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Poland: Counter-terrorism bill would give security service unchecked power

A counter-terrorism bill set for final adoption by the Upper House of the parliament (Senat) this week in Poland consolidates sweeping powers, including enhanced surveillance capacity, in the hands of the Internal Security Agency (ISA), with no independent oversight mechanism to prevent abuse and ensure proper accountability. The bill risks violating the rights to liberty, privacy, expression, association, peaceful assembly, and non-discrimination. Amnesty International has also criticized the fast-track process for deliberating upon and passing the bill, and the near absence of consultation and authentic debate with civil society in that process.

CONCENTRATION OF INTERNAL SECURITY AGENCY POWERS

The defining feature of the bill is the expansion and consolidation of ISA powers, with no independent oversight mechanism to review ISA operations. Under the bill, the ISA will be able to access data from virtually every government agency (e.g. other law enforcement agencies, social security agency, financial institutions, and local authorities, among many others) and from private companies. The ISA would also have access to closed-circuit television (CCTV) recordings from public facilities, roadways and other public locations. Decisions regarding security and intelligence operations, including surveillance and other monitoring of alleged terrorism suspects, would be left solely to the ISA in consultation only with the Prosecutor General who, under another new law, is also the Minister of Justice. The ISA works covertly and most operations are conducted entirely in secret, severely increasing the risk of abuses of power.

EXPANSION OF SURVEILLANCE POWERS

The bill's focus on enhancing the ISA's surveillance powers is particularly problematic. Coupled with a range of expanded surveillance powers enshrined in the February 2016 Police Act, the counter-terrorism bill helps set the stage for unprecedented access -- since the collapse of the Soviet Union -- by state authorities to the personal data and other information of Polish citizens and others present or residing on Polish territory. Moreover, any person who "could be connected with incidents of a terrorist nature" would be put on a list maintained by the ISA, but the bill has no provision for notifying people at a relevant point regarding their placement on such a list, permitting challenges to placement on the list, or a process to get one's name removed from the list.

On 10 June 2016, the Council of Europe's Venice Commission adopted an opinion on surveillance powers in Poland in which the Commission opined that the "procedural safeguards and material conditions set in the Police Act for implementing secret surveillance are still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals."¹ Under the police law, courts are allowed to authorize surveillance of content of communications on the basis of a list of crimes that the Venice Commission considered overly broad, and without a requirement to consider proportionality. Metadata, which can be as or more revealing of personal information than content, can

¹ European Commission for Democracy through Law (Venice Commission), Opinion No. 839/2016, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e), para. 132 (2016).

be accessed directly by police without a court order. Amnesty International has previously criticized the Police Act for its lack of adequate protections for communications covered by professional privilege and the absence of a requirement that law enforcement actors notify subjects of surveillance at some relevant stage that they have been monitored, which undermines the possibility of obtaining a remedy for violations of human rights linked to surveillance.

The combined powers enshrined in the Police Act and in the counter-terrorism bill raise serious concerns that the right to privacy will be infringed in the course of police and ISA operations, with little or no recourse to a remedy for those subjected to unlawful surveillance measures.

EXTENDED PRE-CHARGE DETENTION

The counter-terrorism bill also includes provision for 14-day detention without charge, for persons suspected of terrorism-related acts based on a vague definition of what constitutes an “act of a terrorist nature.” In a regulation that accompanies the bill, information that can be used to determine whether a person is suspected of association with or involvement in an “act of a terrorist nature” includes: the expression of “fundamentalist slogans” by representatives of Muslim institutions in Poland; information indicating the intent of a foreign national from a “high risk” country coming to Poland for academic training or to study; details relating to conferences/seminars/meetings of foreigners from “high risk” countries on Polish territory; details of plans to establish Islamic universities in Poland; information regarding the participation of Polish nationals in Internet platforms (chat rooms and forums) on so-called “radical Muslim websites”; and visits to detention/prison facilities by Islamic clerics or representatives of organizations associated with the Muslim faith.

The focus on Islam and Muslims, and on foreigners, is discriminatory on its face. The Polish authorities must ensure that Muslim individuals and foreign nationals are not subjected to such racial/ethnic/religious profiling, and communities where Muslims or foreign nationals reside, work and take leisure are not targeted for surveillance and monitoring simply based on the community’s dominant faith or the residence status of its inhabitants. Instead, law enforcement measures must target specific individuals and be based on a reasonable suspicion of involvement in a specific criminal act.

The current maximum for pre-charge detention in Poland is 48 hours. The 14-day pre-charge detention regime for this newly identified category of “terrorism suspect” would place Poland on par with the United Kingdom, which has the longest maximum pre-charge detention period in the EU.

