



Représentant les avocats d'Europe
Representing Europe's lawyers



the global voice of
the legal profession

Justice under Siege:

a report on the rule of law in Poland

November 2007

**An International Bar Association
Human Rights Institute / Council of Bars
& Law Societies of Europe Report**

International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom

tel: +44 (0)20 7691 6868. fax: +44 (0)20 7691 6544
www.ibanet.org

Justice under Siege:

a report on the rule of law in Poland

Contents

Executive Summary	5
Chapter One: Background	13
Introduction	13
Political background	15
Poland's constitutional arrangements	16
The Governmental system of Poland	17
1. Executive	17
2. Legislature	18
3. Judiciary	19
The legal system	20
Chapter Two: Threats to the judiciary in Poland	23
1. Power of the Minister of Justice to move judges without their consent	25
2. Assessor judges	27
3. Limited tenure of trainee judges	28
4. Amendments to the disciplinary procedures for prosecuting judges who commit intentional crimes	34
5. Changes to disciplinary proceedings	41
6. Judicial appointments	41
7. Changes to the Constitutional Tribunal	44
8. Recent refusal of the President to appoint judges	50
Chapter Three: Threats to the legal profession in Poland	53
1. Supervision of legal professional bodies by the Minister of Justice	54
2. New three-licence category of the legal profession	61
3. Changes to disciplinary proceedings	67

4. Fee capping for advocates and legal advisers	69
5. Personal asset declarations for legal professionals	74
6. Submission of client contracts	75
Chapter Four: Threats to the prosecution system in Poland	79
1. Excessive Government interference	79
2. Threats against individual prosecutors	81
3. Separation between courts and prosecutors	85
Chapter Five: Conclusions and Recommendations	87

Executive Summary

This report is the result of a fact-finding mission to the Republic of Poland (Poland) undertaken by the International Bar Association's Human Rights Institute (IBAHRI) and the Council of Bars and Law Societies of Europe (CCBE) between 3-7 September 2007.

The mission was prompted by concerns that a number of recently passed and proposed legislative amendments have or would have a negative impact upon the rule of law and pose a threat to the independence of the judiciary and of the legal profession. Inappropriate executive interference with the prosecution system was also worrisome.

During the mission, the delegation met with a wide range of stakeholders representing the judiciary, the legal profession, the prosecution system, non-government organisations, universities and opposition parties. Despite repeated requests, the delegation was not able to meet with representatives from the government, which at that time was headed by the Law and Justice party.

Delegation members

The IBAHRI and CCBE are grateful to the delegation members who accepted the invitation to take part in this mission. The delegation members were:

- The Right Honourable Lady Cosgrove, former Judge of the First Division of the Inner House of the Court of Session, Scotland, United Kingdom;
- Mr Martin Solc, Chair of the IBA Public and Professional Interest Division, former President of the Czech Bar Association, Czech Republic;
- Dr Rupert Wolff, President of CCBE 2001, Vice-President of Austrian Bar Association, Austria;
- Mr John Fish, President of CCBE 2002, Ireland;
- Ms Felicia Johnston IBAHRI Programme Lawyer, United Kingdom; and
- Ms Brooke Hartigan, Rapporteur, United Kingdom.

The full conclusions and recommendations are set out in Chapter 5 of the report.

Summary of conclusions

The former Law and Justice Party-led government of Poland appeared to have embarked upon a campaign to gain control over the entire justice system. The former government appeared to have no proper regard for Constitutional limitations and binding international law and openly declared its animosity towards the judiciary, the legal professional and prosecutors. This lack of respect for Constitutional and international rights and the disrespect shown towards judges, lawyers and prosecutors by the last Polish government is deeply disturbing. The IBAHRI and CCBE were unable to conclude that the government had introduced the changes other than for the sole purpose of assuring compliance by all those engaged in the justice system with the will of the state authorities.

Threats to the judiciary

The independence of the judiciary is universally accepted as the cornerstone to the rule of law. Any threats to the independence of the judiciary have significant implications for the rule of law, good governance and public confidence in the legal system.

Several pieces of legislation introduced by the Law and Justice Party concerning the judiciary were brought to the attention of the delegation. Taken individually, these pieces of legislation could be viewed as involving only small increases in executive power over the judiciary. When considered cumulatively, the effect of the legislation is far greater, hinting at a more systematic and sinister attempt on the part of the government to influence and control the judiciary. Particular concerns were identified as follows:

