



THE POLISH NATIONAL BAR OF ATTORNEYS

Country Report

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

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Introduction

Year 2016 brought many legislative initiatives related to the Constitutional Tribunal, National Council of Judiciary as well as powers of police and secret services to use surveillance, including electronic one. In addition, there is a constant practice of creating law for short-term benefits only, without considering long-term effects of introduced regulations. 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. 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.

Constitutional Tribunal

All the 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 lead in fact in 2016 to take the control over the Tribunal by the President recommended by the ruling party. As an effect of several amendments to the laws regulating the functioning of the Tribunal, refusal to publish its judgments from 2015 and 2016 on incompatibility of these amendments with the Constitution, allowing the work by judges elected by the new Parliament as well as forcible leave of the Vice-President of the Tribunal, the President and the majority of judges have recommendation of the ruling party.

The abovementioned actions may lead the public to doubts on Tribunal's impartiality and independence.

Judges

The National Council of Judiciary is the body that safeguards the independence of courts and judges in Poland. According to the Constitution the Council is composed as follows: 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 3) four members chosen by the Sejm from amongst its Deputies and two members chosen by the Senate from amongst its Senators. Among others, The National Council of Judiciary submits proposals to the President of Poland to appoint new judges.

In May 2016 and again in January 2017 the Minister of Justice published a proposal to change the Act on The National Council of Judiciary, including among others shortening the term of office of the current members of the Council within 4 months after entering the new act into force, election of judges - members of the Council by the Parliament and not by judicial assemblies, creation a second chamber of the Council composed of politicians and openness of all voting. In addition, a procedure of appointment of judges is to be changed. Till now, after conducting a qualification procedure, The Council submitted one candidate to be appointed by the President of Poland. According to new regulations, the Council will be obliged to submit two candidates for each post.

Proposed regulations introducing appointment of judges to the Council by politicians or enhancement powers of President of Poland in the nomination procedure increase the influence of politicians on the judiciary and lead to rigorous control of the Minister of Justice over the administration of courts.

Right to privacy

On 15 January 2016, Poland's Parliament adopted the 'Act of 15 January 2016' being partly an implementation of the Constitutional Tribunal's judgment in case K 23/11. However, the Act of 15 January 2016 allows law enforcement agencies and police authorities wide access to citizens' Internet and telecommunication usage data (e.g. billings of phone connections, geolocation, metadata of sent and received messages, logins, contacts, Internet profiles, visited websites, and personal settings) without prior review or approval from a judge. The Act of 15 January 2016 provides only half a year *ex-post* judiciary control, while not specifying the court's competences in this regard at all.

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 remains). The draft law does not foresee the possibility of issuing a complaint 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 breach 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).

Public media and freedom of expression

The Act of 30 December 2015 on the amendment of the Broadcasting Act of 29 December 1992 ('Amending Act') entered into force on 8 January 2016. The Amending Act has made changes to the Broadcasting Act with regards to the functioning of public service broadcasting companies. The Amending Act stipulates that the terms of office for companies' management boards and supervisory boards expire and all the members of those bodies are nominated and revoked solely by the Minister of Treasury, without any participation of the constitutional body – The National Broadcasting Council (KRRiT).

The Amending Act narrows powers of the KRRiT, which constitutional task are safeguarding the freedom of expression, right to information and public interest. Within the new legislation all real powers and control over public media are granted to the legislative organ, which is the Minister of Treasury.

Freedom of assembly

On December 2016, the Parliament introduced amendments to the Act on Assembly. The act introduced a new rule that it is forbidden to organize assembly in the same time and place, where assembly organized by public

authorities or by churches. The act allows also the regional representative of the government ('wojewoda') to be included in the procedure of organizing assembly. The governmental representative will be entitled not only to give permission to organize so called 'recurring assembly' but, in some circumstances, will have the power to ban an ordinary assembly. A hierarchy of assemblies is introduced giving the precedence to the recurring assemblies. When the governmental representative gives the permission for such assembly, local authorities are obliged to ban all other assemblies in the same place and time even if it was announced before entering into force the abovementioned amendments.

Civil service

Adopted on 30 December 2015 amendments to the law on civil service 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.

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.