



KRAJOWA IZBA
RADCÓW PRAWNYCH

Country Report
of the Polish Council of Attorneys at Law and Polish Bar Council
for the Conference of Presidents of the Bar and Law Societies in Vienna

Legal and political situation in Poland in 2017

2017 was a year of numerous and far-reaching legislative changes in Poland. They shook the principle of separation of powers (aka *trias politica* model) and undermined independence of judges which is the pillar of the democratic state based on the rule of law. The said changes affect first and foremost the procedure of ordinary courts, the Supreme Court and the National Council of the Judiciary which is a constitutional body safeguarding the independence of the judiciary and autonomy of judges.

They directly impact all the representatives of the legal profession in Poland and, obviously, those of the judiciary in particular, but also lawyers (in Poland the persons with the professional titles of *adwokat* and *radca prawny*) – whose independence was undermined. As a result, they put at risk the state democracy and adversely influence the functioning of the society. The amendments to the Act – Law on the Ordinary Courts come first here, as it is the courts that resolve a full spectrum of cases concerning the day-to-day life of citizens and ranging from family matters through professional issues to business affairs which directly shape the condition of the Polish economy and the competitive position of Poland in the world. A judge who is not protected by the mechanisms guaranteeing his/her independence or a lawyer who will have to consider his/her interest vis-à-vis that of his/her client are examples of situations which only recently seemed to belong to the far closed pre-1989 history of communism in Poland.

Bar-related changes

Please note that the said changes and the accompanying rhetoric, which has been frequently permeated with general criticism addressing lawyers, have a detrimental effect on the perception of the representatives of the legal profession; the said representatives are not treated by the authorities as partners – professionals who can offer advice – but as the persons posing threat to the independence and effective functioning of the state machinery. Attempts are made to influence the independence of bars and lawyers themselves. Among other measures taken, amendments are being drafted which will affect the training of legal trainees, the legal training procedure and the terms and conditions of passing the exam for the attorney at law, whereby they will lower the training standards for the lawyers acquiring the qualifications of the attorney at law. Bars will be further impacted by the changes made to the Supreme Court where – in consequence of the new passed act – a Disciplinary Chamber was formed in which lay judges will adjudicate for the first time. The Chamber will be tasked with *inter alia* reviewing revocation of disciplinary decisions, as discussed below.

Amendments to the Act – Law on the Ordinary Courts

The bill amending the Act – Law on the Ordinary Courts and certain other acts was put forward by a group of Members of Parliament in April 2017. The Act took effect in August 2017. The amendments reinforced the position of the Minister for Justice who was awarded the powers to recall presidents and deputy presidents of ordinary courts within 6 months of the act taking effect or to transfer them, for example. Further, now it is the Minister for Justice to decide whether the judges who reached the retirement age may continue to adjudicate. The requirement for the Minister for Justice to obtain advice of general assemblies of courts in the appointment and recalling procedure for the judges of regional and appeal courts was waived. Further, presidents of district courts will be now appointed by the Minister for Justice and not as earlier – by presidents of appeal courts in observance of the advising procedure. Next, the new act requires the female judges to retire upon reaching the age of 60. This gives rise to doubts because of sex discrimination (65 years for male judges). Please note that despite the protests of large groups of citizens, representatives of non-governmental organisations, public and private institutions and many others who expressed their concerns about subordination of the judicial branch to the executive branch and undermining of the independence of courts and autonomy of judges, the President of the Republic of Poland did not avail himself of the right of veto, vested in him under the Constitution of the Republic of Poland.

In parallel to the Law on the Ordinary Courts, in summer 2017, pivotal amendments were made to the Act on the Supreme Court and the Act on the National Council of the Judiciary. For those acts however, the President of the Republic of Poland exercised the right of legislative veto and resolved to draft new bills. The recently passed Act on the Supreme Court and the Act on the National Council of the Judiciary derive from the legislative initiative of the President of the Republic of Poland dated 26 September 2017.

