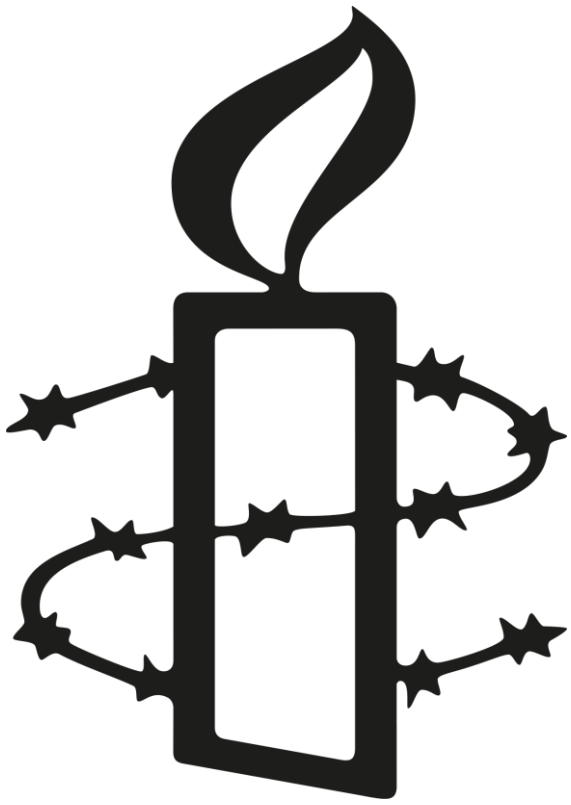

POLAND

DISMANTLING RULE OF LAW?

AMNESTY INTERNATIONAL SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW – 27TH SESSION OF THE UPR WORKING GROUP, APRIL/MAY 2017

AMNESTY INTERNATIONAL

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

First published in 2016
by Amnesty International Ltd
Peter Benenson House, 1 Easton Street
London WC1X 0DW, UK
Index: EUR 37/5069/2016
September 2016
Original language: English

amnesty.org

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INTRODUCTION

This submission was prepared for the Universal Periodic Review (UPR) of Poland in April–May 2017. In it, Amnesty International evaluates the implementation of recommendations made in the previous UPR, assesses the national human rights framework and the human rights situation on the ground, and makes recommendations to the government of Poland to address the human rights challenges mentioned in this report.

Amnesty International acknowledges that Poland has improved its responses to racist crimes in the past few years. However, regrettably, ethnic minorities, refugees, asylum-seekers and migrants continue to experience discrimination and violence, and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are not adequately protected against discrimination.

Amendments to the law governing the Constitutional Tribunal, combined with the current government's disregard for its judgments, have undermined its independence and the human rights protection system in Poland.

Poland's abortion law has been at risk of further restrictions through a bill to ban it in all circumstances except when it is the only means to save a woman's life. Following mass protests and a women's strike, the bill was eventually rejected but the government has announced it is considering other restrictions.

Amnesty International is concerned that the new Counterterrorism Law consolidates extensive powers in the hands of the Internal Security Agency. Decisions in 2015 by the European Court of Human Rights found that Poland had collaborated with the CIA to establish a secret prison; however, the judgements have still to be implemented.

FOLLOW UP TO THE PREVIOUS REVIEW

During its second UPR in 2012, Poland supported recommendations on a number of issues, including ensuring that the office of the Human Rights Commissioner (Ombudsperson)[1] is sufficiently resourced,[2] recognizing aggravating circumstances for hate crimes related to gender

[1] The terms "Ombudsperson" and "Ombudsman" were used during Poland's last UPR. The term "Human Rights Defender" was used in the office's English language publications in the past and was replaced, in 2016, by "Commissioner for Human Rights" or "Human Rights Commissioner", which is the term used throughout this submission.

