

Universal Periodic Review of Poland

Submission by the Helsinki Foundation for Human Rights &

Professor Zbigniew Hołda Association

2016

1. Introduction

The Helsinki Foundation for Human Rights (“HFHR”) is one of the biggest and oldest non-governmental organisations working to protect human rights in Poland. HFHR’s mission is to promote human rights, democratic values, and rule of 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 the United Nations Economic and Social Council (“ECOSOC”) and is a member of numerous research networks and platforms. HFHR participated as a stakeholder in the first cycle of the Universal Periodic Review in Poland.

The Zbigniew Hołda Association (“PHA”) was established in May 2010 on the initiative of criminal justice lawyers. The Association aim is to promote the achievements of Professor Zbigniew Hołda, a renowned human rights advocate and specialist in the field of rule of law, criminal justice, freedom of expression and artistic freedom. The goal of the Association is to monitor and intervene in case of rule of law violations or criminal justice abuses.

In our submission, we would focus on the recently changed human rights landscape in Poland and focus primarily on the Constitutional Tribunal crisis, as it directly affects and impairs the protection of human rights in the country. We also discuss the situation around public media, and the effect of the recent changes to the laws on public media on media freedom. Moreover, we refer to the attacks on the judiciary and their impact on the division of powers. Finally, we address the problem of migrant crisis, which is a predominant concern 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 perspective, the safeguarding of the rule of law.

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

The current constitutional crisis has two aspects: one is related to the process of appointing new judges of the Constitutional Tribunal, and the other to the legislative changes aimed at paralyzing the Tribunal.

Origins of the crisis

The beginning of the crisis can be traced back to the adoption of the Act on Constitutional Tribunal by the Sejm (the lower chamber of the Parliament) in June 2015¹. This Act included a temporary provision (Article 137) that allowed the Sejm to elect 5 new judges (namely, one-third of the entire Tribunal composition) to the Constitutional Tribunal. 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 refused to 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 parliamentary elections took place. The Law and Justice party won the elections with 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 a new temporary provision (Article 137a), which established a new deadline for presenting candidates for the judges to replacing those, 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 7th term². On 2 December, the Sejm appointed five new judges and the President immediately (at night and without any media presence) swore 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 on the Constitutional Tribunal of 25 June 2015, asking 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 constitutionally valid basis for the elections of three judges

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

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

who were to replace the judges whose tenures expired on 6 November 2015³. Whereas with respect to the two judges whose terms of office lapsed on the 2 and 8 December 2015, the elections of judges by the Sejm of the 7th 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 decision in yet another case concerning its own organization⁴. 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 8th term to again elect five new judges of the Constitutional Tribunal.

The Tribunal confirmed that the Sejm of the 7th term was entitled to elect three judges, and thus the Sejm of the 8th term could elect 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 above-mentioned judgments of the Constitutional Tribunal did not lead to the end of the constitutional crisis. Quite to the contrary – the crisis 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 7th term on the basis of unconstitutional provision, while 3 of them were elected correctly, but not sworn into office by the President. Five judges elected by the Sejm of the 8th term were sworn into office by the President, but they were elected for places already occupied by the judges elected in the 7th term.

On 12 January 2016, the Constitutional Tribunal issued a public statement, informing that it had discontinued the proceedings concerning the appointment of 5 judges in December 2015⁵. In December 2015, a group of MPs submitted a motion to the Constitutional Tribunal to verify whether the constitutionality of 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. On basis of this decision of 12 January 2016, the President of the Constitutional Tribunal announced that the two judges 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.

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

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

⁵ 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/>

“Remedial” Act on the Constitutional Tribunal

In December 2015, Sejm started work on a so-called “remedial” Act on Constitutional Tribunal⁶. Similarly to the amendment adopted in November 2015, also this Act was adopted at an accelerated pace and without proper consultations with experts. The Act introduced provisions that in practice might lead to a complete paralysis of the Tribunal. It stipulates that the Tribunal should make all decisions with two-thirds majority, the cases should be considered in the order in which they were lodged, and the full panel should be composed of at least 13 judges. In cases before the Tribunal, the hearing could take place after 45 days since the notification of the parties on the date of the hearing (or, if the case is ruled by the full panel, after 3 months),

On 9 March 2016, the Tribunal issued a judgment regarding the “remedial” Act⁷. The Tribunal held that it may neither operate nor adjudicate on the basis of laws whose constitutionality raises significant doubts. According to the Tribunal, the new law 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 the 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 judgments of the Constitutional Tribunal are binding and final, the Government refused to recognize the binding force of the judgment on the “remedial” act, and declined to publish it in the Official Journal. The Government argues that the judgment is invalid because it was issued through a procedure inconsistent with the requirements of the Act on Constitutional Tribunal – the very one the constitutionality of which was reviewed in that case. After issuing the judgment of 9th March 2016, the Tribunal restarted its day-to-day work. Between March and July 2016 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 of the Council of Europe issued an opinion on the amendments to the Act on Constitutional Tribunal adopted in December 2015⁸. The Commission criticized all the changes introduced by the amendment. The opinion states “the paralysis 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.

