



**Submission by the Helsinki Foundation for Human Rights**

**to the**

**Human Rights Committee**

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## **1. Introduction**

The Helsinki Foundation for Human Rights (“HFHR”) is one of the biggest and oldest non-governmental organisations dealing with the human rights protection in Poland. HFHR’s mission is to promote human rights protection in democratic state ruled by law. HFHR undertakes educational, legal and monitoring activities both in Poland and the countries of the former Soviet block. HFHR has a consultative status at ECOSOC and is a member of numerous research networks and platform. The HFHR is regularly engaging in different UN mechanisms, including the UPR and the Human Rights Committee review.

After the parliamentary elections of October 2015 many substantial changes were introduced to the legal system. The constitutional crisis (which resulted in the process of appointing new judges of the Constitutional Tribunal and changes to the law adopted at accelerated pace) posed a serious threat to safeguarding the rule of law and separation of powers. At the same time, the new governing majority adopted many changes in acts on police, public media, anti-terrorism. All of these changes raised serious concerns from the human rights protection perspective.

This review at the United Nations Human Rights Committee therefore comes at a timely moment for Poland; as there is a true threat to the respect of the rule of law and the democratic principles established since 13 September 1989, we believe the Human Rights Committee has the opportunity through its dialogue with the Polish government to offer a path to reforms in order to guarantee the respect of human rights in the country. We call upon the government to build a platform to cooperate with civil society on the implementation of the recommendations made by the Committee following this review, as well as other recommendations made by other international independent human rights mechanisms, such as the European Commission for Democracy through Law (Venice Commission), the Council of Europe Commissioner for Human Rights, and the European Union’s rule of law mechanism.

In our submission, we will focus on:

1. The Constitutional Court crisis, as it directly affects and impairs the protection of human rights situation in Poland;
2. The situation around public media and the effect of recent changes on media freedom
3. Attacks on the judiciary and their impact on the division of powers
4. The new law on Police and the antiterrorist law
5. The problems related to the migrant crisis, which is a predominant problem across Europe.

## 2. Constitutional crisis in Poland

Since autumn 2015 Poland has been facing a serious constitutional crisis, which threatens the independence of the Constitutional Tribunal and, in broader scope, the safeguarding the rule of law.

The Constitutional Tribunal is one of the key elements of the entire checks-and-balances mechanism in the Polish legal system. It has the power to verify whether legislation – acts, regulations or international agreements – complies with the Constitution. The Constitutional Tribunal is also an important element in the human rights protection system in Poland. According to the Constitution, everyone whose fundamental rights or freedoms have been violated has a right to submit a motion to the Tribunal for a verification of a provision upon which the court's final decision was issued (Article 79 par. 1 of the Constitution)

The constitutional crisis has two aspects – one is related to the process of appointing new judges of the Constitutional Tribunal and the second one to the legislative changes aiming at paralysation of the Tribunal works.

### *Origins of the crisis*

The beginning of the crisis connected with the adoption of the Act on Constitutional Tribunal by the Sejm (the lower chamber of the Parliament) in June 2015<sup>1</sup>. This Act included a temporary provision (Article 137) that allowed the Sejm to elect 5 new judges (namely 1/3 of the entire Tribunal composition) to the Constitutional Court. The newly elected judges were supposed to replace three judges whose tenures expired on 6 November 2015 and two judges whose tenures expired on 2 and 8 December 2015. At the same time, the Parliament term of office ended at the turn of October and November 2015. In August 2015, two months before the parliamentary elections, the Act came into force. During its last session the Sejm of the 7th term, acting on the basis of the newly adopted Act, adopted five resolutions in which it appointed five new judges of the Constitutional Tribunal.

The President of Poland did not swear the new judges into office. He expressed an opinion (in a press interview published on 11 November 2015) that the elections of the judges had “violated democratic rules”.

### *Legislative changes to the Act on Constitutional Tribunal of June 2015*

On 25 October 2015, the new parliamentary elections took place. The Law and Justice party won the elections by gaining almost 38% of votes and 235 seats (out of 460) in the Sejm. The first session of the newly elected Parliament started on 12 November 2015.

One of the first legislative initiatives undertaken by the new governing majority concerned the Act on Constitutional Tribunal. Within three days and without any consultations with experts, the Sejm adopted an amendment to the Act on Constitutional Tribunal revoking among others Article 137. The amendment introduced new temporary provision (Article 137a) that

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<sup>1</sup> The Law of 25 June 2015 is available at: <http://dziennikustaw.gov.pl/du/2015/1064/1>

established new deadline for presenting candidates for the judges replacing those judges whose tenure expired in 2015.

