

Poland's Anti-Terror Law

Recommendations for U.S. officials attending Warsaw NATO Summit 2016

Background

Since the right-wing Law and Justice Party took office in Poland after the October 25, 2015 election the Polish government has begun passing legislation that threatens the rule of law and fundamental human rights. Having gained a wide margin of support in the Polish Parliament—only 14 seats away from a super-majority in the Sejm (lower house)—and with President Andrzej Duda and Prime Minister Beata Szydlo firmly supportive of its policies, Law and Justice is implementing policies that fundamentally threaten what was once considered one of the firmest democracies in Central Europe and a key democratic ally of the United States. Law and Justice is wielding its power over the executive and legislative branches to threaten the judiciary, hampering its ability to review challenges to its recently-passed actions and policies.

These new policies concern the make-up of the Constitutional Tribunal, the laws governing its decision-making, laws governing media control and publishing, laws governing police powers and surveillance generally, and the current law regarding anti-terrorist activity. These laws have been passed on a very short timeframe and with little, if any, consultation with the public, civil society, or even discussion within the parliament itself.

Anti-terror Legislation

On June 17, with 55 votes in favor and 28 against, the Polish Senate passed an anti-terrorism law that had been approved by the Sejm on June 10.¹ Development of the law occurred under a cloud of secrecy, without any consultation with civil society or publication of the law. The law's provisions, which were made public only after the Panoptikon Foundation published a copy obtained from an anonymous source, are not narrowly-tailored to achieve the goal of distinguishing terrorists from everyday citizens expressing their views, or NGO workers monitoring rule of law in Poland. Local NGOs and lawyers note that many provisions of the legislation are inconsistent with the Polish

Constitution and the European Convention on Human Rights.

Once the law is signed by the president, it will go into effect immediately, despite the lack of transparency in its consideration and absence of a comment period. The Polish government has indicated its wish that the law come into effect prior to the NATO Summit on July 8 and 9, 2016. Watchdog groups, such as Panoptikon Foundation and Helsinki Foundation for Human Rights, have demanded that the law be redrawn to comply with democratic standards of free speech and freedom of assembly.²

¹
<http://legislacja.rcl.gov.pl/docs//2/12284561/12348751/12348752/dokument218594.pdf> (in Polish)

²
https://secure.avaaz.org/pl/petition/Wladze_Rzeczypospolitej_Polskiej_Ustawa_antyterrorystyczna_NIE_dla_ograniczania_naszych_praw_i_wolnosci/?wyznngb (in Polish); see also <https://panoptikon.org> (in Polish)

The Act contains the following provisions, which have raised the concerns of civil society:

- **Foreign nationals, non-Poles are considered terrorist suspects.** Tourists, business visitors, and people living in Poland who do not have Polish citizenship may be the subject of surveillance based solely on the fact that they are foreigners. Foreigners are subject to surveillance and phone tapping without court oversight, and subject to fingerprinting at any time.

Civil society has raised concerns that this provision creates a great risk of discrimination, especially in light of the growth of anti-refugee and anti-Muslim discourse. They have also raised concerns that Poles who are believed to be non-citizens could be targeted under these provisions.
- **Arrest based on reasonable suspicion.** 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.
- **Limitations on freedom of assembly.** The law expands the powers of law enforcement in any situation in which there is suspicion that a crime relating to terrorism might occur.³ Civil society leaders fear that the definition of terrorism could be used broadly to apply to protests aimed to affect state policy or decision-making, and could therefore be used to prohibit public demonstrations. The law would give police power to seal the border and cancel public

meetings. It also gives police greater power to search individuals, and in some cases power to shoot to kill.

The law specifies four levels of state of alarm, and indicates that if the government announces a third or fourth level state of alarm, the Minister of Internal Affairs can order a prohibition on public assembly. There is no process of verification or need for evidentiary support to declare a state of alarm.

- **Broader access to information about citizens available to paramilitary groups who are now considered part of state law enforcement.** The law brings into the definition of the territorial defense strategy over 30,000 paramilitaries nationwide, who may be employed if law enforcement is unable to deal with terrorist threats.⁴ These new members of the state defense, along with police, the armed forces, and the security service (ABW), will have increased and more streamlined access to citizen information, including social insurance databases, databases regarding municipal utility information and payments, and information about children and their education. The use of these powers will not be subject to any controls.
- **Restriction of freedom of communication.** The law also allows the government to block access to websites with review of the propriety of the block occurring after five days. The purchase of anonymous prepaid phone cards will be prohibited, instead, citizens must provide their Social Insurance (PESEL) number at the time of purchase. Several NGOs, including the Panoptikon Foundation and Helsinki Foundation for Human Rights have noted

³ Terrorism in Polish law is defined in this document on page 2: http://www.coe.int/t/dlapil/codexter/Country%20Profiles/CODEXTER%20Profiles%20_2012_%20Poland%20E.pdf

⁴ <http://www.dw.com/en/inside-europe-concern-over-new-anti-terror-legislation-in-poland/av-19222275>

that potential terrorists will easily avoid sharing real information when purchasing a card, while the law will make it more difficult for journalists and citizen watchdogs to obtain anonymously sourced information, and communication will be limited for citizens out of fear.