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

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

⁸ 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)

The fourth Act on the Constitutional Tribunal

In July 2016, the Parliament adopted a new Act on Constitutional Tribunal⁹. 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 on examining cases in the order of submission (however, this time it allowed for certain exceptions), a blocking mechanism in the decision-making process (stipulating that if a minimum of four judges wish to, they can postpone the ruling of the Tribunal for up to 6 months), and a mechanism allowing the executive power to influence the Tribunal's works, namely if the case had to be recognized 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 that "the 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 to be partially unconstitutional. The government refused to acknowledge this judgment, and as a result this decision remains unpublished. However, on the basis of the provisions introduced by the Act of July 2016, the government published all the judgments issued between March and July 2016 with an exemption of the judgment of 9th March.

Summary

The constitutional crisis in Poland poses a serious threat to 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 majority required to make such a change). The crisis is underlined by the fact that never before had a government refused to acknowledge the judgment issued by the Constitutional Tribunal.

The HFHR and PHA suggest the following recommendations, which can remedy the constitutional crisis:

- 1) Swear into the office 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 new legislation.

2. Status of the judiciary

Changes in the justice system – reunification of the Offices of the Minister of Justice and Prosecutor General

In January 2016, the Parliament adopted new Act on Prosecutor Office¹⁰. The main change introduced by this Act was the reunification of the Offices of the Minister of Justice and Prosecutor General.

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

¹⁰ The law is available at: <http://dziennikustaw.gov.pl/du/2016/177>

Until 2009, the Minister of Justice acted also as the Prosecutor General. Such a convergence of roles posed a potential (or sometimes real) danger of subjecting the prosecutors' work to political influences. The reform from 2009, separated the two offices and the Prosecutor General's office became independent, although Prosecutor General had an obligation to present annual summaries of its work before the Parliament.

The Act adopted in January reversed the reform of the Prosecution introduced in 2009. In the light of Act, the prosecution is entirely supervised by the Ministry of Justice. Furthermore, the Act widens the competences of the Prosecutor General. For example, the Prosecutor General is able to appoint or dismiss a head of the prosecution unit on the basis of a discretionary decision without the necessity of carrying out a transparent and open recruitment process.

Furthermore, the Prosecutor General is able to issue decisions regarding specific investigations. The new Act on Prosecutor Office gives to the Prosecutor General the power to release to the media the information from any investigation.

The Act came into force in March 2016. A month later, the Ombudsman submitted a motion to the Constitutional Tribunal upon verification the Act's constitutionality. The Ombudsman questioned the constitutionality of the provisions that among others oblige the prosecutors to fulfill all the Prosecutor General's orders concerning actions undertaken in the investigation, provisions enabling the Prosecutor General to change or shift any decision issued by the prosecutor of lower rank and the provision that gives the Prosecutor General the power to release to the media the information from any investigation. The Constitutional Tribunal has not ruled in this case yet.

Refusal to appoint of judges by the President

On 22 June 2016 the President refused to appoint 10 candidates for judges (including both candidates for their first judicial office and candidates for promotion). He did not provide any reasons for the refusal, although the media informed that some of the candidates adjudicated in politically controversial proceedings (e.g. civil proceedings between a left-wing politician and the leader of the Law and Justice party, which supports the current President). The President's ability to decline the appointment of a judge raises serious controversies, as it is not explicitly specified in the Constitution. The Constitution stipulates only that "Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Judiciary Council" (art. 179), and that in order to exercise his right to appoint judges the President does not need signature of the Prime Minister (art. 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 appointments¹¹. Furthermore, the Helsinki Committee and the HFHR criticized the President's decision in a joint statement¹².

¹¹ Oponion 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>

¹² Statement of the Helsinki Committee and HFHR available at: <http://www.hfhr.pl/wspolne-stanowisko-komitetu-helsinskiego-i-zarzadu-hfpc-ws-ustawy-o-tk/>

Draft of the amendments to the Act on National Judiciary Council

On 2 May 2016, the Government published a draft of an Amendment Act to the Act on the National Judiciary Council¹³. The draft provides far-reaching changes regarding the composition of the Council and its role in the process of judicial appointments, which may negatively influence the independence of the judiciary.