- The ability of the Minister of Justice to second judges between courts or locations against their will constitutes an unacceptable level of executive interference in the judiciary, and is very likely to breach the Polish Constitution and international law. IBAHRI and CCBE fear that this power will be misused to remove judges who are disliked by, or whose decisions are unpopular with, the government. If determined to be administratively necessary, such powers must only be granted to an independent authority such as the National Council for the Judiciary (NCJ) or a court. Empowering the Minister of Justice in this way breaches judicial independence and impartiality, and gives rise to concern that judges may make decisions under the threat of adverse sanction.
- The IBAHRI and the CCBE are concerned about the conferring of full judicial powers on possibly inadequately trained trainee judges, but of greater concern is the appointment of trainee judges for a trial period. Despite the continued significance of the NCJ in appointing judges, the recent refusal of the President to make the recommended appointments without reasons causes the IBAHRI and CCBE to fear that the trial periods could be used by government to exclude judicial candidates for political reasons. While short trial periods are acceptable under international law, the practical implications of the amendment give cause for concern in the current Polish political climate.
- The IBAHRI and the CCBE consider that the recently passed amendments empowering the Minister of Justice to suspend a judge who has committed an intentional crime is unjustified, and breaches international law. It is an established principle of international law that judges are subject to suspension and other sanctions only by an independent authority or a court or tribunal decision, and not by a member of the executive or someone who, also being Prosecutor General, may be a party to the proceedings. While criminal immunity for judges is not a requirement of international law, fair disciplinary proceedings for judges are important and necessary. The amendments also reduce the role of disciplinary courts in determining whether to proceed with prosecutions of judges and limit the period to only 24 hours for serious crimes without hearing the accused. Judges who are subject to a charge or complaint against them should have it dealt with expeditiously and fairly in accordance with appropriate standards.
- The ability of the Minister of Justice to appoint presidents of certain courts with just the opinion of the General Assembly of Judges, appoint temporary presidents (repeatedly) and to nominate for judges' positions is further cause for concern. The IBAHRI and CCBE consider

that these amendments would allow the Minister to influence the composition of the judiciary by nominating and appointing persons of his preference.

- The proposed changes to the Constitutional Tribunal and in particular those requiring due consideration to be given to cases being heard in the order in which the applications are received rather than in order of priority and requiring the Tribunal to have at least 11 of its 15 judges consider every case are of especial concern. These amendments, whilst *prima facie* not objectionable, are likely to cripple the Constitutional Tribunal, which has been a robust defender of the Polish Constitution and the rights which it enshrines. If this legislation is passed, there will be a significant backlog of cases virtually paralysing the operation of the Constitutional Tribunal and allowing unconstitutional legislation to remain in operation for an unacceptable period of time. Other amendments, including changes to the appointment procedures for President and Vice-President of the Constitutional Tribunal and introducing time constraints to proceedings are also of concern, and the exercise of these powers will continue to be monitored by the IBAHRI and CCBE. The IBAHRI and CCBE believe that these amendments, taken cumulatively, are aimed at reducing the important power of the Constitutional Tribunal to consider the constitutionality of legislation as and when it is introduced. The IBAHRI and CCBE welcome the proposal to increase the influence of judicial bodies in appointment procedures to the Constitutional Tribunal.
- The IBAHRI and CCBE are also deeply concerned about the President of Poland's recent refusal to appoint judges nominated to various courts in Poland by the NCJ. Given the complete absence of reasons for his refusal, the IBAHRI and CCBE can only assume that his motives are inappropriate and reflect an intention to increase executive interference in the composition of courts. This appears to breach the Polish Constitution and the separation of powers doctrine.

Threats to the legal profession

The independence of the legal profession, while not enshrined in a binding international treaty, is a widely recognised and important element of the rule of law. A number of pieces of the legislation examined impacts negatively on the independence of lawyers and their professional associations. Particular concerns were identified as follows:

- Recently passed amendments conferring supervisory power on the Minister of Justice in respect of legal professional bodies are inappropriate to the extent they infringe the right to the self-government of professional organisations as enshrined in the Polish Constitution and the right to free association guaranteed by international law. These amendments include: the requirement for the submission of all association resolutions to the Minister of Justice; the power of the Minister of Justice to request the Supreme Court to overturn association resolutions; a new avenue of appeal to the Minister of Justice against an association resolution or disciplinary proceeding; and the power of the Minister of Justice to recommend investigations by a disciplinary court against a trainee advocate or legal adviser. The delegation was concerned to hear from the Polish bar associations that they fear that, if they challenge the constitutionality of this act, the government may set maximum fee caps.
- The introduction of a new three licence category for lawyers overseen by the Minister of Justice

gives the executive significant power over the admission to and management of the legal profession. The IBAHRI and CCBE acknowledge that many law graduates in Poland have been unable to find work and that it may be necessary to expand the profession. Any such expansion should, however, be overseen by an independent self-governing association, and preferably, should not involve the creation of a third profession. The most serious consequence of this legislation is the potential negative impact on the independence of professional associations. Due to increasing restrictions placed on these independent bodies, many advocates and legal advisers will be forced to transfer to the licensing regime. As a result, there may be a large percentage of Polish lawyers working under the supervision of the Minister of Justice rather than as independent practitioners supervised by professional associations.