Few days later, the Sejm adopted five resolutions which declared “the lack of legal force” of the resolutions electing five judges by the Sejm of the 7<sup>th</sup> term<sup>2</sup>. On 2 December, the Sejm appointed five new judges and President immediately (to be precise at night without any media presence) sworn them into office.

#### *Judgment of the Constitutional Tribunal of 3 December 2015*

In the meantime, the group of opposition MPs filed a motion to the Constitutional Tribunal concerning the Act of 25 June 2015 on the Constitutional Tribunal to verify whether the legal basis for the elections of judges in October 2015 was compatible with the Constitution. The hearing before the Constitutional Tribunal was held on 3 December 2015, just after the President took the oath from the new judges of the Constitutional Tribunal. On the same day, the Tribunal issued a judgment in which it ruled that Article 137 of the Act on the Constitutional Tribunal was a constitutional basis for the elections of three judges who were to replace the judges whose tenures expired on 6 November 2015<sup>3</sup>. Whereas in respect of two judges whose terms of office lapsed on the 2 and 8 December 2015, the elections of judges by the Sejm of the 7<sup>th</sup> term were found unconstitutional. Moreover, the Tribunal stated clearly that it is an obligation of the President to swear judges validly elected by the Sejm into office.

#### *Judgment of the Constitutional Tribunal of 9 December 2015*

On 9 December 2015, the Constitutional Tribunal held a hearing and announced a judgement in yet another case concerning its own organization<sup>4</sup>. This time it reviewed the constitutionality of the Act of 19 November 2015 amending the Act on the Constitutional Tribunal. The main point of the decision concerned the capability of the Sejm of the 8<sup>th</sup> term to again elect five new judges of the Constitutional Tribunal.

The Tribunal confirmed that the Sejm of the 7<sup>th</sup> term was entitled to elect three judges, and thus the Sejm of the 8<sup>th</sup> term – only two judges. The Tribunal ruled that “Article 137a of the Act on the Constitutional Tribunal – insofar as it concerns putting forward a candidate for a judge of the Constitutional Tribunal to assume the office after the judge whose term of office ended on 6 November 2015 – is inconsistent with the Constitution.”

The two abovementioned judgments of the Constitutional Tribunal did not lead to the end of the constitutional crisis. Quite contrary – the crisis even escalated due to the fact that it was unclear how many judges were authorized to adjudicate cases. There was no doubt as to the fact that 2 judges were elected by the Sejm of the 7<sup>th</sup> term on the basis of unconstitutional provision, while 3 of them were elected correctly, but not sworn into office by the President.

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<sup>2</sup> The Sejm resolutions of 25 November 2015 are available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WMP20150001132>

<sup>3</sup> The judgment is available at: <http://trybunal.gov.pl/rozprawy-i-ogloszenia-orzeczen/wyroki/art/8748-ustawa-o-trybunale-konstytucyjnym/>

<sup>4</sup> The judgment is available at: <http://trybunal.gov.pl/rozprawy-i-ogloszenia-orzeczen/wyroki/art/8792-nowelizacja-ustawy-o-trybunale-konstytucyjnym/>

Five judges elected by the Sejm of the 8th term were sworn into office by the President but they were elected for the places already occupied by the judges elected in the 7<sup>th</sup> term.

On 12 January 2016, the Constitutional Tribunal informed the public that it had discontinued the proceedings concerning the appointment of 5 judges in December 2015<sup>5</sup>. In December 2015, a group of MPs submitted a motion to the Constitutional Tribunal to verify whether the Parliament's resolutions of November 2015 reversing the initial appointment of judges and the ensuing five resolutions of December 2015 appointing five new judges did or did not violate the Constitution. On basis of this decision, the President of the Constitutional Tribunal announced that the two judges correctly appointed in December 2015 by the new governing majority were assigned to cases. The remaining three candidates appointed by the Sejm and sworn into office by the President have the status of the Constitutional Tribunal's employees. At the beginning of 2016, the Tribunal was composed of 12 acting judges out of 15 envisaged by the Constitution.