Changes under the Act on the Supreme Court of 8 December 2017

In keeping with the Constitution of the Republic of Poland, the Supreme Court oversees the activity of ordinary and military courts as regards adjudication, but also performs other activities defined by the Constitution and other laws. The Supreme Court is tasked with the review of election protests for example. Further, the Supreme Court proclaims validity of the parliamentary election, the election for the European Parliament, the election of the President of the Republic of Poland or validity of referenda. The recently passed new Act on the Supreme Court will take effect on 3 April 2018. The Act consolidates the position of the executive branch – and of the President of the Republic of Poland and the Minister for Justice in particular – vis-à-vis the judicial branch, which is an element undermining the independence of judges. What's more, the organisation of the Supreme Court will be restructured. Following the recently adopted amendments, next to the Civil Chamber, Criminal Chamber and Labour Law, Social Security and Public Affairs Chamber, two new Chambers of the Supreme Court will be formed. These are: the Chamber for Extraordinary Control and Public Affairs and the Disciplinary Chamber. Within the latter two, lay judges – appointed by the Senate – will adjudicate for the first time. The Disciplinary Chamber will be now a very important and complex branch in the court framework, while changes to its *modus operandi*, including introduction of lay judges into its structures, are crucial *inter alia* because this Chamber reviews cases of revocation of disciplinary decisions for judges and lawyers. The fact that under Article 111 of the Act, the Supreme Court Judges who become 65 years of age until the effective entry of the Act or will become 65 years of age within 3 months from its effective date will retire, unless the President of the Republic of Poland agrees to them remaining in their capacity, raises multiple doubts. The age in question was lowered from 70 years in the previous law. In 2018, upon the effective entry of the act, the changes discussed herein will entail far-reaching personnel changes within the Supreme Court, with almost all its layers affected.

Amendment to the Act of the National Council of the Judiciary

The National Council of the Judiciary is a constitutional body which is to safeguard the independence of the judiciary and autonomy of judges. Until recently, it was the National Council of Judiciary to decide finally on the appointment of judges. The legislative initiative concerning the bill amending the earlier Act on the National Council of the Judiciary was put forward by the Council of Ministers already in March 2017. Yet, the recently passed amendments follow the legislative initiative of the President of the Republic of Poland dated 26 September 2017. The Act was signed on 20 December 2017. The earlier proposal of amendment to the Act on the National Council of the Judiciary was vetoed by the President of the Republic of Poland in July 2017. Its partial unconstitutionality was given among veto reasons.

The new Act provides, first and foremost, for the selection of 15 members of the National Council of the Judiciary by the Sejm (the lower chamber of the Polish Parliament) for the joint four-year term of office and resignation from the current solution being the selection made by the representatives of judges. Members will be selected from the list of candidates with the majority of 3/5 of votes in the presence of at least 50% of the statutory number of MPs. Should no selection be made under the above procedure, the subsequent selection will be possible with the absolute majority of votes. The majorities adopted can be read as an attempt to refute the claims of unconstitutionality of the amendment passed. In reality, the act markedly limits the autonomy of judges. The changes made will result in the situation where judges will be selected by the parliament, whereby the judicial branch will be made dependent on the legislative branch. In consequence, the selection of judges will become political. The provision reading the removal of current members of the National Council of the Judiciary before the expiry of the term of office gives rise to serious doubts as well.

Legislative changes vis-à-vis international community

The above-named legislative changes evoked much concern among the representatives of EU authorities first and foremost. At the same time, Polish authorities voice a critical position on the remarks and opinions coming from Brussels. The said criticism follows, among others, a firm position of the European Union on the changes made. In December 2017, the European Commission activated the mechanism under Article 7 of the Treaty on European Union due to a clear risk of a serious breach of the rule of law in Poland. The Commission also issued a complementary (4th) Rule of Law Recommendation, setting out clearly the steps that the Polish authorities could take to remedy the current situation. In the press release, the European Commission arguments that “over a period of the last two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council of the Judiciary, prosecution service and National School of Judiciary. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.” Further, because of the Law on the Ordinary Courts, the Polish Government will be referred to the Court of Justice of the European Union. The Venice Commission of the Council of Europe also voiced its serious concerns about the situation in Poland, while the Parliamentary Assembly already in October 2017 adopted a resolution on the rule of law concerning e.g. the current situation in Poland.