- The IBAHRI and CCBE are also concerned about the proposed creation of a new disciplinary division within an appellate court for the purpose of adjudicating disciplinary cases against lawyers, which deprives the legal profession's self-governing bodies of their powers in relation to administering disciplinary proceedings. Significantly, the proposed legislation does not appear to apply to Law Licence holders. In particular, several of the provisions contained within the relevant legislation increase the supervisory powers of the Minister of Justice over the disciplinary proceedings of legal professionals. Such changes include a requirement that the Minister of Justice shall receive disciplinary court decisions and empower the Minister of Justice to instigate explanatory proceedings against an advocate or legal adviser and to appeal against disciplinary court decisions. While governments may have a role to play in establishing the regulatory framework for lawyers, legal professional associations must have the right to retain primary responsibility for disciplining members of the legal profession. This proposal undermines this right, and constitutes a breach of the right guaranteed by the Constitution and international law of legal professional associations to associate freely and remain independent.
- The IBAHRI and CCBE are also concerned about the proposed fee-capping measures for advocates and legal advisers. These measures introduce maximum fees, which, it appears to be justifiably feared, are likely to be set at an unreasonably low level. The fee-capping measure is viewed by the legal community as unwarranted executive interference imposed unfairly, as other professions have not been similarly targeted. The measures also appear to breach European Community anti-competition law.
- Additional measures, including proposals for those in the legal profession to make a personal asset declaration and to maintain a list of contracts with clients and submit these contracts to the courts may not be unconstitutional but are inappropriate as they appear designed primarily to detect cases where advocates and legal advisers have circumvented the fee-capping restrictions. The measure is ill considered and discriminatory in its application (it only applies to advocates and legal advisers and not to law licence holders). It is a threat to the independence of the Polish legal profession as it may force independent lawyers to transfer to the licensing regime.

The constraints on the legal profession proposed or imposed by the last Polish government seriously undermine the effective functioning of the justice system and the ability of lawyers to carry out their professional duties freely and in the best interests of their clients. They also undermine public confidence in the justice system.

Threats to the prosecution system

International standards do not require the same standard of independence for prosecutors as for the judiciary or the legal profession. However, there are certain limitations on the extent to which the executive may interfere in the role of the prosecutor.

The Polish system currently combines the role of Prosecutor General with Minister of Justice. While this has in the past appeared to operate effectively, the then-Minister of Justice Zbigniew Ziobro increasingly intervened publicly in particular cases. As a result of these interventions, the Polish Prosecutors' Association released an appeal calling for independence and impartiality amongst all prosecutors. It appears that the head of the Polish Prosecutors' Association was subsequently targeted, criticised publicly, charged with criminal offences and accused of having communist sympathies. This raises serious concerns for both the effectiveness of the prosecution system and the apparent breach of prosecutors' rights to freedom of association and freedom of expression.

The IBAHRI and CCBE consider that the combination of the roles of Minister of Justice and Prosecutor General is inappropriate in the context of Poland's political climate, particularly in light of the Minister of Justice's recently increased powers over the courts.

In summary, the IBAHRI and CCBE have found that many of the legislative provisions brought to its attention by various individuals and associations are deeply concerning and threatening to the rule of law in Poland. The IBAHRI and CCBE have concluded that most of the legislation examined has the effect of enabling the executive to encroach upon the independence of the judiciary, the legal profession and the prosecution service. These encroachments are unwarranted and unacceptable, and in some instances unconstitutional and in contravention of international legal standards. Further, the negative comments made by the executive against the judiciary reflect a disturbing attitude against judicial independence.

Summary of recommendations

The IBAHRI and CCBE make the following recommendations:

1. The Polish government must respect the separation of powers doctrine which guarantees separation of the executive, legislature and judiciary. Separation between these three arms is paramount in upholding the rule of law in any country, and is enshrined in Poland's Constitution as well as binding international law.
2. The Polish government must observe constitutional supremacy and must act in accordance with the Constitution and international standards at all times.
3. The executive is urged to end immediately the previous government's campaign of hostility against the judiciary, legal profession and prosecution system.
4. The Polish government should, as a matter of urgency, engage with the judiciary, legal profession and prosecution service to discuss the legislation outlined in this report that are of concern to these sectors and to the IBAHRI and CCBE alike.

Recommendations concerning threats to the judiciary

5. The executive must act in accordance with the rule of law, recognising in particular the fundamental principle of the independence of the judiciary.
6. Given their views about undue executive interference in the judiciary highlighted in the conclusions above, the IBAHRI and CCBE urge the Polish government to repeal the provisions permitting the involuntary secondment of judges. Any legislation providing for secondment in the absence of consent should ensure that this will happen only by virtue of a court decision and in terms of a clear set of criteria, should never take place during a case and should incur no forfeiture of the judge's original appointment.
7. The IBAHRI and CCBE also call upon the Polish government to:
 - a. withdraw the proposed constitutional amendment to introduce a trial period for trainee judges or, at a minimum, guarantee that the President of Poland will act on recommendations from the NCJ, ensuring that trial period decisions are made independently and impartially;
 - b. repeal the provisions granting the Minister of Justice a role in the newly introduced disciplinary proceedings relating to judges and also the time constraints imposed on the disciplinary tribunal to issue its consent to the commencement of proceedings against a judge; and
 - c. amend legislation to remove the role of the Minister of Justice in appointing presidents to certain courts and temporary judges.
8. The IBAHRI and CCBE call upon the President of Poland to issue forthwith reasons for his recent refusal to appoint nominated judges to various courts to avoid further speculation and reassure the judicial community. The IBAHRI and CCBE urge the President of Poland to observe the Constitution and to appoint judges as recommended by the NCJ.
9. The executive must desist immediately from interfering with the composition and administration of the Constitutional Tribunal. All provisions seeking to interfere with the order of cases considered by the Tribunal, the number of judges required to hear each case and the time constraints on considering cases must be withdrawn.
10. The IBAHRI and CCBE urge the Polish government to be temperate in its criticism of judicial decisions, to refrain from criticism regarding ongoing cases and to avoid attacking judges personally.