As discussed above, according to Article 179 of the Constitution, judges shall be appointed by the President 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 makes significant changes in this regard. According to the proposed Article 37(1) of the Act, if there is more than one candidate for a given judicial position, the National Judiciary Council has to review all candidates and recommend at least two to the President. Such a requirement would completely change the role of the Council and of the President in the process of judicial appointments. The President would be authorized to choose between various candidates nominated by the Council, and will therefore have a much greater influence on the appointments. 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, which stipulates that the terms of office of all elected members of the Council be terminated within 4 months from the entry of the Act into force. The sudden dismissal of all members of the Council may be perceived as a politically motivated form of pressure on this constitutional body. Such a conclusion is further justified by the fact that the Council has been critical of 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

The politicians have been frequently commenting on the judiciary in the public. Their comments touch upon the Constitutional Court, the President of the Constitutional Court and individual judges. Most of the comments target particular judges, and their aim is to discredit the judiciary in the eyes of society. The Supreme Court judges (after their attempt to protect the Constitutional Tribunal) were called by the Spokesperson of the ruling party “*a bunch of fellas who want to defend the status quo of the previous regime*”¹⁴. The speaker of the Sejm, commenting on the judgments of the Constitutional Tribunal of 9 March 2016 stated “*These are merely opinions of the Tribunal – opinions of the members of the Constitutional Tribunal. (...) The Tribunal may not comment on the choices made by the Parliament*”¹⁵. The Head of the Kukiz ‘15 party stated, in reference to the developments around the Constitutional

¹³ The draft amendment is available at: <https://legislacja.rcl.gov.pl/projekt/12284955>

¹⁴ Statement available at: <http://www.tvn24.pl/wiadomosci-z-kraju.3/rzecznik-pis-beata-mazurek-o-sadzie-najwyzszym-zespol-kolesi.639007.html>.

¹⁵ Statement available at: <http://wiadomosci.onet.pl/tylko-w-onecie/trybunal-konstytucyjny-wyrok-tk-w-sprawie-noweli-pis/q72lp6>

¹⁵ Statement available at: http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/Pismo_Prokuratora_Generalnego_z_5_kwietnia_2016_r..pdf

Tribunal and the judiciary that the judicial system in Poland is “*the prosecutorial-judicial mafia*”¹⁶.

The HFHR and PHA would suggest the following recommendations:

- 1) Reform the Prosecution Office in order to separate the function of Minister of Justice and Prosecutor General, which would ensure a greater independence of the prosecution authorities.
- 2) The President should appoint the 10 judges proposed by the National Judiciary Council.
- 3) The Government should seize any pressure, be it legislative amendments or unfavorable comments on the judiciary. The balance of powers should be restored and respected according to the UN Basic Principles on the Independence of the Judiciary adopted on 13 December 1985.
- 4) Politicians and public officials should refrain from discrediting the judiciary and particular judges in the eyes of the public.

3. Public media and freedom of expression

December Act

On 29 December 2015, Sejm adopted an amendment to the Broadcasting Act of 29 December 1992. The amendment gave the Ministry of Treasury the competence to nominate management and board of director members in the public media institutions. Therefore, the role of the National Broadcasting Council (previously responsible for selecting public media leadership) was substantially limited. The Act also removed the transparent and public competition process for high-level positions in the public media, and the terms of their offices. The Act had a temporary character and was in force until the end of June 2016¹⁷. Its adoption provoked firestorm of criticism from the Polish NGOs and international organizations¹⁸. It was highlighted that the Act strengthened the dependence of public media on the Government, and could therefore weaken their pluralistic nature. The Polish Ombudsman filed a constitutional challenge of the Act with the Constitutional Tribunal.

The Act of 29 December 2015 (“December Act”) set a deadline for Sejm to adopt a comprehensive reforming the functioning of the public media. On 22 June 2016, when it was obvious the reform wouldn’t be ready by the date set out in in the December Act, Sejm adopted a new act that was supposed to fill in the gap left by December Act’s expiry in June, and to start the series of reforms of the public media.

June Act

Act of 22 June 2016 on the National Media Council (“June Act”) introduced a new institution – the National Media Council (“NMC”)¹⁹. The competences of the new institution in many

¹⁶ Speech available at: <http://www.tvn24.pl/wiadomosci-z-kraju.3/kukiz-mowi-o-prokuratorsko-sadowniczych-list-otwarty-sedziow.616569.html>

¹⁷ Law from 30 December 2015, Official Journal 2016, pos. 25, available at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20160000025>

¹⁸ Opinion of the Helsinki Foundation for Human Rights from 30 December 2016, available at: http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/03/ENG_Helsinki_opinia_media.pdf

¹⁹ Law from 22 June 2016, Official Journal 2016, pos. 929, available at: <http://www.sejm.gov.pl/sejm8.nsf/komunikat.xsp?documentId=D49AF4B1166B6550C1257FE100489A92>

fields reflect the competences of the National Broadcasting Council. The major task of NMC is to appoint and dismiss the members of public media governing bodies and the Polish Press Agency. NMC also has supervising powers over the Polish Press Agency, and holds competences to control public broadcasters. The process of electing the members of the NMC raises doubts. The Act does not prohibit combining a mandate of a Member of Polish Parliament and a Member of NMC. Moreover, the Act does not provide for a contribution of non-governmental actors to the process of selecting the management and boards of directors in the public media. The NMC was appointed in July 2016, and three of its members are active politicians of the ruling party (Law and Justice).

