



THE POLISH BAR OF LEGAL ADVISERS

Country Report

**Conference of Presidents
of the European Bars and Law Societies**

Vienna, February 2016r.

Executive summary

- There is a structural problem with the legislative process connected with overuse of a “fast track” procedure in the parliament and lack of public consultations, resulting in the poor quality of law.
- The government took direct control over public radio and television.
- New legislation paralyzes in fact the Constitutional Tribunal.
- New law allows the government to dismiss all higher civil servant in next 30 days.
- New procedure before the Patent Office widens powers of lawyers in proceedings related to the registration of industrial property.

Dysfunctionality of the legislative process

A horizontal problem across the Polish legal system remains the **poor quality of law**, which to a limited extent only is created on the basis of evidence and a properly conducted assessment of various socio-economic consequences, using the results of public consultations.

Dysfunctionalities of the legislative process have become particularly evident since November 2015, that is since the beginning of the term of office of the new parliament. In practice, most of the legislative initiatives were undertaken through the Members of Parliament's bills, which are not subject to inter-ministerial consultations or public consultations. Serious doubts are evoked also because of the pace of the legislative process, which makes it impossible to allow for the views of social, professional and expert organizations. Violated is also the constitutional principles of three readings, which is treated only in a formal way, as well as the constitutional ban of ‘urgent proceedings’ in the matters regulating the functioning of the political system of public authorities (e.g.: amendments to the Constitutional Tribunal Act). Violating the constitutional rule of the legislative process that states about maintaining the trust in the state and its laws has become so frequent that it raises concerns about the degree of predictability of the legal system as a whole. This further brings concerns of threats to the protection of constitutional and international standards.

The paralysis of the Constitutional Tribunal

All the latest undertakings of the legislative and executive organs of the state to streamline the operations and to ensure pluralism in the composition of the Constitutional Tribunal are in fact aimed at paralysing its functioning.

Despite the Constitutional Tribunal's judgment of 3 December 2015 (Ref. No. K 34/15), which decided that the three Constitutional Tribunal judges chosen by the previous parliament (i.e. the Parliament of the 7th term) were selected on the basis consistent with the Constitution, they were not sworn in by the President of the Republic.

What is more, the Parliament of the 8th term has passed a resolution declaring the nullity of the choice of these three judges, and then has proceeded to choose three new judges to replace them. The President has taken immediately their oath, which in the opinion of the ruling party gives them the mandate to rule as judges of the Constitutional Tribunal.

On November 19 2015, an amendment to the Constitutional Tribunal Act was passed, which has among others shortened the terms of office of the current President and Vice-President of the Constitutional Tribunal. This and many other provisions of the amendment has been declared by the Tribunal to be unconstitutional (judgment of 9 December 2015, Ref. No. K 35/15). During the proceedings before the Constitutional Tribunal, the Polish Bar of Legal Advisers has expressed its opinion, appearing as *amicus curiae*. On request of the Polish Bars, the Council of Bars and Law Societies of Europe (CCBE) and the

International Bar Association (IBA) took part in both hearings on December 3 and December 9, 2015 as the observers.

On 22 December 2015 another Act was passed whose real purpose is to prevent the exercise of constitutional tasks of the Constitutional Tribunal. This Act stipulates that the basic composition of the Tribunal (other than when resolving questions of law and constitutional complaints) is full composition, in which at least 13 judges adjudicate (out of 15). Judgments of the Tribunal must be reached by the 2/3 majority. The Act provides that it shall enter into force on the day of its publication, which constitutes disregard for the period of *vacatio legis*. One might consider that the adoption of such a solution is to prevent the examination of the constitutionality of the law in question. The refusal by the President of the Republic to accept the oath of the three judges selected according to the Constitution does not allow the Tribunal to adjudicate in full composition of the Tribunal.

The President of the Polish Bar of Legal Advisers issued a letter to the President of the Republic of Poland suggesting that amended Act to the Constitutional Tribunal before signing it by the President should be considered by the Tribunal, in order to provide a preventive control of its compatibility with the Constitution.