Recommendations concerning the legal profession

11. The IBAHRI and CCBE call on the Polish government to desist immediately from pursuing legislative measures that may compromise the independence of the legal profession.
12. There must be no influence exerted on the legal profession by the executive or any State organ in a manner which compromises the independence of the legal profession or the ability of individual lawyers to exercise their professional duties freely.

13. The IBAHRI and CCBE urge the Polish government to respect the self-government of legal professional associations. These associations must maintain their independence and must not be subjected to undue interference. This must not be bypassed by the creation of a new legal profession.

14. The government must ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and do not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. The Polish government is therefore called upon to repeal enacted and withdraw proposed legislative provisions that undermine the independence of the legal profession in Poland, including those that:

- confer a supervisory role on the Minister of Justice over legal professional associations;
- introduce a third category of lawyers (licensed lawyer) under the supervision of the Minister of Justice;
- confer a supervisory role on the Minister of Justice over disciplinary proceedings relating to legal professionals and reduce the role of legal professional associations;
- impose caps on fees charged by advocates and legal advisers;
- require the making of a personal asset declaration by persons in the legal profession in Poland in order to detect breaches of fee-caps; and
- require the keeping of a list of contracts dealing with remuneration between lawyer and client and the submission of these contracts to court, also designed to detect breaches of fee-caps.

15. The IBAHRI and CCBE urge the Polish government to engage in constructive dialogue with the legal profession to resolve ongoing tensions. Regular liaison meetings should be held with the legal profession to address issues of common interest and to resolve potential conflicts.

16. The IBAHRI and CCBE urge the Polish Bar Council and the National Council for Legal Advisers to reassess their entrance procedures and limitations on admission to reflect both the demand for lawyers in Poland and the number of law graduates entering the workforce.

Recommendations concerning the prosecution system

17. The government of Poland and prosecutors throughout Poland must respect the *UN Guidelines on the Role of Prosecutors*.

18. The government of Poland is urged to separate the functions of Prosecutor General and Minister of Justice. Failing the separation of these roles, the IBAHRI and CCBE call on the Minister of Justice to refrain from making public criticisms of ongoing cases, and to avoid personal criticisms for prosecutors as experienced by Mr Parulski. Should disciplinary action be required this should be done in accordance with established and transparent procedures.

19. The IBAHRI and CCBE give their full support to Mr Parulski and the Polish Prosecutors' Association, and call on the new government of Poland to respect the rights of prosecutors to free

expression and association, as guaranteed by the Polish Constitution and international law.

20. The IBAHRI and CCBE encourage the government to enter into constructive dialogue with regulatory bodies (such as the NCJ) and professional associations (such as the Polish Prosecutors' Association and the Polish Judges' Association) to determine whether it is appropriate to introduce the role of investigative judge.

Chapter One: Background

Introduction

This report is the result of a fact-finding mission to the Republic of Poland (Poland) undertaken by the IBAHRI and CCBE between 3-7 September 2007. The mission was prompted by concerns that a number of recently passed and proposed legislative amendments have or would have a negative impact upon the rule of law. Of particular concern was the actual and proposed increase in power and control over the judiciary and the legal profession (consisting of advocates and legal advisers) by the Minister of Justice and recent events involving inappropriate governmental interference in the prosecution system.

The delegation's terms of reference were

- 1) to examine the specific legislative instruments that have been alleged to have impacted on the independence of the judiciary and the legal profession, and to determine whether they comply with international legal standards (especially those binding on Poland) and the Polish Constitution;
- 2) to examine the current status of the judiciary in Poland and determine whether there is executive interference in their independence;
- 3) to examine the current status of the legal profession, and the independent bodies that represent the legal profession, to determine whether there are unacceptable constraints on their independence;
- 4) to identify any legal guarantees for the effective functioning of the justice system, and whether those guarantees are respected in practice;
- 5) to examine claims of government and judicial interference in the independence of the legal community, and specifically with the Polish National Council of Legal Advisers and the Polish Bar Council;
- 6) to determine whether there is any other impediment, either in law or in practice, which jeopardises the administration of justice;
- 7) to prepare a report for dissemination as appropriate; and
- 8) to make recommendations for future activities and projects to address any perceived problems.

Organisation of the Mission

The International Bar Association (IBA) is the world's largest lawyers' representative organisation comprising 30,000 individual lawyers and over 195 bar associations and law societies. In 1995, the IBA established the IBAHRI under the Honorary Presidency of Nelson Mandela. The IBAHRI is non-political and works across the Association, helping to promote, protect and enforce human rights under a just rule of law and to preserve the independence of the judiciary and the profession worldwide.

Created in 1960, CCBE is the officially recognised representative organisation for the legal profession in the European Union (EU) and the European Economic Area (EEA). The CCBE is incorporated in Belgium as an international non-profit-making association. The CCBE liaises between the bars and law societies from the member states of the EU and the EEA. It represents all such bars and law societies before the European institutions, and through them more than 700,000 European lawyers. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE enjoys consultative status with the Council of Europe. The CCBE places great emphasis on respect for human rights and the rule of law.