Any person deprived of his or her liberty must be charged within a reasonable time or released, and should be given the possibility to contest the legality of the detention. Any individual subjected to such pre-charge detention must have access to counsel of choice at the outset of custody and during all interrogations. They should also have access to family members, adequate medical care, and other guarantees and safeguards in conformity with Poland’s international human rights obligations.

INFRINGEMENT OF FREEDOM OF EXPRESSION

Freedom of expression and the right to seek, receive and impart information are also at risk as the bill includes provision for the Director of the ISA to order the immediate blocking of specific websites with no prior judicial authorization. Only after a five-day period must a court confirm that the ISA’s order to block a website was justified under Polish law. The head of ISA and Prosecutor General can appeal a decision by a court indicating that the order to block a website was not justified. The ISA or Prosecutor General’s challenge to such a court ruling can be based on vague national security grounds and it remains unclear what evidence the ISA and Prosecutor General would need to disclose in a challenge to a court’s ruling that an order to block a website was not justified. The bill is silent regarding whether other persons or organizations can appeal the blockage of a website.

While the blocking of the entire content of a website in itself raises significant freedom of expression-related concerns, in any event such blockage of content should not take place without prior judicial authorization. Judicial scrutiny after the fact is not enough. Moreover, the 5-day lapse time between

blocking content and judicial scrutiny would result in website content being unavailable for users without any prior judicial determination regarding whether such a blockage was necessary and proportionate.

INFRINGEMENT OF FREEDOM OF PEACEFUL ASSEMBLY

Freedom of peaceful assembly would also be under threat under the bill's provisions. If the terror alert system established under the bill were to reach "high," the bill grants the authorities the power to ban assemblies and public protests. The vague definition of terrorism under Polish law and the lack of transparency in the operation of the alert system, including the fact that much intelligence information feeding into it would be secret, could lead to violations of the right to peaceful assembly and freedom of expression. Because of the flaws in the bill, the government could also use the terror alert system as an excuse to ban peaceful public protests against government policy on a range of issues – e.g. environmental policy, or social policy related to abortion or LGBTI issues.

FOREIGN NATIONALS TARGETED

Foreigners in Poland are particular targets of the bill's proposed measures. Under the bill, foreigners specifically can be subjected to a range of covert surveillance measures, including wire-tapping, monitoring of electronic communications, and surveillance of telecommunications networks and devices. Such surveillance would be permitted on order of the Prosecutor General for up to three months, with no requirement of prior judicial authorization, or indeed of reasonable suspicion of wrongdoing. Singling out foreign nationals in such a manner is discriminatory, and, especially given the secret nature of surveillance, could lead to racial and ethnic profiling. The bill does not provide procedural safeguards to ensure that a person, should she or he be made aware of surveillance, can challenge it and have access to an effective remedy against unlawful surveillance

The bill also permits intelligence, police and border officers to take fingerprints, photos, and keep a database of foreigners suspected of entering and/or remaining in Poland illegally, having been in a territory where groups labelled as terrorist are active, or where there is a mere suspicion that a person could be associated with a terrorism-related act, which, as noted, is extremely vaguely defined under Polish law. In addition to the possible concerns in terms of those individuals' right to privacy and presumption of innocence, the risks of discrimination based on nationality and ethnicity, among others, are particularly high.

The Polish authorities must be scrupulous to ensure that foreign individuals are not profiled on nationality or racial, ethnic, or religious grounds and are not forcibly returned or otherwise transferred from Poland to a country where they would be at risk of persecution or human rights violations such as torture and other ill-treatment.

While States have an obligation under international human rights law to protect people on their territory from imminent threats to life, human rights law also sets clear criteria and limits on what governments can do to achieve that aim. Ill-defined and overly broad laws are open to arbitrary application and abuse. Amnesty International calls on the Polish authorities to ensure that the new powers in the bill, as well as all counter-terrorism operations, are in full conformity with Poland's international human rights obligations. Poland should demonstrate its commitment to upholding human rights and the rule of law, not consolidate power in the state's security apparatus at the expense of human rights and fundamental freedoms.

For further information: *Poland: New surveillance law a major blow to human rights*, AI Index: EUR 37/3357/2016, 29 January 2016, <https://www.amnesty.org/en/documents/eur37/3357/2016/en/>.

External reference: The full opinion of the European Commission for Democracy through Law (Venice Commission) can be accessed here: *Poland: On the Act of 15 January 2016 amending the Police Act and certain other Acts*, Opinion No. 839/ 2016, Adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), Published in Strasbourg, 13 June 2016 [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).

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