Recommendations for the U.S. Government

The consideration and passage of these laws, as well as a recent media law, have provoked a great deal of concern from the EU and United States. Victoria Nuland visited Poland on February 11 and 12 to meet with local ministries as well as think tanks.⁵ On February 10, Senators John McCain, Richard Durbin, and Ben Cardin wrote a letter to Prime Minister Beata Szydlo expressing concern about threats to rule of law in the country. During President Duda's visit to Washington for a security conference on March 31 and April 1, President Obama refused to meet with him, interpreted as a signal that Washington was not pleased with Poland's constitutional crisis.

Human Rights First has discussed these laws with members of civil society of Poland, and provides the following recommendations:

- When he speaks at the NATO Summit President Obama should stress that, as members of NATO, nations need to remember that tolerance and pluralism, independence of the judiciary, solidarity, and democratic values make us strong.** He should also note that at a time when these values are being challenged, it is crucial that NATO members maintain and uphold these values in solidarity.

⁵ Though, notably, her visit seemed to express more support to the Polish government than concern regarding recent events, see e.g., this press release by the Polish Ministry of Defense issued February 11, 2016, <http://en.mon.gov.pl/news/article/2016-02-12-victoria-nuland-visits-polands-ministry-of-defense/pdf/>.

- U.S. officials should emphasize in direct communications with Polish officials that as a global democratic leader, Poland's choices have ripple effects on other nations. U.S. officials should** suggest that negative effects of Poland's policies on rule of law and human rights can negatively impact the perception of the international business environment in the country, hampering international business dealings and investment.⁶
- U.S. officials should directly link bilateral meetings and "face time" with top U.S. officials around the NATO Summit to Polish movement toward reinstatement of basic rule of law principles in the country.** This could include recognition of the Constitutional Tribunal decision, revision of the anti-terror law to specifically define a clear and appropriate standard for arrest, deletion of the anti-terror law provision allowing surveillance of foreigners based solely on their foreign status, and clarification of the circumstances under which third and fourth alarm states arise under the anti-terror law.
- U.S. officials should emphasize with their Polish counterparts the need for Poland to honor Constitutional Tribunal decision K47/15, or create an exception to the law or similar language allowing for consideration out of order of cases involving "significant matters of constitutional interpretation."**
- U.S. officials should stress to Polish officials that increasing police powers can increase the risk of violent extremism and result in increased opposition action against the government.** U.S. officials should propose that Poland limit the new provisions of the police law to apply only to police—and not include paramilitary organizations—especially regarding

⁶ <http://www.ft.com/fastft/2016/04/04/moodys-polands-constitutional-crisis-could-scare-investors/>

matters of surveillance. The United States should urge Poland to create an oversight body to independently review the actions of law enforcement.

- ☑ **U.S. officials should discuss with Polish officials the need to allow citizens to express grievances publicly through non-violent protests, pressing them to provide access to a particular location within the city of Warsaw/Krakow for protests at all times, even during the NATO Summit and World Youth Day in July.**
- ☑ **U.S. officials should cite research indicating that lack of common understanding and tolerance between ethnicities and communities leads to greater instability and extremism, and urge Poland to address matters that could lead to instability and terrorism by recommitting to combat xenophobia.** Specifically, it should press Poland to reinstate the Council on Countering Racism and Xenophobia, which was recently shutdown (in May 2016), and reinvigorate the Government Plenipotentiary for the Development of Civil Society and Equal Treatment by appointing new experts who are recognized researchers in the field of ethnic cooperation, conflict resolution, and combatting xenophobia.

- ☑ **The United States should urge Poland to introduce independent, external oversight of the surveillance program put in place by the police law, requiring judicial or prosecutorial oversight of at least requests that target large amounts of information, private data of a defined person, data sought by agencies with a tenuous connection to the subject of the search, or data that is not obviously needed to prevent or punish terrorist acts.**
- ☑ **U.S. officials should raise with Polish officials the fact that the anti-terror draft law provisions threaten American citizens visiting Poland as tourists and for business.** The United States should make clear that it may be forced to issue a warning to tourist and business travelers to Poland regarding the fact that they are subject to the law. It should also express that the U.S. government may issue warnings specifically to U.S. businesses operating in Poland that the new anti-terror law may impair the work of their business and their relationships with clients.