Delegation members

The HRI is grateful to the delegation members who accepted the invitation to take part in this mission. The delegation members were:

- The Right Hon Lady Cosgrove, former Judge of the First Division of the Inner House of the Court of Session Scotland, United Kingdom;
- Dr Rupert Wolff, President of CCBE, 2001, Vice President of Austrian Bar Association, Austria;
- Mr John Fish, President of CCBE 2002, Ireland;
- Mr Martin Solc, Chair of the IBA Public and Professional Interest Division, former President of Czech Bar Association, Czech Republic;
- Ms Felicia Johnston IBAHRI Programme Lawyer, United Kingdom; and
- Ms Brooke Hartigan, Rapporteur, United Kingdom.

Interviews and consultation

During the course of the mission, the delegation met with representatives of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary (NCJ), the Human Rights Ombudsman, the Polish Bar Council, the National Council for Legal Advisers, the Polish National Lawyers' Association (a lawyers' interest group), the Polish Prosecutors' Association, the Helsinki Foundation, the Parliamentary Legislative Committee, members of opposition parties, constitutional law experts from the University of Warsaw and the Polish Judges Association.

Despite repeated requests, the delegation was not able to meet with representatives from the government, which was then led by the Law and Justice Party. In particular, numerous requests were sent to the Minister of Justice, Zbigniew Ziobro and the Vice-Minister of Justice, Anrzej Kryze. A letter from Mr Kryze was sent to the delegation during the mission, claiming that only one week's notice had been provided. In fact, letters had been sent to the government at least three weeks prior to the visit to request meetings, and had been followed up with telephone calls to their offices. The letter from Mr Kryze stated, *inter alia*:

'I do not identify, however, any reasons for concern about the implementation of such values [concerning the autonomy of courts] including in the context of both adopted and planned

changes in the Polish legal system. The latter do not constitute any danger for the independence of legal professions and are aimed at the implementation of the constitutional rule of the subordinated role played by those professions in relation to public interest.’

The delegation had the services of an interpreter during most of the meetings. The delegation relied on the translations provided to it during the visit, as set out in the text of the report. The IBAHRI and CCBE have been informed that some changes have been made to the draft legislation examined within this report since the time of its visit. The versions considered and cited herein and those that were current as at 3 September 2007.

The IBAHRI, CCBE and the delegation members wish to express their gratitude and appreciation to those they interviewed and also to those who assisted them in so many ways during their visit.

Political Background

Following the Second World War, Poland formed part of the Communist Eastern Bloc. A series of political pacts in 1988 allowed for democratic elections in 1989, ending the rule of the Communist Party and its allies. In September 1989, Poland elected the first non-Communist government in Eastern Europe. The new government made a ‘return to Europe’ its priority, signing a trade and economic cooperation agreement with the European Economic Community (EEC) the same month as it was elected, thereby laying the foundations for greater economic cooperation between Poland and Western Europe. The so-called Europe Agreement was subsequently signed in 1991 setting out transitory measures for the next 10 years with the aim of establishing free trade, a move which also opened up political dialogue. The Europe Agreement entered into force in February 1994, followed two months later Poland’s formal application to the European Union (EU) for membership. In 2004, Poland formally acceded to the EU.

There have been four different governments since 1997: Jerzy Buzek’s (1997 – 2001); Leszek Miller’s (2001 – 2004); Jaroslaw Kaczyński’s (2005 – 2007), with Kazimierz Marcinkiewicz initially taking the position as Prime Minister, and the newly-elected centre-right government headed by Donald Tusk. Buzek’s government legislated under President Aleksander Kwaśniewski, and was based on a centre-right parliamentary coalition. Elections in 2001 led to the victory of the leftist coalition, headed by the Alliance of Democratic Left (SLD). Due to a change of government mid-negotiation for EU accession, Miller’s government accepted terms laid out by Brussels on a number of contentious issues such as the movement of Polish workers and agricultural subsidies. A referendum held on the Treaty of Accession resulted in a clear majority (77.45 per cent) of Polish citizens voting to support Poland’s membership in the EU.¹ The centre-right Law and Justice Party, headed by Jaroslaw Kaczyński, who initially declined to take the position of Prime Minister due to the fact that his twin brother had become President, won elections in September 2005. He has sparked controversy within the EU through his support of the death penalty and restrictions placed on gay rights protests.

¹ G Gruszczak, ‘Poland: A Reluctant Member’, in Eds EE Zeff & EB Pirro, *The European Union and Member States*, Lynne Rienner Publishers, London, 2006 p294

Recent political events

On 7 September 2007, the final day of the delegation's visit to Poland, two motions: one for the dissolution of the Sejm (the Parliament) and one for the dismissal of the government, were tabled before the Sejm. The Law and Justice Party, which had been ruling in a minority in parliament since it broke up the governing coalition on 13 August, voted for dissolution, as did the largest opposition party, Civic Platform (PO). Two thirds of members of parliament were required to vote for the motions, and the Law and Justice Party and PO, the two largest parties, were joined by post-communist groups. In accordance with article 98 of the Polish Constitution, which requires an election within 45 days of dissolution, a parliamentary election was held on 21 October 2007.