The actions taken recently against the Constitutional Tribunal pose a serious danger that any given law which violates the Constitution and fundamental rights of citizens will not come under the assessment of an independent constitutional court. It should further be noted that this is not only a violation of the constitutional right of access to court, but it is also the violation of the right to court specified in the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6), and the right to court guaranteed by Article 47 of the Charter of Fundamental Rights of the EU (due to the European functions of the Tribunal, e.g.: when it comes to the procedure of questions referred to the ECJ).

Public media and freedom of expression

On 8 January 2016 amendments to the Act on Radio and Television entered into force. This law removes the requirement for explicit and open competitions to become a member of the supervisory and management boards in organs of public radio and television. The decision on their appointment and dismissal is in the hands of the Minister of the Treasury. At the same time, along the entry into force of the amendments, terms of office and mandates of the existing boards in the public media institutions were shortened. The principle of term of office of the authorities of public radio and television was also abandoned.

The amending Act significantly limits the constitutional powers of an institution, which is the guardian of freedom of speech, the right to information and public interest in the context of radio and television, that institution being the National Council of Radio and Television. The constitutional provisions on **political neutrality of members of the Council** should be reflected in the selection procedure of politically neutral public media authorities.

The new provisions redirect all the authority of nomination to the political authority of the executive branch, which is the Minister of the Treasury. Certainly such complete subordination of public media to the executive authorities can influence the way media pursue their public mission, which includes the provision of information and the protection of freedom of speech.

It is worth noting that reservations regarding the compliance of the new legislation with European standards have been expressed not only by the Human Rights Commissioner of the Council of Europe, the European

Commission, a representative of OSCE on the Freedom of Media and international organizations of professional journalists, but also by the Polish public opinion. This has been reflected by mass public gatherings, which took place in Poland on 9 January 2016.

Adopted on 8 January 2016 the so-called 'small amendment' law on media is to stay in force until 30 June 2016, when it will be replaced by substantial amendments - the new law bringing to life national media. The proposed National Media Council may further limit the constitutional powers of the National Council of Radio and Television.

Powers of the police and special services as a threat to privacy

In December 2015 a Members of Parliament's draft to amend the Police Act and other laws regulating the operation of special services was introduced. This draft is said to be implementing the Constitutional Tribunal's judgment of 30 July 2014 (ref. No. K 23/11).

The analysis of the draft indicates, however, that it goes beyond the above aim and also provides for the regulation of other issues, which are important from the point of view of civil rights and freedoms. These include the issue of access by the police and other secret services to Internet data in the context of operational activities. In particular the proposal of the collection of such data by police and other secret services, **the bill does not meet the criteria justifying the restrictions on the rights and freedoms arising from the Constitution (especially Art. 47 which defines the protection of private life), as well as from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 7 and 8 of the Charter of Fundamental Rights of the EU.**

The wide range of information to which special services might have access will allow for a broad and precise reproduction of various aspects of private life of citizens. It can also lead to the possibility of building a personal profile of certain persons involved in the communication process, and thus the possibility of determining their lifestyle or political and personal preferences.

The current Article 18(6) of the Act on electronic services asks the service providers to deliver information concerning the above mentioned data to state authorities, but this **must be linked** to the proceedings operated by them. Meanwhile, Internet data acquisition and processing will not have to be related to any ongoing investigation. The proposed procedures do not provide for a prior control by an independent authority either, and the proposed *ex post* control seems in many respects illusory.

In this context the problem with the protection of lawyers' professional secrecy appears (even if the absolute prohibition of use of evidences covered by defender's secrecy still remains).

The draft law does not foresee the possibility of issuing a complain against the court order to use in criminal proceedings materials covered by the professional secrecy by the person obliged to keep all information in confidentiality (e.g. legal adviser or advocate). This is much lower standard of protection from this indicated on the basis of defender's secrecy before the court. Because of unknown reasons such right to complain has a public prosecutor only. This breaches the principle of equality of arms resulting in unjustified limitation of rights of legal advisers and advocates comparing with the public prosecutor by deprivation them the remedies against exemption from professional secrecy (not related to the defender's secrecy).