### *“Remedial” Act on the Constitutional Tribunal*

In December 2015, Sejm started work on so-called “remedial” Act on Constitutional Tribunal<sup>6</sup>. Similarly to the amendment adopted in November 2015, also this Act was adopted at accelerated pace and without proper consultations with experts. The Act introduced provisions that in practice might lead to a complete paralysis of the Tribunal's works. In the light of the Act the Tribunal should make decisions in 2/3 majority, the cases should be recognized in the sequence their were lodged and the full panel should be composed of at least 13 judges. In cases pending before the Tribunal, the hearing could take place after 45 days since the notification of the parties on the date of the hearing (if the case is ruled by the full panel – after 3 months).

On 9 March, the Tribunal issued the judgment regarding the “remedial” Act<sup>7</sup>. The Tribunal held that it may neither operate nor adjudicate on the basis of laws whose constitutionality raises significant doubts. According to the Tribunal, this would threaten the effective adjudication of cases already present on its docket. The Constitutional Tribunal ruled that the amendment to the Constitutional Tribunal Act is contrary to the Constitution in its entirety. Above all, the legislative procedure applied to the enactment of the amendments was declared unconstitutional. The Tribunal ruled that this procedure was so hasty that in practice it prevented a review of the amendment's draft despite numerous concerns over it likely being unconstitutional.

Although the judgements of the Constitutional Tribunal are binding and final, the Government refused to recognise the binding force of the judgement and declined to publish it in the Official Journal. The Government argues that the judgment is invalid because it was issued in a procedure inconsistent with the requirements of the Act on Constitutional Tribunal – the same which constitutionality was reviewed in that case. After issuing the judgment of 9<sup>th</sup>

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<sup>5</sup> The resolution of the Constitutional Court of 7 January 2016 is available at: <http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/8836-uchwaly-sejmu-rp-w-sprawie-stwierdzenia-braku-mocy-prawnej-uchwal-sejmu-rp-z-dnia-8-pazdziernika/>

<sup>6</sup> The Law of 22 December 2015 is available at: <http://dziennikustaw.gov.pl/du/2015/2217>

<sup>7</sup> The judgment is available at: <http://trybunal.gov.pl/rozprawy-i-ogloszenia-orzeczen/wyroki-i-postanowienia/art/8859-nowelizacja-ustawy-o-trybunale-konstytucyjnym/>

March 2016, the Tribunal restarted its works. Between March and July the Tribunal issued almost 20 judgments none of which was published until August 2016.

#### *The opinion of the Venice Commission*

On 9 March 2016, the Venice Commission issued an opinion on the amendments to the Act on Constitutional Tribunal adopted in December 2015<sup>8</sup>. The Commission in its opinion criticized all the changes introduced by the amendment. The opinion states “the paralysation of the work of the Constitutional Tribunal poses a threat to the rule of law, democracy and protection of human rights.”

The Commission emphasized that the Government’s refusal to publish the Tribunal’s judgment of 9 March 2016 would not only be contrary to the rule of law, but such an unprecedented move would also further deepen the constitutional crisis.

#### *The fourth Act on the Constitutional Tribunal*

In July 2016, the Parliament adopted new Act on Constitutional Tribunal<sup>9</sup>. Unlike in the case of previous changes, this proposal was not limited to amendments, but constituted an entirely new piece of legislation. The new Act included: a rule of examining cases in the order of submission (however this time it provided certain exceptions), a blocking mechanism in the decision making process (minimum four judges can postpone the ruling of the Tribunal for even 6 months) and a mechanism allowing the executive power to influence the Tribunal’s works, namely if the case had to be recognised in the presence of the Prosecutor General and he did not show up to the hearing, the hearing would have to be postponed. In its statement, issued after adoption this Act, HFHR alarmed “new Constitutional Tribunal Act betrays the principle of separation of powers and paves the way towards a constitutionally unrestricted dictatorship of the parliamentary majority”.

In August 2015, the Constitutional Tribunal found this Act as partially unconstitutional. The government refused to acknowledge this judgement, and as a result this decision remains unpublished. However, on basis of the provisions introduced by the Act of July 2016, the government published all the judgements issued between March and July 2016 with an exemption of the judgement of 9<sup>th</sup> March.