In these elections, the centre-right Civic Platform party, headed by Donald Tusk, won government. The Law and Justice party is now the main opposition party. As the mission was conducted and the report written during the period in which the Law and Justice party were in power. References to actions of the Polish government throughout this report should be read in this light. However, the new government will be similarly responsible for upholding and defending the separation of powers and the rule of law in Poland. The IBAHRI and CCBE invite the new government to take note of this report and the concerns and recommendations outlined within it, and anticipate that the Civic Platform party will respect the rule of law.

Poland's constitutional arrangements

Poland is a Republic governed by a Constitution passed by the National Assembly on 2 April 1997. In May of the same year a referendum on the new Constitution was held and was approved. The Constitution came into effect on 17 October 1997.

The Constitution forms the basis of the Polish political, judicial and legislative systems. It governs the relationships between these systems and bodies related to them, and guarantees individual civil rights and freedoms. These rights and freedoms include all those usually found in a democratic country: equality in law; freedom of conscience and religion; right to fair trial; right to vote; and certain family welfare and child rights provisions. The Constitution also imposes certain duties and obligations on Polish citizens such as concern for the common good and loyalty to the Polish Republic.

As the supreme Polish legal document, the Constitution must be upheld by all organs of the Polish state. A separate Constitutional Tribunal allows Polish citizens to bring a complaint against any breach of the Constitution.

Under article 235, a bill to amend the Constitution may be submitted by the President, the Senate or by at least one fifth of the statutory number of deputies. The bill must then be adopted by the Sejm by a majority of at least two thirds of votes in the presence of at least half of the statutory number of deputies. From there it must then be passed by the Senate by an absolute majority of votes in the presence of at least half of the statutory members.

The Governmental system of Poland

1. Executive

THE COUNCIL OF MINISTERS

The Council of Ministers is also referred to as the cabinet, and is the primary body that exercises executive power. The Council of Ministers is headed by the Prime Minister and consists of ministers, heads of central institutions and heads of ministerial departments but may also contain committee and project chairpersons, as determined by the Prime Minister. Once the President appoints the Council of Ministers they take an oath swearing loyalty to the Constitution and the Republic and its laws. Currently the Council of Ministers has 21 members.

In its exercise of executive power, the Council of Ministers signs and revokes international agreements, manages current state policy and is responsible for the operation of government. Individual ministers may also be responsible for the tasks assigned to them by the Prime Minister, and any breach of the law related to these offices may be put before the State Tribunal, a court appointed by the Sejm with Sejm members acting as judges, for trial.

THE PRESIDENT

The President, currently Lech Kaczyński, plays a central role in the Polish political and legal systems. The Constitution clearly defines his role as the head of state as well as setting out his obligations, rights and scope of authority. He is the head of the executive authority, supreme representative of the Polish state and supreme commander of the armed forces.

Though the President has free choice in selecting the Prime Minister, in practice it is usual for him to appoint the politician who holds a majority in the Sejm. The President holds certain legislative powers: he can veto legislation, though this veto can be overruled by a 60 per cent majority vote in the Sejm providing more than half its statutory members are present. He can also refer certain bills to the Constitutional Tribunal to assess their compliance with the Constitution in advance of signing them and bringing them into force. He also holds the right of clemency, although in practice any decision to overturn a final court verdict is taken only after consultation with the Minister of Justice. The President calls elections to the Sejm and Senate, and has the right to shorten their terms in exceptional circumstances. He also holds the power to call national referenda on proposed legislation.

In addition to this, in his capacity as supreme representative of the Polish State, the President is responsible for representing Poland's interests internationally, and therefore ratifies international agreements, and has the power of nomination and recall of ambassadors.

THE PRIME MINISTER

The Prime Minister, currently Donald Tusk, heads the Council of Ministers, or Cabinet, and the civil service. In this role he fulfils various duties to the state through directing the work of the Cabinet and governing the country within the guidelines set out in the Constitution and other relevant

legislation. There are a number of high level state posts he may not hold whilst Prime Minister, such as President, Chairman of the National Bank, or an Ombudsman.

Upon taking office, the Prime Minister must pledge to follow the Constitution and other laws, and to act for the wellbeing of Polish citizens. Once he has taken up his post, his dismissal is difficult to achieve as the Constitution stipulates that the republic must be ruled by parliamentary majority. The Council of Ministers may hold a vote of no confidence. Essentially this entails obtaining a majority vote by statutory representatives for the motion put forward by a minimum of 46 representatives and naming a new candidate for the post of Prime Minister. The Prime Minister may also dissolve the Council of Ministers, usually at the first session of the newly elected Sejm, but also in the case of resignation or a vote of no confidence.

RELATIONSHIP BETWEEN THE INCUMBENT PRESIDENT AND FORMER PRIME MINISTER

In 2006 controversy was sparked when the President appointed his twin brother to the post of Prime Minister. Jaroslaw Kaczyński was appointed to succeed Prime Minister Kazimierz Marcinkiewicz despite the fact that both brothers had previously claimed they would never take up the two most powerful political positions in the republic simultaneously.² When the Law and Justice Party, led by Jaroslaw, won the September 2005 elections he declined to take up the position of Prime Minister, saying it would send the wrong signal to the outside world if he and his twin held the two most powerful jobs in Polish politics. A year later he took up the position when Marcinkiewicz resigned for undisclosed reasons, saying it had been suggested by members of his party and that he was the best candidate.

