

UPDATE, MAY 2017

RULE OF LAW AND HUMAN RIGHTS CONCERNS IN POLAND

This document provides updates on the main concerns in relation to the rule of law and human rights in Poland. It focuses on the independence of judiciary, freedom of assembly and the situation of asylum-seekers and migrants. It is based on the findings of an Amnesty International visit in Poland from 14 March to 12 April 2017 during which the researchers met with the government officials; representatives of NGO; journalists; activists; legal scholars; participants in protests subjected to criminal prosecutions; asylum-seekers and others. It reflects Amnesty International's assessment of the amendments of the Law on the National Council of Judiciary, the Law on Assemblies and the amendment of the Asylum Law. This document provides further evidence of the deterioration of the Rule of Law and human rights situation in Poland.

FREEDOM OF ASSEMBLY

On 16 March 2017, the Constitutional Tribunal ruled that the amendment of the Law on Assemblies was constitutional. The new regulation entered into force on 2 April. The amendment introduces a category of “cyclical demonstrations” organized by the same entity on the same location several times a year. Organizers of “cyclical demonstrations” have a priority over anybody else on a given location. Under the law, the distance between assemblies announced at the same place and at the same time has to be at least 100 metres. The amendment was criticised by Polish NGOs and activists for restrictions that may result in breach of the freedom of assembly.¹

On 10 April 2017, the Warsaw Municipality received a notification of an assembly organized by a group of citizens around an informal association Citizens of the Republic of Poland (Obywatele RP). The assembly was planned on 10 May between 8am and 10pm on the Krakowskie Przedmieście street with an estimated participation of 1,000 people. In the past years, this area has been regularly used by another group of citizens who assemble there every month on the 10 to commemorate the Smolensk plane crash during which died the president Lech Kaczyński and 95 other people, including military chiefs of staff, politicians, and high-ranking officials. During these monthly commemoration events, frequently appear politicians of the governing Law and Justice party, including its chief Jarosław Kaczyński.

In relation to the notification by citizens associated with Obywatele RP, the Municipality received information from the Governor of Mazovian Province (*Wojewoda Mazowiecki*) on 27 April stating that in an area that includes Krakowskie Przedmieście will be held a “cyclical assembly”. The organizer of the assembly has effectively “booked” the space every month on the 10 (from 6am until 10pm) until the 2020. On 28 April, the Municipality banned the assembly of Obywatele RP announced on 10 April.²

In parallel to the legislative changes affecting the right to freedom of assembly, Amnesty International documented several cases of prosecutions or harassment of protesters that threaten to have a chilling effect on the freedom of assembly and expression.

¹ Helsinki Foundation for Human Rights. *Constitutional Tribunal: amendments to Assemblies Act constitutional despite all objections*. 16 March 2017. <http://www.hfhr.pl/en/constitutional-tribunal-amendments-to-assemblies-act-constitutional-despite-all-objections/>

² Decision in Polish: <http://bip.warszawa.pl/NR/rdonlyres/702D7516-3060-483B-BD2F-B75B25498F28/1258548/decyzjanrWV5310ZG242017zdnia28042017bdo.pdf>

In January 2017, the Warsaw police launched a public appeal to identify demonstrators caught on camera images from protests in front of the parliament on 16 and 17 December 2016.³ The protests were prompted by the new regulation restricting the access of media to the parliament. The authorities eventually refrained from implementing the restrictions after the mass protests. According to the police statement accompanying the appeal published in January, people pictured on the images are being investigated in relation to the “public disturbances” during these protests.

The publication of the snapshots was criticised by NGOs voicing concerns over “chilling effect” on any future protests.⁴ In March and April 2017, Amnesty International interviewed three of the protesters whose images were published by the police and a lawyer representing some of them. Under to the law, the publication of the images was unlawful as it was done in a stage of the procedure during which the police hasn’t yet identified and charged the suspects (*in rem* stage of the procedure).⁵ A lawyer representing some of the protesters filed complaints against the police in this regard. In addition, the publication of images negatively affected some of the protesters who feared for their safety after the images were reprinted by a number of media and attracted a lot of hatred online. According to the parliamentary opposition, in relation to the December 2016 protests, the police is currently investigating about 100 people. Some of them are reported to have been merely passing by the protests.⁶

One of the participants at the protests, a university student Piotr,⁷ is now being charged for restricting the freedom of the media.⁸ He described the events on 16 December 2016 as following: “I went to the demonstration as an individual, not as part of a group... A journalist from the national TV was trying to broadcast live from the assembly. He and the cameraman were positioned in space of approximately 6 m² with about 30 other people. The journalist was in the centre, the participants were around them. We were not violent, we were just standing there, making a lot of noise. People were shouting and the journalist was unable to make a transmission directly from the middle of the protest. At some point, we started passing a copy of the Constitution and holding it in front of the camera. This is the thing I’m now being prosecuted for... They are certainly trying to scare people so that they don’t protest.”