[2] Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Poland*, 9 July 2012, A/HRC/21/14, recommendation 90.35 (Australia); Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Poland* (addendum), 7 September 2012, A/HRC/21/14/Add.1.

identity and sexual orientation,[3] and strengthening anti-discrimination laws to better protect lesbian, gay, bisexual, transgender and intersex persons and persons with disabilities.[4] Poland also accepted, but considered already implemented, a recommendation to ensure women's access to lawful abortion by creating clear regulations for the implementation of the 1993 Act on Family Planning[5] and partially supported a recommendation to conduct an effective inquiry into Poland's involvement in the CIA's rendition and secret detention programme.[6]

While some positive steps were taken with respect to these recommendations, those steps were subsequently reversed or did not come into effect. For example, in 2013, the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance was established;[7] however, in 2016 it was abolished.[8] Despite support expressed to Amnesty International in March 2015 by the then Minister of Justice, efforts have stalled to amend the Penal Code[9] to investigate and prosecute crimes related to gender identity and sexual orientation as hate crimes.[10] LGBTI persons and persons with disabilities have also not been awarded greater protection in Poland's anti-discrimination law.[11]

The budget of the Human Rights Commissioner's office was reduced by approximately 3 million PLN (approximately 781,000 USD) in 2016 compared to 2015 (by almost eight percent), despite the Commissioner's request to have it increased.

Women in Poland continue to face systemic difficulties in accessing safe and legal abortion and proposals to further restrict their access were before Parliament (see also below).

In 2015, the European Court of Human Rights (ECtHR) found that Poland colluded with the CIA to establish a secret prison at Stare Kiejkuty.[12] A domestic criminal investigation into this has been pending since 2008.

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[3] A/HRC/21/14, recommendation 90.68 (United Kingdom of Great Britain and Northern Ireland); A/HRC/21/14/Add.1.

[4] A/HRC/21/14, recommendation 90.70 (Austria); A/HRC/21/14/Add.1.

[5] A/HRC/21/14, recommendation 90.106 (Norway); A/HRC/21/14/Add.1.

[6] A/HRC/21/14, recommendation 90.123 (Cuba); A/HRC/21/14/Add.1.

[7] As indicated also in Poland's mid-term progress report to the Human Rights Council, at paragraph 23.

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

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

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

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

[12] *Al Nashiri v Poland*, 28761/11 [2015] ECHR (16 February 2015), *Husayn (Abu Zubaydah) v Poland*, 7511/13 [2015] ECHR (16 February 2015). Further information can be found in Amnesty International's 2013 report, *Unlock the truth. Poland's involvement in CIA secret detention* (Index: EUR 37/002/2013).

THE NATIONAL HUMAN RIGHTS FRAMEWORK

Since the Law and Justice (*Prawo i Sprawiedliwość*) party came to power in October 2015, 148 new laws and legislative amendments have been enacted,[13] some laying the legislative groundwork for potential human rights violations. These developments have drawn the attention of the European Commission for Democracy through Law (Venice Commission)[14] and the Council of Europe Commissioner for Human Rights.[15] In January 2016, the European Commission, for the first time, initiated a structured dialogue with Poland under the Rule of Law Framework. On 27 July 2016, it issued a recommendation, giving Poland three months to take steps to remedy the Constitutional Tribunal crisis.[16]

CONSTITUTIONAL TRIBUNAL

The Constitutional Tribunal plays a vital role in protecting human rights in Poland, including by adjudicating on the conformity of laws, judgments, administrative decisions and state actions with constitutional rights. The previous Parliament, led by the Civic Platform (*Platforma Obywatelska*) party, introduced amendments to its functioning by adopting a Law on the Constitutional Tribunal

[13] Data from Polish Parliament's website: www.sejm.gov.pl/sejm8.nsf/agent.xsp?symbol=USTAWYALL&NrKadencji=8&NrPosiedzenia=23

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

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

[16] European Commission, Opinion on the Rule of Law in Poland, 1 June 2016; Rule of Law Recommendation on the situation in Poland, 27 July 2016. In its Recommendation, the Commission opined that the rule of law in Poland has been under threat and recommended that Poland takes the following steps to enable the Constitutional Tribunal to function effectively:

- "respects and fully implements the judgments of the Constitutional Tribunal of 3 and 9 December 2015. These require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis do not take up the post of judge without being validly elected;
- publishes and implements fully the judgment of 9 March 2016 of the Constitutional Tribunal, as well as all subsequent judgments, and ensures that the publication of future judgements is automatic and does not depend on any decision of the executive or legislative powers;
- ensures that any reform of the Law on the Constitutional Tribunal respects the judgments of the Constitutional Tribunal, including the judgments of 3 and 9 December 2015 and the judgment of 9 March 2016, and takes the Opinion of the Venice Commission fully into account; and
- ensures that the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution is not undermined by new requirements, whether separately or through their combined effect;
- ensures that the Constitutional Tribunal can review the compatibility of the new law adopted on 22 July 2016 on the Constitutional Tribunal before its entry into force and publish and implement fully the judgment of the Tribunal in that respect."

on 25 June 2015.[17] It afforded it the right to elect five Tribunal judges to replace five departing judges, including two judges whose term was only set to end after the Parliament's own term. The Constitutional Tribunal later ruled that these two judges were elected unconstitutionally.[18] However, Poland's President refused to swear in all of the newly elected judges and instead, on 2 December 2015, the new Parliament, led by the Law and Justice party, elected five new judges of their choice.

Since the Law and Justice party came to power, a further three far-reaching amendments to the Law on the Constitutional Tribunal have been enacted,[19] all of which, according to judgments passed by the Constitutional Tribunal on 9 March and 11 August 2016, are wholly or partially unconstitutional.[20] The Prime Minister refused to publish these judgments in the Journal of Laws, and stopped publishing the Tribunal's judgments altogether for several months. Refusing to publish judgments with which the executive does not agree poses a threat to judicial independence and has resulted in legal uncertainty.

The latest amendment to the Law on the Constitutional Tribunal, enacted on 22 July 2016, exacerbates legal uncertainty, providing, for instance, that cases must be examined in sequence of registration. This removes the Tribunal's power to decide which matters to consider as a priority. Another amendment requires the Tribunal to apply to the Prime Minister to have its judgments published in the Journal of Laws, changing what used to be an administrative step to a political, decision-making step. The Law also suspends the Tribunal's work for six months to bring pending applications in line with the law, allows all the judges elected by the new Parliament to adjudicate, despite the Tribunal's rulings against that, and, if four judges disagree with the opinion of the majority, permits them to stall proceedings for up to six months instead of dissenting.

As complaints to the Tribunal do not have a suspensive effect, and as its judgments are not being implemented by the executive, the effectiveness of such a remedy has been greatly restricted. Unconstitutional laws, which may facilitate human rights violations, can now be passed and applied in Poland. The legislative reforms, combined with the executive's disregard for the Constitutional Tribunal's judgments, effectively dismantle the human rights protection system in Poland and undermine the independent functioning of the justice system.

THE HUMAN RIGHTS COMMISSIONER

The Human Rights Commissioner is an independent statutory body, established in 1987, with a mandate to defend human rights enshrined in the Polish Constitution, international and regional treaties and relevant domestic legislation. The Commissioner can receive and investigate complaints from anyone within Poland's jurisdiction, independently investigate actions and inactions by public authorities and take measures to address violations, including by bringing

[17] Law of 25 June 2015 on the Constitutional Tribunal (*Ustawa z dnia 25 czerwca 2015 r. o Trybunale Konstytucyjnym*) Journal of Laws 2015 item 1064. The Helsinki Foundation for Human Rights criticized these amendments at the time: Helsinki Foundation for Human Rights' statement of 10 June 2015: www.hfhr.pl/wp-content/uploads/2015/06/oswiadczenie_kh_11062015.pdf.

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

[19] Law of 19 November 2015 amending the Law on the Constitutional Tribunal (*Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym*) Journal of Laws 2015 item 1928; Law of 22 December 2015 amending the Law on the Constitutional Tribunal, Journal of Laws 2015 item 2217; Law of 22 July 2016 on the Constitutional Tribunal, Journal of Laws 2016 item 1157.