2. Legislature

There are two legislative bodies which constitute the Polish Parliament: the Sejm, the lower house, and the Senate, the upper house. The Sejm contains 460 elected deputies, whilst the Senate is made up of 100 Senators. Polish politics is based on a party system. Deputies are elected to the Sejm through secret ballot in local constituencies, and sit as representatives for the constituency where they won their mandate. However, when voting, deputies are not required to consult or follow their electorates. Rather they remain bound by the Constitution to vote in a way which they believe will benefit the whole republic.

In practice, most legislation is brought to the house through parliamentary 'clubs' in the Sejm or Senate, made up of members of the same political party. Current parliamentary clubs in the Sejm and Senate are:

- Citizens' Platform (PO)
- Law and Justice Party (PIS)
- Democratic Left Alliance (SLD)
- Self-Defence Party (Samoobrona)
- League of Polish Families (LPR)

² Judy Dempsey, 'Polish President to Appoint his Twin as Prime Minister' (*New York Times* 10 July 2006).

- Polish Peasant Party (PSL)
- Peoples' National Movement (RLN)

Deputies also have the right to question members of the Council of Ministers, and to establish and work in committees reviewing issues before the parliament relating to legislation, public life or state administration. There are currently 25 permanent committees of this nature, including the Justice and Human Rights Committee, the European Committee, and the State Treasury.

3. The Judiciary

THE NATIONAL COUNCIL OF THE JUDICIARY (NCJ)

The NCJ is an organisation comprised of 25 members and is responsible for many activities, including (but not limited to) assessing candidates for judicial office, adopting resolutions on referring legislation to the Constitutional Tribunal, petitioning the President for the appointment of judges, and appointing a disciplinary ombudsman for the judges of common courts.³ The NCJ is comprised of: the First President of the Supreme Court; the President of the Supreme Administrative Court; the Minister of Justice; one representative nominated by the President of Poland; four MPs nominated by the Sejm; two senators nominated by the Senate; two Supreme Court judges selected by the General Assembly of Supreme Court Judges; two Administrative Court judges selected by the General Assembly of Supreme Administrative Court Judges; two Appeal Court judges selected from the General Assembly of Appeal Court Judges; eight circuit court judges selected by the General Assembly of Circuit Court judges; and one military court judge selected by the General Assembly of Military Court judges.

THE COURT SYSTEM

All judges throughout Poland are appointed by the President upon a motion by the NCJ. There are three main courts: the Supreme Court; the Constitutional Tribunal; and the State Tribunal.

The Supreme Court

The Supreme Court is the court of last resort, dealing with appeals against judgement in the lower district, voivodeship (provincial) and appeal courts. It also has the authority to resolve disputed issues in specific cases, and to issue resolutions to clarify particular legal provisions.

The Constitutional Tribunal

The Constitutional Tribunal primarily oversees the compliance of statutory law, legislation and international agreements with the Polish Constitution. It resolves disputes on the constitutionality of activities of state institutions, constitutional complaints, and disputes over the power of constitutional bodies. It also regulates the aims and activities of political parties to ensure their compliance with the Constitution. The Constitutional Tribunal is made up of 15 judges who sit for nine year terms. They are chosen by the Sejm and are intended to be fully independent. A proposal is underway to increase the role of the NCJ and other judges' organisations in proposing candidates to the Constitutional Tribunal, which has the full support of the IBAHRI and CCBE.

³ See The Act on the National Council of the Judiciary dated 27 July 2001, Article 2.1.

The State Tribunal

The State Tribunal is reserved for rulings concerning those who hold the highest offices of state in Poland. It rules on cases concerning infringement of the Constitution or crimes committed by the President, government ministers, the President of the National Bank and other administrative heads and senior state officials. The First President of the Supreme Court heads the tribunal, supported by two deputies and 16 members of the State Tribunal chosen from outside the Sejm. The composition of the Tribunal is established at the first sitting of a new Sejm. Its members must have no criminal record and must not have had their civil rights revoked or be in the employment of the state administration.

General Courts

The general courts include district, voivodeship (provincial) and appeal courts, and are supervised by the Supreme Court. They adjudicate on matters concerning family, civil, labour and criminal law.

Administrative Courts

The administrative courts adjudicate cases involving legal persons or private citizens and administrative bodies. They settle issues surrounding the compliance of administrative bodies with the law.

Military Courts

The military courts adjudicate crimes committed by soldiers in active service as well as matters relating to prisoners of war and crimes committed by civilians employed in military units.

The Legal System

Polish law follows the Civil Law tradition and can be divided into two elements: universally binding law and internal law. The sources of universally binding Polish law are the Constitution, statutes, ratified international agreements and resolutions. To enter into force, the statutes, regulations and enactments of local law have to be published in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

All other acts, for example resolutions adopted by Sejm, Senate and the Council of Ministers, constitute a part of internal law and relate only to the organs of public administration and self-government.

Composition of the legal profession

In Poland, the provision of legal advice and representation of parties before the courts lies within the domain of two professions: advocates and legal advisors. Both operate within their own self-regulatory professional societies: the Polish Bar Council and the National Council of Legal Advisors. While originally quite different, the functions the professions have become progressively more similar. Criminal and fiscal offence cases, however, remain solely within the advocates' domain.