Another example of measures with a chilling effect on the freedom of assembly and expression are disciplinary proceedings against school teachers who participated in the Black Protest (#CzarnyProtest) on 3 October 2016.⁹ Ten school teachers from the town Zabrze wore black on the day of the protest and posted their picture on a private Facebook profile of one of them. In a response to this, the Disciplinary Commission at the Educational Board of the Silesia Province

³ <http://www.policja.waw.pl/pl/dzialania-policji/aktualnosci/41147,Kto-rozpoznaje-te-osoby.html>

⁴ See in Polish: <https://amnesty.org.pl/oswiadczenie-w-zwiazku-z-publicacja-zdjec-osob-ktore-braly-udzial-w-demonstracji-pod-sejmem/>; and in English:

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

⁵ Publication of images in *in rem* stage without a court order breaches Art. 13.3 of the Press Law (Art. 13) and the Code of Criminal Procedure as well as the Civil Code.

⁶ In Polish: <http://wyborcza.pl/7,75398,21770593,po-juz-ok-100-protestujacych-pod-sejmem-16-grudnia-z-zarzutami.html?disableRedirects=true>

⁷ His real name is concealed for his protection.

⁸ A criminal offence under article 44.1 of the Media Law

⁹ See in Polish: http://www.dzienniklodzki.pl/strona-kobiet/a/za-czarny-protest-pod-sad-bo-przyszly-do-pracy-ubrane-na-czarno.11773745/?utm_source=social-media-facebook&utm_medium=przycisk-gora

started proceedings against them in February 2017. They were investigated for the breach of the Teachers' Ethical Code, namely for infringing the principle of teachers' impartiality by expressing their opinions at school and for neglecting their duties as teachers. The charges were changed during the course of the proceedings to 'manifestation of opinions on a protest in relation to changes in the law on abortion during the working hours at school'. In an interview with Amnesty International, the teachers alleged serious irregularities that occurred within the proceedings, in particular the fact that their casefiles were used interchangeably. All the evidence used against them was based on a testimony of one person and newspaper articles based on it. Nine of the teachers were eventually acquitted of all 'charges'.

ASYLUM-SEEKERS AND MIGRANTS

In relation to the situation of access to asylum in Poland, Amnesty International considers the push-backs at the Brest-Terespol crossing between Poland and Belarus a breach of EU law (the EU Directive 2013/32/UE) as well as international human rights law. In addition, Amnesty International is seriously concerned over the proposed legislative changes that threaten to negatively affect access to asylum in Poland.

Since 2016, Amnesty International has been receiving reports of and has itself documented flaws in the border control procedures in practice as well as collective expulsions of foreigners – mainly from Chechnya, Ukraine and Tajikistan – at the Brest-Terespol border crossing. These expulsions amount to a breach of Poland's obligation under the EU and international law that prohibits rejections of individuals at the border without due process and consideration of their individual circumstances. Several reports alleged summary returns of the vast majority of people trying to enter Poland through the official border crossings.¹⁰ Polish Border Guards made routine decisions to return migrants and asylum-seekers to Belarus after short interviews carried out in conditions that do not ensure privacy. The Border Guard officers declined to file an application for international protection even in cases when the foreigners directly requested it.¹¹ The main reasons for these negative "decisions" were the lack of the legal travel documents and conclusion that people attempting to enter Poland were "economic migrants". The Ombudsman's inspection carried out on 11 August 2016 concluded that the Border Guards were *de facto* carrying out an assessment whether a given person should be considered an applicant for international protection. Under the Polish Asylum Law, once established that a person aims to apply for international protection, the Border Guards are obliged to accept the application and allow the person to enter the territory of Poland. On the day of Ombudsman's inspection, 406 out of 436 foreigners who attempted to enter the territory of Poland were rejected. The majority, 223 of those were minors.¹² Concerns over adequacy of assessment carried out by the Border Guards was expressed also by an NGO, the Association for Legal Intervention that monitored the situation at the border crossing on 2 and 3 March 2016. The NGO reported that the border guards did not hear out the individuals attempting to enter Poland. According to Association for Legal Intervention, "[the Border Guards] officials frequently make arbitrary assessment of the reasons for seeking international protection given by foreigners. Such assessment is done on the basis of very

¹⁰ Human Rights Watch. *Poland: Asylum Seekers Blocked at Border*. 1 March 2017
Available at: <https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border>; Górcyńska, M. & Szczepanik, M (Helsinki Foundation for Human Rights). *Droga donikąd*. October 2016

¹¹ Office of the Commissioner for Human Rights (Ombudsman). Inspection of the railway border crossing in Terespol. 21 September 2016. Interview with the Head of the Rights of Migrants and Minorities Unit of the Ombudsman, 24 March 2017.

