tom Porteous, deputy program director. Anže Močilnik, senior associate in the Europe and Central Asia Division, provided valuable practical support and production assistance. Additional production assistance was provided by Madeline Cottingham, photo and publications coordinator, and Fitzroy Hepkins, production manager. Staff at the Helsinki Foundation for Human Rights, Poland, provided valuable comments on the report.

We are grateful to all Polish civil society organizations and activists who shared their experiences and expertise with us and who show courage and commitment in protecting the rule of law, human rights principles and working on behalf of victims of human rights abuses in an increasingly hostile environment.