The discretionary competences granted to the NMC in the sphere of creation of the highest managerial positions in public media are objectionably broad. Such provision allows for politicization of the public media, and furthering its dependence of the Government. This is worrying especially given that the December Act waved numerous guarantee provisions protecting independence and stability of the offices in the public media²⁰.

The NMC is composed of five members elected jointly by the Sejm (which elects three members) and President (who elects two members). The term of their office is six years. The President of the NMC is elected from among the members of the Council. The NMC is obliged to present a written report on its activity to the Sejm, Senate and President written report on its activity by 31st of March of each year. The report must also be publicly accessible. However, if the report is not approved by the above-mentioned organs, the NMC is not dissolved. Sejm, Senate, the President and the President of NMC can only submit comments to the report, which the NMC is obliged to address within 30 days.

The Act envisages that the administrative-organizational support to the NMC be provided by the Chancellery of the Sejm. The costs of NMC's functioning and members' salaries are covered from the national budget, managed by the Chief Officer of the Chancellery of the Sejm. This solution can be considered as further weakening the impartiality of the NMC, by financially subordinating it to the Chancellery of the Sejm.

The NMC is to be attributed with far-reaching control over the Public Media Fund (money collected from the audience and state support), and will also have insight into the files of public broadcasters. As has been underlined above, such actions may adversely affect the editorial independence of the public media. The fact that the Act does not stipulate any rules on the NMC functioning poses a 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 public media staffing

It is estimated that since the start of the public media reforms over 188 of public media employees have left or have been dismissed due to political reasons. Among them are respected personalities, such as Kamil Dąbrowa²¹, the head of the 1st Program of the Polish Radio and Piotr Kraśko, the Editor-in-Chief and Presenter of evening news (“Wiadomości”)

²⁰ 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>

²¹ 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/>

in Polish Television²². 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 the recommendations made during the last UN Universal Periodic Review (“UPR”) of Poland, defamation still remains criminalized. Poland is regularly found in violation of art. 10 of the European Convention of Human Rights, due to upholding art. 212 of the Criminal Code and criminalizing bloggers and journalists²³. On 1 September 2016, the Polish Ombudsman called for removing art. 212 of the Criminal Code and replacing it by civil defamation²⁴.

The HFHR and PHA suggest the following recommendations:

- 1) Adopt a broad and complex regulation concerning the public media, which will guarantee political independence of public broadcasters, and financial sustainability of the public media, in accordance with the media freedom and freedom of expression guarantees enshrined in art. 19 of the International Covenant of Civil and Political Rights.
- 2) Immediately seize dismissals from the public media based on political motives.
- 3) Review art. 212 of the Criminal Code, with the aim of removing it from the Criminal Code.

4. 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 the victims of torture.

The Polish law allows for 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. The Polish law does not provide any restrictions nor shorter time limits for detention of these extremely vulnerable groups. Monitoring of the detention centres conducted by the HFHR and Association for Legal Intervention in 2014 showed that they do not ensure proper conditions for the well-being of children.

The second problem concerns an ineffective identification of the victims of torture. Although the Polish law provides special guarantees for asylum-seekers and returnees, who have been 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.

²² The monitoring of the dismissals in public is conducted by Towarzystwo Dziennikarskie and available at: <http://towarzystwodziennikarskie.org/>

²³ E.g. Lewandowska-Malec v. Poland, application no. 39660/07, Maciejewski v. Poland, application no. 34447/05.

²⁴ Ombudsman statement is available at: <https://www.rpo.gov.pl/pl/content/art-212-rzecznik-proponuje-zmiany-w-przepisach-o-znieslawieniu>

Finally, the HFHR has been observing recently an increase in the number of reports from individuals who were denied the possibility to apply for international protection at the 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 have been refused the right to lodge an asylum application and enter Poland. Among the asylum-seekers who were refused entry to Poland, a particularly disturbing situation is that of Tajik nationals being members of the opposition political party and facing a real risk of persecution upon return to their country of origin.

The HFHR and PHA would suggest the following recommendations:

- 1) 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) Establish an effective system for 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) Ensure that every foreigner who wishes to apply for asylum in Poland is permitted to do so, in compliance with the Convention relating to the Status of Refugees.

On behalf of the PHA and the HFHR,

Danuta Przywara
President of the Board