¹² Inspection. p. 1

short interviews conducted in conditions which do not provide any intimacy...”¹³

Amnesty International interviewed five asylum-seekers from Chechnya in Warsaw on 1 April 2017 who had eventually entered Poland through the Terespol border crossing. They all reported repeated returns by the Polish Border Guards despite the fact that they declared the intention to apply for international protection. Four of them alleged torture and threats of further violence against them or their family members by the security forces in Chechnya, one reported physical threats against her from a family member.

The reports of push-backs continued in 2017. On 17 March 2017, a group of 14 lawyers accompanied by Polish NGO workers and journalists attempted to assist 40 Chechen applicants for international protection at the Terespol border crossing. The Border Guards banned the lawyers from the area where they were carrying out their “assessment”. “It was absolutely shocking... They told us they couldn’t get the lawyers in as this *was not* an administrative but a border procedure,” one of the lawyers told Amnesty International.¹⁴ Although their clients had a written declaration stating that they aimed to apply for asylum, the Border Guards dismissed that. According to activists working with the refugees pushed back from Terespol to Brest, none of the 40 asylum-seekers has been allowed to enter Poland since, despite repeated attempts. The treatment of refugees and migrants at Terespol by the Polish Border Guards prevents the asylum seekers to access Polish territory and apply for asylum.

On 13 April 2017 the Minister of Interior announced on a programme of TVP Info that Poland needs to be ready to face situations similar to the one that evolved in Hungary in 2015 when there were clashes between refugees and Hungarian police.¹⁵ The Minister also announced that the Ministry of Interior has been working on regulation on detention facilities for migrants and asylum-seekers. This announcement was made two weeks after the Ministry published a draft amendment of the law on detention facilities for foreigners that introduces the possibility to use containers for accommodation. Earlier on, in January 2017, the Ministry of Interior presented amendment of Asylum Law which introduces and safe country lists, and the automatic detention for asylum seekers who filed their application at border crossings.

Article 39 of the draft amendment of the Asylum Law introduces an accelerated “border procedure” applicable to both applicants who “come from a safe country of origin” or have travelled through a “safe third country” before entering Poland.

Amnesty International considers that linking the concept of “safe third country” to accelerated border procedures is not compatible with the EU Directive 2013/32/UE. The proposed “border procedure” restricts access to the regular asylum procedure for asylum seekers originating from the countries in the list (as well as for those subjected to this

¹³ Association for Legal Intervention. *At the Border: Report on monitoring of access to the procedure for granting international protection at border crossings in Terespol, Medyka, and Warszawa-Okęcie Airport*. 2016. p. 41

¹⁴ Interview in Warsaw, 11 April 2017

¹⁵ See in Polish: <https://www.mswia.gov.pl/pl/aktualnosci/15996,Szef-MSWIA-o-kryzysie-migracyjnym-ustawie-antyterrorystycznej-i-bezpieczenstwie-.html> and: <http://wiadomosci.gazeta.pl/wiadomosci/7,114884,21649734,blaszczak-powtarza-ze-chce-zamknac-uchodzcow-w-obozach-otoczonych.html#MTstream>

procedure on other grounds), on the basis of a presumption of “safety” in their country of origin. As a result of these restrictions, individuals in need of international protection risk being returned in violation of the obligation of *non-refoulement*. Furthermore, the imposition of an accelerated procedure to asylum seekers originating from countries considered to be “safe”, while such a procedure is not imposed on asylum seekers originating from other countries, amounts to discrimination on the basis of their national origin.