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<sup>8</sup> The Venice Commission decision is available at: [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)

<sup>9</sup> The Law of 22 July 2016 is available at: <http://dziennikustaw.gov.pl/du/2016/1157/1>

### *Summary*

The constitutional crisis in Poland poses serious threat to safeguarding the rule of law, separation of powers and the functioning of human rights protection system. The governing party is attempting to change the entire political system using lower ranking laws such as acts and resolutions without, however, changing the Constitution (since it does not have the required majority to change the Constitution). Furthermore, never before had the government refused to acknowledge the judgement issued by the Constitutional Tribunal.

#### **HFHR recommends the following to the Polish government:**

- 1) Swear into office the three judges legally appointed in October 2015.
- 2) Acknowledge all the judgments of the Constitutional Tribunal.
- 3) Guarantee the respect for the Constitutional Tribunal's jurisprudence in adopting a legislation anchoring such a guarantee in law.

### 3. National Media Council

#### *December Act*

On 29 December 2015 Sejm adopted amendment to the Broadcasting Act of 29 December 1992. The amendments gave the Ministry of Treasure competence to nominate management and boards of directors in public media. Therefore the role of the National Broadcasting Council was substantially narrowed (previously it was competent in selecting authorities in public media). Act also liquidated transparent and public competitions for authoritative positions in public media and terms of their offices. Act had temporal character and was in force until the end of June 2016<sup>10</sup>. Its adaptation provoked firestone of criticism of polish NGOs and international organizations<sup>11</sup>. It was underlined that Act is strengthening the dependence of public media on the Government and can in consequence weaken their pluralistic dimension. Polish Ombudsman filed a constitutional challenge of the Act to Constitutional Tribunal.

December Act scheduled final date for polish Sejm to adopt comprehensive regulations reforming functioning of public media. On 22 June 2016 when it was obvious the reform wouldn't be ready accordingly to the timetable drafted in December Act, Sejm adopted new act that was supposed to fill in the gap left by December Act expiring in June and start the series of reforms in public media.

#### *June Act*

Act of 22 June 2016 on the National Media Council introduced the new institution - National Media Council (hereinafter: "NMC")<sup>12</sup>. Competences of the new institution in many fields reflect competences of National Broadcasting Council. The major task of NMC is appointing and dismissing the composition of public media bodies and the Polish Press Agency. NMC has supervising powers over the Polish Press Agency. It holds competences to control public broadcasters. The election of members of the National Media Council raise doubts. The Act does not envisage the prohibition of joining the mandate of a Member of Polish Parliament and a Member of NMC. Also Act does not provide contribution of other (non-governmental) actors to the process of composition of management and boards of directors in public media. The NMC was appointed in July 2016, three of their members are active politicians of the ruling party (Prawo i Sprawiedliwość).

Discretionary competences in the sphere of creation of the highest managerial positions in public media assigned to NMC are objectively broad. That favors politicizing public media and strengthening its dependence of the Government. Especially in the situation when after

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<sup>10</sup> Law of 30 December 2015, Official Journal 2016, pos. 25, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000025>

<sup>11</sup> Opinion of HFHR of 30 December 2016, available at: [http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/03/ENG\\_Helsinki\\_opinia\\_media.pdf](http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/03/ENG_Helsinki_opinia_media.pdf)

<sup>12</sup> Law of 22 June 2016, Official Journal 2016, pos. 929, available at: <http://www.sejm.gov.pl/sejm8.nsf/komunikat.xsp?documentId=D49AF4B1166B6550C1257FE100489A92>



December Act numerous guarantee provisions protecting independence and stability of the offices in public media have been waved<sup>13</sup>.

NMC is composed of five members elected jointly by the Sejm (three members) and President (two members). Term of their office lasts six years. The President of the NMC is elected among the members of the Council. The NMC until 31<sup>st</sup> of March of each year presents to the Sejm, Senate and President written report on its activity in previous year. Report is also publicly accessible. However lack of its acceptance by abovementioned organs does not mean dissolution of NMC. Sejm, Senate and President and President of NMC can only submit comments to the report. NMC is obliged to address these comments within 30 days.

The Act envisages that the administrative-organizational service of the NMC is provided by the Chancellery of the Sejm. Costs of functioning of NMC and members' salaries are covered by national budgetary means, managed by the Chief Officer of the Chancellery of the Sejm. This solution can be considered as weakening the impartiality of the NMC and financially subordinating it to the Chancellery of the Sejm.

Council is to be attributed with wide controlling powers upon Public Media Fund also it will have insight in files of public broadcasters. It has been underlined therefore that its actions will not influence positively the editorial independence and self-standing of media bodies. The fact that Act does not envisage rules on the NMC functioning poses substantial risk of the lack of public control over NMC decisions (managing institutions of public confidence and in the future significant public financial assets).