[20] Constitutional Tribunal judgment K 35/15 of 9 December 2015, Journal of Laws 2015 item 2147; Constitutional Tribunal judgment K 47/15 of 9 March 2016, not published in the Journal of Laws at the time of drafting; Constitutional Tribunal judgment K 39/16 of 11 August 2016, not published in the Journal of Laws at the time of drafting.

cases to the Constitutional Tribunal. The Commissioner has challenged a number of legislative amendments introduced since the Law and Justice party came to power in autumn 2015. While proposals by the government to reduce the scope of his work have for now been dismissed, the institution's functioning is threatened by budget cuts. Its budget was reduced by approximately 3 million PLN (approximately 781,000 USD) in 2016 in comparison to 2015 (a reduction of almost eight percent), despite the Commissioner's request to have it increased.

SEXUAL AND REPRODUCTIVE RIGHTS

Poland's abortion legislation is among the most restrictive in Europe. A new bill, proposing further restrictions, was submitted to Parliament on 5 July 2016.[21] This included amendments to the Act on Family Planning[22] and the Penal Code.[23] On 23 September 2016, members of parliament referred the bill to a parliamentary committee for further discussions. An alternative citizens' initiative bill was submitted to Parliament on 4 August 2016, proposing to allow access to abortion in all circumstances until the 12th week of pregnancy; it was rejected on 23 September 2016.

The restrictive bill would ban abortion in all circumstances except when it is the only means available to save a woman's life; however, it failed to provide guidelines for medical professionals on making such an assessment. It also proposed to criminalize women and girls considered to have obtained an abortion, and anyone assisting them to do so, and increased the maximum prison term for people who perform abortions from three to five years.

The proposal sparked mass protest, an unprecedented women's strike on 3 October and widespread international solidarity, resulting in the Parliament backtracking on its decision and rejecting the bill on 6 October 2016. The ruling party has stated, however, that it will draft another proposal to restrict abortion on a lesser scale. Any further restrictions to Poland's abortion law would have grave consequences for rights of millions of women and girls.

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

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

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

THE HUMAN RIGHTS SITUATION ON THE GROUND

COUNTERTERRORISM AND SURVEILLANCE

A new Counterterrorism Law was enacted on 10 June 2016, following a fast-track legislative process.[24] 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 as those to the Police Act[25] and the Criminal Procedure Code,[26] it may facilitate violations of the rights to life, liberty, privacy, fair trial, expression, peaceful assembly, and non-discrimination.

The Law's definition of terrorism-related crimes is based on that contained in the Penal Code, which was criticized by the Human Rights Committee in 2010.[27] Terrorism-related crimes and incidents are broadly and imprecisely defined in the Law and the accompanying Regulation.[28] Such ill-defined and overly broad laws may be open to arbitrary application and abuse.

Surveillance powers have also been expanded under the amended Police Act.[29] 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.

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

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

[25] 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.

[26] 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.

[27] Human Rights Committee, *Concluding observations of the Human Rights Committee, Poland*, CCPR/C/POL/CO/6, 15 November 2010, §4.

[28] 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.

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

it may be extended by a court order).[30] 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.[31] 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,[32] 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.[33]

INVESTIGATION OF POLAND'S INVOLVEMENT IN CIA RENDITION AND DETENTION PROGRAMMES

In *Al Nashiri v Poland*[34] and *Husayn (Abu Zubaydah) v Poland*,[35] the European Court of Human Rights found that Poland had colluded with the CIA to establish a secret prison at Stare Kiejkuty and violated the European Convention on Human Rights due to, among other things, the lack of an investigation into the victims' claims, their torture and other ill-treatment, secret detention, and transfer to places where they were at risk of further human rights violations.[36] The judgments have yet to be implemented, despite Poland's attempts to obtain diplomatic assurances from the United States that Abd al-Rahim Al Nashiri would not be subjected to the death penalty and that both men would not be deprived of the right to a fair trial.[37]

The domestic criminal investigation has been pending since 2008. In March 2016, the Prosecutor General's Office and the Regional Prosecutor's Office in Kraków responded to Amnesty International's requests for information by informing the organization that proceedings are ongoing.