The draft Act does not meet the majority of standards determined in the decisions of the Polish Constitutional Tribunal, the European Court of Human Rights and the Court of Justice of the European Union.

The Polish Bar of Legal Advisers presented to the Parliament its negative opinion on the draft act and proposed further amendments.

Civil Service

Adopted on 30 December 2015 amendments to the law on civil service adversely affects certain constitutional provisions. In accordance with Art. 153(1) of the Constitution, in order to ensure a professional, diligent, impartial and politically neutral discharge of the State functions, corps of civil servants are to be installed in the offices of the government. The new law does no longer form the requirement to choose the Head of Civil Service from among the civil servants. What has been also abstained from is the requirement of experience for those persons holding leadership positions in the public sector. Moreover, the prohibition of a prior membership in a political party was also dropped. The Act has interrupted the ongoing term of office of the members of the Civil Service Council, which was replaced with a new institution - the Council of Public Service, the composition of which **does not guarantee pluralism**.

In relation to persons holding senior positions in the civil service the requirement of experience in public administration as well as management experience was removed. A competitive and open form of the recruitment procedure was also dropped.

According to the amendment, **any employment contracts** with persons who on the date of entry into force of the new law occupy senior positions in the civil service and managerial positions in the foreign service, **shall expire** after 30 days from the date of entry into force of the said law if before this date such persons is not offered any new working conditions for a further period, or in the event of refusal of such new working conditions. The new law was not subject to public consultations and it was not presented for the opinion of the Council of Civil Service, which violates the principle of proper legislation.

The provisions of the new law entering into force 14 days after its announcement **violate**, contrary to the declared objectives, **the principle of political neutrality of the civil service as well as its professional character**, creating a threat to the fundamental rights of citizens. This does not only violate the Constitution, but also the right to good administration laid down in Art. 41 of the Charter of Fundamental Rights of the EU, which guarantees everyone the right to have their case handled impartially.

The Polish Bar of Legal Advisers presented to the Parliament its negative opinion on the said law on 29 December 2015.

Free legal advice

In January 2016 a system of free legal advice was launched in Poland. There are currently 21 million citizens entitled to benefit from this system. This is the effect of the Law of 5 August 2015 on free legal advice and legal education, which was passed by the previous parliament. This law ensures first time in Poland the possibility to use legal aid in a pre-litigation stage.

Free legal aid covers:

- 1) provision of information to the beneficiary on the valid legislation in force, his or her rights and/or obligations; or
- 2) indication to the beneficiary a possible way of solving his/ her legal problem; or

- 3) assistance in drafting documents in cases mentioned in paragraph 1 and 2 except of procedural documents related to the preparatory proceedings or to the court or administrative proceedings; or
- 4) drafting a motion for the exemption from court fees or to grant free legal representation in court proceedings, or else to grant free legal representation by an advocate, legal adviser, tax adviser or patent attorney in administrative proceedings.

Over 1500 centres for legal aid were established in the whole country. In half of them legal aid is offered by legal advisers and advocates, the other half is managed by NGOs with at least 2-years' experience in providing legal advice or legal information and legal aid on pre-litigation stage is not provided by lawyers but by graduates of law faculties. Due to the fact that the system of free legal aid has just started its functioning, it is difficult at the moment to evaluate the level of its efficiency, however, in the due course of its monitoring, it seems that some modification may be introduced.

Changes in law on industrial property rights

Due to the amendments to the Act on industrial property right of 20 June 2000, the scope of the activity of legal advisers has been widened. From 30 November 2015 legal advisers and advocates may become legal representatives before the Patent Office in so-called 'registration proceedings'. The previous Act allowed lawyers to represent clients only in litigation cases and not in registration proceedings, which were reserved for patent attorneys only. Such changes bring the provisions related to proceedings before the Polish Patent Office much closer to the model existing in the majority of EU Member States.