Under the draft Amendment of the Asylum Law, border procedure under article 39 shall apply also to those asylum-seekers who filed their application at the border crossing point and who are deemed to represent “a threat to the State security or the public order” (Article 39b, 1.6). Amnesty International is concerned that the application of such provision may have severe negative consequences on those applicants as they would be subjected to accelerated procedure within which their claim will not be substantively assessed.¹⁶ In cases involving state security, evidence against individuals is usually collected by the Internal Security Agency (ISA), a body with no independent oversight mechanism to review its operations.¹⁷ Asylum-seekers who are deemed to be a threat to state security then risk arbitrariness in proceedings within which they may find themselves unable to access and rebut the evidence collected against them. A recent case of deportation Ameer Alkhawlaneg to Iraq shortly after receiving negative decision on his asylum application on the basis that he was a “threat to national security” illustrates these concerns. The main ground for the negative asylum decision was evidence collected against him by the ISA. This evidence was not made available to the legal representative of Ameer Alkhawlaneg. After the final negative decision on his asylum claim, the authorities swiftly proceeded with the deportation. In their expert opinion on the case, Helsinki Foundation for Human Rights argued that the denial to provide access to the case files prepared by ISA against Ameer Alkhawlaneg have effectively prevented him from learning about the details of the negative decision on his asylum application.¹⁸ This situation resulted in a violation of his right to asylum procedure under the law.

The Amendment of the Asylum Law introduces automatic detention of those applicants who filed their asylum claims within the border procedure (Section 6 of Article 87 paragraph 1 together with art. 88 and 89c). Under these provisions, an applicant will be put into detention if he or she does not satisfy the requirements for entry into the territory of the republic of Poland and stay in that territory.

Amnesty International considers that this provision can result in automatic and therefore arbitrary detention incompatible with international law. Any detention related to immigration control is permissible only on limited grounds, such as prevention of unauthorized entry into or effecting removal from the country. Even when the use of detention fulfils these requirements, international standards constrain the resort to detention for immigration control purposes by requiring its compliance with the principles of necessity and proportionality. This means, for example, that in each individual case detention will only be justified if less restrictive measures have been considered and found to be insufficient with respect to the legitimate objectives that the state seeks to pursue. Asylum-seekers – who are presumed to be eligible for international protection unless and until proven otherwise following a full, fair

¹⁶ UNHCR. *UNHCR's Position on Manifestly Unfounded Applications for Asylum*. 14 December 1992. P. 397.

¹⁷ Amnesty International. *Poland: Submission to the United Nations Human Rights Committee 118th Session*, 17 October – 4 November 2014, p. 11

¹⁸ Helsinki Foundation for Human Rights. *HFHR statement on Ameer Alkhawlany's obligation to return*. 18 April 2017. Available: <http://www.hfhr.pl/en/hfhr-statement-on-ameer-alkhawlany-obligation-to-return/>

and effective asylum determination procedure – should in particular not be detained, either administratively or under any immigration powers, because of their inherent vulnerability. Children must never be detained for immigration purposes. Automatic, group-based detention is by definition arbitrary and therefore unlawful. Detention of asylum-seekers and migrants on the grounds of their irregular status should always be a measure of last resort.

Considering that currently the applications for asylum in the border areas are submitted mainly by citizens of Russian Federation, Tajikistan and Ukraine who are entering Poland as entire families, this provision is likely to result in the detention of minors. According to the Chairman of the Refugee Board, a majority of those who attempted to enter Poland through Terespol are children.¹⁹ The proposal will thus effectively lead to immigration detention of hundreds of children in the border areas in direct breach international law.

THE INDEPENDENCE OF JUDICIARY

In the context of the deterioration of human rights situation in Poland, Amnesty International pays close attention to the question of independence of judiciary and the respect for the rule of law which are necessary requirements for guaranteeing an effective access to justice and remedies for any potential victims of human rights violations.

On 3 March 2017, the Minister of Justice presented a proposal to amend the Law on the National Council of the Judiciary (NCJ).²⁰ Under the amendment, the members of the NCJ, the constitutional organ safeguarding the independence of courts and judges, should be elected by the parliament. The draft proposed that out of the total 25 members of the NCJ, 15 members would be judges *chosen* by the lower chamber of the parliament. The remaining 10 members would be appointed by the President of the Republic and the lower and upper chambers of the parliament. Under the Constitution, the Council comprises of *25 members*, the President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of Poland. *15 members* are selected from among the judges of the Supreme Court, the general courts, the administrative courts and the military courts. According to the Constitution. Only *four* Council members are members of by the lower chamber of the parliament (Sejm) and *two* are members of the Senate.²¹

In addition, the amendment of the Law on the National School of Judiciary and Public Prosecution changes the process of appointments and dismissals of judges. While under the current regulation, the nominations of judges are made on the recommendation of the NCJ, the amendment reduces the National Council's role to a *possibility* to object a particular candidate. It will no longer have the competence to promote trainee judges.²²

Several international bodies have expressed concern over the amendment. A report commissioned by the Office for Democratic Institutions and Human Rights (ODIHR) concluded that the if adopted, the law would jeopardize the independence of a body whose main purpose is to guarantee judicial independence in Poland. "The proposed amendments would mean, in brief, that the legislature, rather than the judiciary would appoint the fifteen judge representatives to the Judicial Council and that legislative and executive powers would

¹⁹ Interview with Amnesty International, Warsaw, 11 April 2017.