DISCRIMINATION AND HATE CRIMES

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

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[30] Law on Counterterrorism of 10 June 2016, Article 9§1.

[31] Law on Counterterrorism of 10 June 2016, Article 9§1.

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

[33] 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.

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

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

[36] *Al Nashiri v Poland*, 28761/11 [2015] ECHR (16 February 2015), *Husayn (Abu Zubaydah) v Poland*, 7511/13 [2015] ECHR (16 February 2015). Further information can be found in Amnesty International's 2013 report, *Unlock the truth. Poland's involvement in CIA secret detention* (Index: EUR 37/002/2013).

[37] www.coe.int/en/web/execution/submissions-poland

In September 2015, Amnesty International published a report on hate crimes in Poland,[38] concluding that members of ethnic minorities, refugees, asylum-seekers and migrants continue to experience discrimination and violence. Most of the civil society organizations and victim support groups, interviewed by Amnesty International, agreed that the responses by the authorities to racist crimes had improved in recent years. However, in some cases the authorities responded effectively only where the incidents occurred in the context of an escalation of racist violence. In many cases, an earlier and quicker response could have prevented some of the attacks.[39] According to the latest report by the Ministry of the Interior and Administration, the police initiated 962 investigations of hate crimes in 2015, as compared to only 698 in 2014.[40]

In February and March 2016, the offices of two major LGBTI organizations in Warsaw, Campaign Against Homophobia and Lambda, were attacked. Despite suffering widespread discrimination and hate crimes,[41] Amnesty International research has shown that LGBTI people are not sufficiently protected under the Penal Code or the 2010 Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment.[42] The Act protects them only in the area of employment. Transgender and intersex people are not explicitly protected from discrimination on grounds of gender identity and expression. The Act's scope of protection on the grounds of disability and religion is also limited.

SEXUAL AND REPRODUCTIVE RIGHTS

Women and girls in Poland continue to face obstacles in accessing safe and legal abortion.[43] The Commissioner for Patients' Rights has noted that refusals to provide a legal abortion are often not recorded as related to the "conscience clause" or recorded at all in patients' medical records.[44] She also noted that patients have reported doctors refusing to perform prenatal diagnostics that

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[38] Amnesty International, *Targeted by hatred, forgotten by law. Lack of a coherent response to hate crimes in Poland* (Index: EUR 37/2147/2015).

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

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

[41] According to a 2013 survey by the European Union Agency for Fundamental Rights, 21% of Polish LGBT individuals interviewed said they had been discriminated against in school and 18% when looking to rent or buy a flat in the previous year. The comparable figures for transgender people were 25% and 19%. In 2014, the Campaign Against Homophobia (*Kampania Przeciw Homofobii*), the main LGBTI organization in Poland, recorded some 120 cases of homophobic and transphobic hate crimes, the overwhelming majority of which targeted people on grounds of their sexual orientation (90%). About 50 of the cases reported involved violence.

[42] Amnesty International, *Targeted by hatred, forgotten by law. Lack of a coherent response to hate crimes in Poland* (Index: EUR 37/2147/2015). Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union on Equal Treatment *(Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) Journal of Laws 2010 no. 254 item 1700.

[43] Monitoring of access to abortion in Polish hospitals by the Federation for Women and Family Planning indicates widespread difficulties. Federacja na rzecz Kobiet i Planowania Rodziny, *Dzień dobry, chcę przerwać ciążę… O procedurach dostępu do legalnej aborcji w polskich szpitalach. Raport z monitoringu*, Warsaw 2016: http://www.federa.org.pl/dokumenty_pdf/raporty/kontrola_praw_kobiet.pdf

[44] The "conscience clause" is a provision under Article 39 of the Polish Act of 5 December 1996 on professions of doctor and dentist, allowing doctors to refuse performing an abortion on conscience or religious grounds. *Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty*, Journal of Laws 1997 no.28 item 152, as amended. In a judgment of 7 October 2015, the Constitutional Tribunal ruled that the requirement for doctors to inform the patient as to the possibility to obtain a legal abortion elsewhere, was unconstitutional (K 12/14 Journal of Laws 2015, item 1633), thus, in practice, putting women and girls at further risk and restricting access to legal abortion in practice.