Support from non-governmental organisations, international legal organisations and other entities

The fact that the unconstitutionality of the recently adopted laws undermining the fundamental principles of a democratic state based on the rule of law and the independence of the legal profession in Poland is recognised not only by the legal profession – the Polish Council of Attorneys at Law and the Polish Bar Council included – but also by the civil society, including by multiple non-governmental organisations whose voice is heard in Poland and abroad offers much consolation here. The Human Rights Watch which in October 2017 made a report titled *Rule of Law and Human Rights Under Attack in Poland* or the Helsinki Foundation for Human Rights which already in June 2017 presented its remarks to the amendments to the Act – Law on the Ordinary Courts indicating among other aspects the too vast powers of the Minister for Justice towards the judicial branch are among such organisations.

A wide response and the support voiced by the representatives of international organisations – including the legal organisations the Polish Bar is an active member of – and by the representatives of bars in other countries were yet another token of solidarity. This is how the feeling of international unity to defend the most important values and to speak with one voice about the matters of significance for the lawyers in Europe and all over the world is created. It is this voice in defence of independence of lawyers – and thus in defence of fundamental rules of the democratic state based on the rule of law and day-to-day life of millions of people – that may shape the actions of governments and the political decisions taken. Still before the amendments to the three aforesaid acts – the Law on the Ordinary Courts, the Act on the Supreme Court and the Act on the National Council of the Judiciary – were adopted in summer and autumn 2017, the Council of Bars and Law Societies of Europe (CCBE) during its plenary session in May 2017 adopted the Model Article on Independence of Lawyers which underlines among other aspects the fact that an independent legal profession is a prerequisite for the rule of law. Next, on 24 November 2017, during the plenary session, CCBE adopted a resolution in which it expressed its concern about the proposed changes to

the Polish judiciary system – and the Act on the Supreme Court and the Act on the National Council of the Judiciary in particular. The resolution was supported *inter alia* by the German Federal Bar (on 12 December 2017) which reasoned that “the independence of judges is one of the fundamental pillars of a functioning state governed by the rule of law”. In 2017, the Polish Council of Attorneys at Law was addressed officially with their concerns by e.g.: the European Bars Federation (on 3 June 2017, 17 July 2017 and 11 November 2017), the International Bar Association (on 19 July 2017), the European Association of Lawyers AEA-EAL (on 18 July 2017), the American Bar Association (on 18 December 2017) and The Law Society of England and Wales (on 19 July 2017), the Executive Board of the European Network of Councils of the Judiciary (on 5 December 2017), the OSCE Office for Democratic Institutions and Human Rights (on 13 November 2017) and the Consultative Council of European Judges (on 10 November 2017). Further, in consequence of the Act on the Supreme Court and the Act on the National Council of the Judiciary being signed by the President of the Republic of Poland, on 22 December 2017, the UN Special Rapporteur on the independence of judges and lawyers stated his view on the recent legislative changes in Poland in the document presenting the reforms as severely undermining the independence of the judiciary.

Summary

The amendments passed during the last few months in Poland violate the constitutional principle of separation of powers (the *trias politica* model), the independence and autonomy of the judiciary from other powers and jeopardize the fundamental civil rights. At the same time, it is especially in these difficult times that one can truly appreciate the importance of our bar membership in international organisations and the considerable support that those organisations offer as a gesture of solidarity. In the future, the Council of Europe Convention on the profession of lawyer – which is now being developed by the Parliamentary Assembly – will prove another significant mechanism to protect the independence of the legal profession.