²⁰ <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1423>

²¹ Amnesty International, FIDH, Human Rights Watch, Open Society European Policy Institute and Reporters Without Border. *Open Letter to the College of Commissioners regarding the situation in Poland*. 16 February 2017.

²² Position of the National Council of Judiciary (in Polish), 10 February 2017 (WO-020-6/17): <http://www.krs.pl/pl/dzialalnosc/posiedzenia-rady/f,189,posiedzenia-w-2017-r/630,7-10-lutego/4617,opinia-krajowej-rady-sadownictwa-z-dnia-10-lutego-2017-r-wo-020-617>

be allowed to exercise decisive influence over the process of selecting judges.”²³ In his letter to the Speaker of the Polish parliament on 31 March, the Commissioner of the Council of Europe for Human Rights, “strongly encourage[d]” the parliament to reject the proposal to amend the Law on the NCJ due to serious concerns that it would undermine the independence of the judiciary.

The Consultative Council of European Judges (CCEJ),²⁴ an advisory body of the Council of Europe also criticized the Amendment for:

- the new selection methods for the members of the NCJ;
- the new structure of NCJ and
- the removal of the judges currently sitting on the NCJ before their term expires.

The CCEJ stated that the “implications of Draft [Law]... effectively mean transferring the power to appoint members of the Council from the judiciary to the legislature. This proposed new method for selecting judicial members of the Council is not in accordance with European standards for judicial independence. It will increase the influence of the legislative power over the judiciary and infringe the well-established principle that judicial members of a Council for the Judiciary should be chosen by their peers.” The new structure of NCJ is supposed to be composed of two assemblies. The first one will have ten members: the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, four members of the lower chamber of the parliament and two members of the parliament’s upper chamber. The Second Assembly shall be composed of fifteen judges appointed by the parliament. The Consultative Council of European Judges expressed concerns that under the rules that should apply in cases of diverging opinions between the two Assemblies, the first Assembly, effectively dominated by the executive and legislative powers, “will have a decisive role in the procedure for appointing judges and trainee judges, and thereby the proposed new procedures may infringe the independence of the judiciary”.²⁵ The Amendment is currently being debated in the lower chamber of the parliament.²⁶

Another source of concerns in relation to the justice system are the large-scale personal changes in the prosecution service carried out in 2016. Upon the merger of the position of the Prosecutor General and the Minister of Justice, which took effect in March 2016, as many as 500 out of the total 6,000 prosecutors in Poland were either degraded to a lower position, transferred to another location or forced to retire. Almost 50 of the prosecutors filed a complaint against these changes at the European Court for Human Rights arguing violations of the right to fair trial and right to an effective remedy. Amnesty International interviewed two of the affected prosecutors who consider these changes politically motivated. “Anybody who was critical to the [current Minister of Justice] or who was vocal in expressing opinions was ‘transferred’.”²⁷ Concerns over the increased powers of the Prosecutor General (PG) and the Minister of Justice (in one person) as a result of the amendments of the Prosecution Act which

²³ OSCE/ODIHR. *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*. Warsaw, May 2017, p. 4.

²⁴ Consultative Council of European Judges, 7 April 2017: http://www.coe.int/t/dghl/cooperation/ccje/cooperation/Opinion%20EN%201_Poland%20April%202017_en.asp

²⁵ Consultative Council of European Judges, 7 April 2017

²⁶ See the state of the legislative procedure (in Polish): <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1423>

²⁷ Interview with Amnesty International, Warsaw, 23 March 2017

entered into force in March 2016, were expressed by several bodies, including the Commissioner of the Council of Europe for Human Rights. He noted in June 2016 that under the new regulation, the increased powers are not balanced by “clear and solid safeguards against abuse... The PG/Minister of Justice now has the power to intervene at each stage of legal proceedings led by any prosecutor by issuing instructions, guidelines and orders on specific measures relating to individual cases. The PG/Minister of Justice can also revoke or modify decisions taken by prosecutors... The PG/Minister of Justice has also been empowered to appoint and dismiss prosecutors on the basis of a discretionary decision...”²⁸

²⁸ Report by Nils Muižnieks following his visit to Poland from 9 to 12 February 2016, p. 21. <https://rm.coe.int/16806db712>