### *Changes in personal composition of public media*

It is estimated, that since the start of reforms in public media over 188 of public media employees have left or have been dismissed based on political reasons. Including Kamil Dąbrowa<sup>14</sup>, Chief of the 1st Program of Polish Radio and Piotr Kraśko, Chief and Presenter of "Wiadomości" TVP<sup>15</sup>. Rapid and radical changes in personal squad of public media bodies and dismissal of long-term, respected journalists raise doubts on the legitimacy of this process and impartial direction of reforms in public media.

### *Criminal defamation*

Despite recommendations made during the last UPR review of Poland, criminal defamation still remains in the Criminal Code. Poland is regularly found in violation of Article 10 of the European Convention of Human Rights due to maintaining Article 212 of the Criminal Code

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<sup>13</sup> Opinion of HFHR of 14 June 2016, available at: <http://www.hfhr.pl/wp-content/uploads/2016/06/HFPC-opinia-ustawa-o-Radzie-Mediow-Narodowych.pdf>

<sup>14</sup> On 24 June 2016 the Warsaw District Court found that the dismissal of Kamil Dąbrowa was illegal and lacked of proper justification: <http://www.hfhr.pl/sad-zwolnienie-naczelnego-radiowej-jedynki-bylo-bezprawne/>

<sup>15</sup> The monitoring of the dismissals in public is conducted by Towarzystwo Dziennikarskie and available at: <http://towarzystwodziennikarskie.org/>

and sentencing bloggers and journalists<sup>16</sup>. On 1 September 2016 the Polish Ombudsman called for deleting Article 212 of the criminal code and replacing it by civil defamation<sup>17</sup>.

**HFHR recommends the following to the Polish government:**

- 1) Adopt broad and complex regulations concerning public media, which would guarantee political independence of the public broadcasters and a financial sustainability of public media in accordance with the media freedom and freedom of expression guarantees enshrined in Article 19 of the International Covenant on Civil and Political Rights.
- 2) To immediately seize dismissals from public media, based on political motives.
- 3) Fully remove Article 212 of the Criminal Code on defamation, in line with international standards on the issue, including Human Rights Council resolution 22/6 on the protection of human rights defenders co-sponsored by Poland.

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<sup>16</sup> E.g. Lewandowska-Malec v. Poland, application no. 39660/07, Maciejewski v. Poland, application no. 34447/05.

<sup>17</sup> Ombudsman statement is available at: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>

#### 4. Status of the judiciary

##### *Refusal of appointment of judges by the President*

On 22 June 2016 the President refused to appoint 10 candidates for the position of judges (among them were both candidates for their first judicial office and candidates for promotion). He did not provide any reasons for the refusal, although media informed that some of the candidates adjudicated in politically controversial proceedings (i.e. civil proceedings between left-wing politician and the leader of the Law and Justice party, which supports the current President). The President's competence to decline the appointment of a judge raises serious controversies as it is not explicitly specified in the Constitution. The Constitution provides only that "Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Judiciary Council" (Article 179) and that in order to use its competence to appoint judges the President does not need signature of the Prime Minister (Article 144 section 2).

As a response to the President's decision the National Judiciary Council issued a statement in which it underlined that the principle of independence of the judiciary requires harmonious cooperation between the President and the Council, and transparency is needed in all actions undertaken during the process of judicial appointments<sup>18</sup>. Also the Helsinki Committee and HFHR in their joint statement criticized the President's decision<sup>19</sup>.

##### *Draft of the amendments to the Act on National Judiciary Council*

On 2 May 2016 the Government published a draft of the Amendment Act to the Act on the National Judiciary Council<sup>20</sup>. The draft provides far reaching changes regarding composition of the Council and its role in the process of judicial appointments, what may negatively influence the independence of the judiciary.

According to Article 179 of the Constitution, judges shall be appointed by the President of the Republic on the motion of the National Council of the Judiciary. The details regarding the procedure are regulated on the statutory level – in the Act on the System of the Common Courts and the Act on the National Judiciary Council. Generally, the role of the President in the judicial appointments is limited to the mere act of appointment of a judge. The draft provides significant change in this regard. According to the projected Article 37(1) of the Act, if there are more applications than one for a given judicial position, the National Judiciary Council has to review all candidatures jointly and recommend the President at least two candidates. Such a requirement would completely change the role of the Council and the President in the process of judicial appointments. The President would get a real influence on the appointments as he would be authorized to choose between various candidates nominated by the Council. On the other hand, the role of the Council would be significantly diminished.