could reveal medical grounds for legal terminations, thereby restricting patients' right to information.[45] In 2013, the European Court of Human Rights found, in *P. and S. v Poland*, that Poland violated the applicants' right to respect for private and family life, as well as the right of *P.*, a 14 year-old rape victim, to be free from inhuman and degrading treatment due to obstacles, harassment and delays impeding her access to safe and legal abortion.[46]

INDEPENDENCE OF THE JUDICIARY

Under the new Law on Prosecution of 28 January 2016, the functions of Prosecutor General and Minister of Justice have been merged.[47] The person who, as Prosecutor General, can decide on investigations undertaken by prosecutors and intervene in cases, is now also a Government Minister, with administrative oversight of courts as Minister of Justice. 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".[48] The new Law also creates a new department within the Prosecution Office with a mandate to investigate the "most serious crimes committed by" prosecutors and judges. These reforms can have significant implications for the independence of the justice system.

RECOMMENDATIONS FOR ACTION BY THE STATE UNDER REVIEW

AMNESTY INTERNATIONAL CALLS ON THE GOVERNMENT OF POLAND TO:

REGARDING THE CONSTITUTIONAL TRIBUNAL

- Implement its judgments of 3 and 9 December 2015 requiring that the three judges lawfully elected in October 2015 by the previous Parliament take office and the three judges elected unconstitutionally by the current Parliament do not take up posts;
- Publish and fully implement the 9 March 2016 and 11 August 2016 judgments on the Law on the Constitutional Tribunal;
- Publish and fully implement subsequent Constitutional Tribunal judgments and ensure that the publication of future judgments is automatic and not dependent on the executive or legislature;

[45] Communication of 11 August 2016 to the Human Rights Commissioner, www.rpo.gov.pl/sites/default/files/Odp.%20RPP%2019.8.16%20%282%29.pdf, p 5.

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

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

[48] Law on Prosecution of 28 January 2016, Articles 12§1 and 12§2.

- Ensure that any future reform of the Law on the Constitutional Tribunal respects the relevant judgments and does not threaten the Tribunal's independence, integrity and effectiveness in carrying out constitutional review.

REGARDING THE HUMAN RIGHTS COMMISSIONER

- Provide the Human Rights Commissioner's office with sufficient resources to function effectively.

REGARDING COUNTERTERRORISM AND SURVEILLANCE

- Amend the Counterterrorism Law to bring it in line with international human rights standards, in particular in relation to the rights to life, liberty, privacy, fair trial, expression, peaceful assembly, and non-discrimination, and ensure that counterterrorism operations are conducted in full conformity with these standards;
- Review and amend legislation relating to surveillance, introduce a proportionality test and establish an independent and effective system of authorization and control, including with regard to collection of metadata, in addition to judicial pre-authorization of surveillance under the Police Act;
- Ensure that professional privilege is not compromised by surveillance measures;
- Ensure that the use of evidence does not violate the affected person's human rights;
- Complete the domestic investigation into CIA detention sites without delay and implement the ECtHR judgments on this issue;
- Ratify the UN Convention for the Protection of All Persons from Enforced Disappearance.

REGARDING DISCRIMINATION AND HATE CRIMES

- Amend the Penal Code to provide that crimes motivated by discrimination on any grounds, including disability, gender identity and expression and sexual orientation, are investigated and prosecuted as hate crimes;
- Amend Poland's anti-discrimination law to provide that discrimination on grounds including disability, gender identity and expression, and sexual orientation is prohibited in all areas of life;
- Reinstate the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance.