Yet another potentially unconstitutional provision of the draft is its Article 5, according to which terms of office of all elected members of the Council will be terminated within 4

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<sup>18</sup> Opinion of 19 May 2016 available at: <http://www.krs.pl/pl/aktualnosci/d,2016,5/4127,opinia-krajowej-rady-sadownictwa-z-dnia-19-maja-2016-r-nr-wo-020-5616>

<sup>19</sup> Statement of the Helsinki Committee and HFHR available at: <http://www.hfhr.pl/wspolne-stanowisko-komitetu-helsinki-i-zarzadu-hfpc-ws-ustawy-o-tk/>

<sup>20</sup> The draft amendment is available at: <https://legislacja.rcl.gov.pl/projekt/12284955>

months since the entry into force of the Act. Sudden dismissal of all members of the Council may be perceived as politically motivated form of pressure on this constitutional body. Such a conclusion is justified even more by the fact that the Council has been critical to many recent laws proposed by the Government. The Act has not been adopted yet – the draft has not been officially submitted to the Parliament and the legislative works are still in the phase of the inter-ministerial consultations.

#### *Public statements about the judiciary*

Politicians largely comment on the judiciary. Comments touch upon the Constitutional Court, the President of the Constitutional Court and particular judges. Most of the comments are targeting particular judges and their aim is to discredit the judiciary in the eyes of society. The Supreme Court judges were called by the Spokesperson of the ruling parties as “*some bunch of fellas who want to defend the status quo of the previous regime*”<sup>21</sup>. The speaker of the Sejm, commenting on the judgments of the Constitutional Court of 9 March 2016 stated “*These are merely opinions of the Tribunal – opinions of members of Constitutional Tribunal. (...) Tribunal may not comment on the choices made by the Parliament*”<sup>22</sup>. The Head of the Kukiz 15 party stated, in reference to the development around the Constitutional Court and judiciary that the judicial system in Poland is a “*the prosecutorial-judicial mafia*”<sup>23</sup>.

#### **HFHR recommends the following to the Polish government:**

- 1) The President should appoint the 10 judges proposed by the National Judiciary Council, in line with international observations on this matter and obligations under the national constitutional order and national legislation.
- 2) The Government should seize any pressure, being legislative amendments or unfavorable comments on the judiciary. The balance of powers should be restored and respected in line with the UN Basic Principles on the Independence of the Judiciary adopted on 13 December 1985 and art. 14 par. 1 of the International Covenant on Civil and Political Rights.
- 3) Politicians and public officials should refrain themselves of discrediting in the eyes of the public the judiciary and particular judges and targeting them with verbal attacks and defamatory comments.

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<sup>21</sup> Statement available at: <http://www.tvn24.pl/wiadomosci-z-kraju,3/rzecznik-pis-beata-mazurek-o-sadzie-najwyzszym-zespol-kolesi,639007.html>.

<sup>22</sup> Statement available at: <http://wiadomosci.onet.pl/tylko-w-onecie/trybunal-konstytucyjny-wyrok-tk-w-sprawie-noweli-pis/q72lp6>

<sup>22</sup> Statement available at: [http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo\\_Prokuratora\\_Generalnego\\_z\\_5\\_kwietnia\\_2016\\_r..pdf](http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_Prokuratora_Generalnego_z_5_kwietnia_2016_r..pdf)

<sup>23</sup> Speech available at: <http://www.tvn24.pl/wiadomosci-z-kraju,3/kukiz-mowi-o-prokuratorsko-sadowniczych-list-otwarty-sedziow,616569.html>

## 5. Law on Police

On 15 January 2016 the Polish Sejm amended the Law on Police<sup>24</sup> by changing the scope of the state agencies' powers to obtain information by monitoring the means of communication and other tools including: computers, telephones, databases, e-mails, social networks, etc.

The amendments aimed to amend the Polish legal system according to the judgement of the Constitutional Tribunal of Poland of 30 July 2014 (no. K 23/11). In that judgement the Constitutional Tribunal concluded that certain provisions of the Act on Police (and several other acts) were incompatible with the Polish Constitution.

Article 19 sets out the rules for secret surveillance (named in the official English translation of the Police Act “operational control”) ordered “in case of preliminary investigation” with regard to crimes (including potential crimes). According to Article 19 para. 6, secret surveillance includes such measures as among others listening to and recording of the contents of telephone conversations and correspondence conducted via telecommunications networks (e-mails, messengers, etc.), in ordinary letters, recording “live” conversations with listening devices and access to hard drives. Therefore, “classical” secret surveillance under Article 19 allows the Police to know the content of communications which were supposed by the interlocutors to be private.

Article 20c of the Police Act deals with metadata (phone calls placed or received, numbers dialled, duration of calls, geographical location of mobile devices at a given moment, web-sites visited, log-ins, personal settings, addresses of e-mail correspondence, etc.). Secret surveillance under Article 19 and metadata collection under Article 20c are ordered on different grounds and implemented within different procedures. As to the grounds, Article 19 contains a closed list of crimes which may warrant surveillance. Furthermore, the collection of metadata poses serious threat to protection of the professional secrecies (client-attorney privilege and journalists' secrecy). The legal framework for collecting metadata under Article 20c is much wider. It is done “in order to prevent or detect crimes or in order to save human life and health, or in order to support rescue and find missions”. In essence, Police may collect metadata for any useful purpose related to the very broad mandate of the police to maintain peace and order.

As to the procedure, secret surveillance governed by Article 19 is performed with the prior consent of a district court (see paras. 1 and 2). However, in “cases of the utmost urgency, where any delay could result in the loss of information or the obliteration or destruction of the evidence of a crime”, police may start surveillance without prior consent of the court but with the authorisation of a prosecutor. If consent is not granted within the following 5 days, surveillance must be suspended and the material gained must be destroyed (para. 3).

By contrast, under Article 20c metadata may be obtained without prior consent of a court. Article 20ca only establishes a system of ex-post review: every six months the police are obliged to pass to a competent court for review a generalised report on metadata collection (para. 2). Finally, Article 20cb sets out the rules for processing and obtaining certain data, that is not subject to any controls, even ex-post. In sum, the Police Act establishes two separate, fundamentally different legal regimes: one for the “classical” secret surveillance of

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<sup>24</sup> Law of 15 January 2016, Official Journali 2016, pos. 147, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000147>

communications, and another for the metadata collection. The first report on the use of metadata contained only figures and dates of data collection, without any case description from the services, neither with any justification, rendering the control of the court illusory.

On 13 June 2016, the Venice Commission issued an opinion on the law<sup>25</sup>, stating that provisions contained in Article 19 and Article 20c are contrary to the right of privacy protection, as enshrined in Article 8 of the European Convention of Human Rights. The amendments implementing secret surveillance are considered insufficient to prevent its excessive use and unjustified interference with the privacy of individuals.

In June 2016, the Ombudsman submitted a motion to the Constitutional Tribunal upon verification the constitutionality of the Act on Police.

**HFHR recommends the following to the Polish government:**

- 1) To comply with the Venice Commission opinion of 13 June 2016 and prevent the excessive use of secret surveillance and interference with citizens privacy.
- 2) To guarantee a judicial review of the metadata gathered on citizens in compliance with Article 17 par. 2 of the International Covenant on Civil and Political Rights.
- 3) To fully implement the Constitutional Tribunal's judgement concerning the constitutionality of this Act with no further delay or exception.

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<sup>25</sup> Opinion No. 839/2016, available at:  
[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e)

## 6. Antiterrorism legislation

On 10 June 2016 the Polish Sejm passed an Anti-terrorism law<sup>26</sup>. Development of the law occurred under secrecy, without any consultation with civil society.

The Act contains the following provisions, which have raised concerns as to privacy protection, discrimination and freedom of assembly.

The Act introduced the definition of “an event of a terrorist nature”. On the basis of the Act the Ministry of the Interior issued a regulation with a catalogue of “events of a terrorist nature”. For example, under the draft regulation, fundamentalist statements made by the representatives of Muslim groups or established Muslim academics will be classified as “events of a terrorist nature”.

Furthermore, the Act includes regulations concerning the operational control towards foreigners. Under the Act the authorities have wide competences to conduct investigations against foreigners. According to the law, these methods may be used for a period of three months based exclusively on an approval given by the Prosecutor General, without the need to obtain a court order to this effect. The court order is needed only after three months of conducting the operational control. The law allows police to arrest individuals based on a “probability” that they were going to commit or had committed a terrorist act. Individuals can be held for a period of 14 days before judicial review occurs, whereas previously judicial review was required within hours. Secret evidence may be used in reviewing the arrest.