REGARDING SEXUAL AND REPRODUCTIVE RIGHTS

- Ensure that safe and legal abortion can be accessed in practice by creating clear, legally binding regulations for the implementation of the 1993 Act on Family Planning;
- Fully and effectively implement the ECtHR's judgments on access to abortion;
- Repeal the Penal Code provisions related to doctors, in particular Article 152, paragraphs 1 and 2, who perform or assist in the performance of an abortion that do not meet the conditions set out in the 1993 Act on Family Planning;
- Ensure access to an effective remedy and timely review of appeals against refusal of an abortion where provided for in law;
- Refrain from enacting proposals to further restrict access to abortion for women and girls in Poland.

REGARDING INDEPENDENCE OF THE JUDICIARY

- Amend the Law on Prosecution, separating the functions of Prosecutor General and Minister of Justice and putting in place sufficient safeguards against abuse of power to protect the independence of the judiciary and the right to a fair trial.

ANNEX 1

CONSTITUTIONAL TRIBUNAL CRISIS TIMELINE

25 June 2015: outgoing Parliament, led by the Civil Platform (*Platforma Obywatelska*) party adopts Law on the Constitutional Tribunal,[49] criticised by NGOs at the time[50] and setting out that the outgoing Parliament had the right to elect five Tribunal judges to replace five departing ones, including two whose term was only set to end after the Parliament's term would end;

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

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

19 November 2015: new Parliament amends the Law on the Constitutional Tribunal, introducing, for instance, a provision enabling it to replace all five previously elected Tribunal judges;[51]

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

3 December 2015: Constitutional Tribunal rules that two out of the five judges elected by the Civic Platform Parliament were elected in violation of the Constitution as their term was to end after the outgoing Parliament's; [52]

9 December 2015: Constitutional Tribunal rules that the majority of reforms in the 19 November Law are unconstitutional;[53]

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

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

28 December 2015: only four days later, the President signs the Law;[54]

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

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

[50] Helsinki Foundation for Human Rights' statement, 10 June 2015: www.hfhr.pl/wp-content/uploads/2015/06/oswiadczenie_kh_11062015.pdf.

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

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

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

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

9 March 2016: Constitutional Tribunal finds the Law of 22 December 2015 unconstitutional.[55] The Prime Minister refuses to publish the judgment in the Journal of Laws, however, and stops publishing Tribunal judgments from then on;

22 July 2016: the latest amendment to the Law on Constitutional Tribunal is enacted.[56] It is challenged before the Tribunal by the Human Rights Commissioner, the National Bar Council and groups of MPs;

27 July 2016: the European Commission issues a recommendation to Poland, giving it three months to report on steps taken to remedy the crisis;[57]

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

11 August 2016: the Tribunal declares some of its provisions unconstitutional in a judgment.[58] Some of these mirror the provisions introduced by previous amendments and include:

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

The Prime Minister refuses to publish this judgment.

16 August 2016: The 22 July Law theoretically enters into force, with the exclusion of the unconstitutional provisions. However, the judgment of 9 March 2016 has still not been published in the Journal of Laws and the executive has thus clearly chosen not to accept the latest ruling and instead apply the new Law in its entirety.

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

[56] Law of 22 July 2016 on the Constitutional Tribunal, Journal of Laws 2016 item 1157.

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

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

ANNEX 2

AMNESTY INTERNATIONAL DOCUMENTS FOR FURTHER REFERENCE[59]

Poland: Submission to the United Nations Human Rights Committee. 118th session, 17 Oct - 04 Nov 2016 (Index: EUR 37/4849/2016).

Poland: Women force historic U-turn on proposed abortion ban, News, 6 October 2016.

A dangerous backward step for women and girls in Poland, Op-ed, 19 September 2016.

Counter-Terrorism Bill Would Give Security Service Unchecked Power, public statement (Index: EUR 37/4263/2016).

New surveillance law a major blow to human rights, public statement (Index: EUR 37/3357/2016).

Targeted by hatred, forgotten by law. Lack of a coherent response to hate crimes in Poland (Index: EUR 37/2147/2015).

Unlock the truth. Poland's involvement in CIA secret detention (Index: EUR 37/002/2013).

[59] All these documents are available on Amnesty International's website: https://www.amnesty.org/en/countries/europe-and-central-asia/poland/

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