The Act also includes regulations concerning blocking access to Internet websites/online content. Under the draft Act the court will be able to impose such measures for up to 30 days upon the motion of the Chief of the Internal Security Agency (ISA), issued with the consent of the Prosecutor General, in order to combat or prevent the terrorist crimes. In “emergency situations” the Chief of the Internal Security Agency (with the consent of the Prosecutor General) will be able to order the blocking measure without prior judicial control (the order will only be subject to subsequent judicial control). In the opinion of the HFHR the proposed website-blocking measures are incompatible with freedom of expression standards developed in the jurisprudence of the European Court of Human Rights as well as guidelines set by the UN Special Rapporteur on Freedom of Expression. In particular, the blocking of websites is to be based on vague prerequisites and therefore does not provide adequate protection against arbitrary and excessive actions of the authorities. HFHR argues that the key problems are the absence of guarantees that would ensure effective judicial review of the activities of secret services and the asymmetry between the position of state agencies and private actors. For example, the Director of the Internal Security Agency and the Prosecutor General are the only entities entitled to appeal the court’s decision to block a website or online content. The other party (the Internet user or website owner) will not be able to question such a warrant.

In July 2016, the Ombudsman submitted a motion to the Constitutional Tribunal upon verification the constitutionality of the Anti-terrorism Law.

### **HFHR recommends the following to the Polish government:**

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<sup>26</sup> Law from 10 June 2016, Official Journal 2016, pos. 904, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000904>

- 1) To provide legislative changes in order to seize the discrimination and surveillance of foreigners, bringing its legislation in line with Article 17 par. 1 of the International Covenant on Civil and Political Rights. In view of the legislative review, ensure broad civil society consultation.
- 2) To provide legislative changes in order to unblock the blocking of the web sites without judicial review in line with the guarantees of freedom of expression enshrined in Article 19 of the International Covenant on Civil and Political Rights.
- 3) To guarantee a judicial review of the information gathered on citizens in compliance with Article 17 par. 2 of the International Covenant on Civil and Political Rights.
- 4) To guarantee an adequate protection of journalistic sources and advocate secrecy in line with Article 19 of the International Covenant on Civil and Political Rights.
- 5) To guarantee that the Constitutional Tribunal's judgement concerning the constitutionality of this Act will be respected and implemented.



## **7. Migrants' rights**

One of the most burning issues in the area of migrants' rights in Poland is the detention of children and vulnerable persons including torture victims.

Polish law allows the detention of families with minors for the purpose of both return and asylum proceedings. Moreover, unaccompanied children over 15-years-old can be detained for the purpose of the return proceedings as well. Polish law does not provide any restrictions nor shorter time limits for the detention of these extremely vulnerable groups. Monitoring of the detention centres conducted by the HFHR and Association for Legal Intervention in 2014 showed that these places do not ensure proper conditions for the well-being of children.

The second problem concerns an ineffective identification of torture victims. Although Polish law provides special guarantees for asylum-seekers and returnees being victims of torture, there is no effective mechanism in place which would allow to promptly recognize such persons in practice. The HFHR observed numerous cases of detaining torture survivors in spite of the absolute prohibition of the detention of alleged victims of violence set in the Polish law.

Finally, the HFHR have been observing recently an increase in the number of reports from individuals who were denied the possibility to apply for international protection at eastern border crossing points of Poland, in particular at a border crossing point between Belarus and Poland in Brest/Terespol. The reports say that, in spite of repeated (even up to 10-40 times), clearly formulated requests, invoking the experience of persecution in the country of origin, asylum seekers are refused the right to lodge an asylum application and enter Poland. Among asylum-seekers refused entry to Poland particularly disturbing situation considers Tajik nationals being members of the opposition political party and facing a real risk of persecutions upon return to their country of origin.

### **HFHR recommends the following to the Polish government:**

- 1) To introduce a ban on detention of migrant and refugee children as well as families with children in compliance with the Committee on the Rights of the Child General Report from 2012.
- 2) To introduce an effective system of identification of vulnerable persons (including torture victims) to prevent their detention in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- 3) To ensure that every foreigner who wish to apply for asylum in Poland would be permitted to do so in compliance with the Convention relating to the Status of Refugees.