In the period of political and economic transformation in Poland during the 1990s, the number of young people studying at universities increased dramatically and studies in law became particularly popular. This resulted in a growing number of graduates who did not find employment. The self-governing bodies have attracted criticism since this time due to allegations that they excessively restricted entry into the profession. The delegation was informed that admission procedures have

been expanded in recent years. To become an advocate or legal advisor it is necessary to complete both legal studies and a traineeship, as well as passing a professional qualifications examination. Admission to the professional traineeship is based on the results of examinations conducted by district bar or legal advisor councils.

International Law in Polish Courts

The status of international law is specifically established by the Polish Constitution:

Article 87

The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

Article 88 (3)

International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.

Article 89

(1) Ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute - if such agreement concerns:

- 1) peace, alliances, political or military treaties;
- 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
- 3) the Republic of Poland's membership in an international organization;
- 4) considerable financial responsibilities imposed on the State;
- 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

(2) The President of the Council of Ministers (the Prime Minister) shall inform the House of Representatives (Sejm) of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.

(3) The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute.

Article 90

(1) The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

(2) A statute, granting consent for ratification of an international agreement referred to in Paragraph (1), shall be passed by the House of Representatives (Sejm) by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

(3) Granting of consent for ratification of such agreement may also be passed by a nationwide

referendum in accordance with the provisions of Article 125.

(4) Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the House of Representatives (Sejm) by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Article 91

(1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

(2) An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

(3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

International Obligations

Poland has been very active in committing itself to a wide range of regional and international human rights treaties.

As a member of the EU, Poland is now a party to many human rights instruments including: the Convention for the Protection of Human Rights & Fundamental Freedoms; the European Social Charter; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and the Council of Europe Convention on the Prevention of Terrorism.

At the international level, Poland is a signatory to all the main United Nations human rights treaties, including: the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Rome Statute of the International Criminal Court.

Poland has been criticised for breaching some of the international standards to which it has committed itself. These criticisms have covered issues including: lengthy judicial proceedings; lengthy pre-trial detention; inadequate judicial training; insufficient access to lawyers and legal aid; discrimination against lesbian, gay, bisexual and transgender persons; discrimination against Jewish people; debates surrounding the reintroduction of the death penalty; restriction on abortion; and the occurrence of extraordinary rendition flights.⁴

⁴ 'Council of Europe Memorandum to the Polish Government: Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights' at <https://wcd.coe.int/ViewDoc.jsp?id=1155005&BackColorIntern=FE65B&BackColorIntranet=FE65B&BackColorLogged=FFC679> 20 June 2007)

Chapter Two: Threats to the judiciary in Poland

A number of legislative amendments concerning the judiciary in Poland have been introduced since the Law and Justice Party came to power on 25 September 2005. Some of these amendments may threaten the independence of the judiciary, breach the Polish Constitution and/ or undermine the separation of powers in Poland. When considered cumulatively, these proposals assume sinister significance and appear to constitute a deliberate campaign by the former government to increase executive interference in and undermine the independence of the judiciary.

When examining these amendments, it is important to recognise some very real failings in the current judicial system in Poland. As stated by the Human Rights Ombudsman:

‘The activity of the judicial system should be improved. As it currently is, the duration of handling individual court cases frequently infringes on the right to hearing a case without undue delay, guaranteed in Article 45(1) of the Constitution, as well as treaty standards binding on Poland.’⁵

The delegation also received reports of congested courts and allegations of corruption amongst some members of the judiciary. However, any changes to the judicial process to address these issues must accord with the stringent standards enshrined in the Polish Constitution and international law.

This report is not intended to be an exhaustive examination of all legislative reforms affecting the judiciary in Poland. Only some of those that may have an adverse effect on judicial independence are examined.

Independence of the judiciary

The independence of the judiciary is a key element in the rule of law. It is enshrined in both international treaty and individual legal systems, and is protected by most national Constitutions. The Constitution of the Republic of Poland guarantees both the separation of powers and the independence of the judiciary:

Article 10

1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

⁵ ‘Summary of Report of the Commissioner for Civil Rights Protection with Results from the Activity of his Office in 2006 submitted to the Sejm and Senate Pursuant to Article 212 of the Constitution of the Republic of Poland’ (*Rzecznik Praw Obywatelskich* 2006), 7.

Article 173

The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Article 178

(1) Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

(2) Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.

(3) A Judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Judicial independence in Poland is currently threatened by legislative amendments which, inter alia:

1. Empower the Minister of Justice (who is also Prosecutor-General and Attorney-General) to second judges between courts or locations against their will;
2. Permit assessors, a category of trainee trial judges in Poland, to act as fully fledged judges despite a lack of suitable qualification and appropriate experience;
3. Provide for the promotion of all trainee judges to fully-fledged judges, but limiting their tenure to between two and four years;
4. Change the disciplinary procedures, and particularly suspension procedures, for judges who commit intentional crimes;
5. Change the disciplinary procedures for all judges;
6. Alter the method of the appointment of presidents of certain courts and temporary judges, empowering the Minister of Justice to appoint temporary presidents, create vacancies and nominate judges to those vacancies, thereby reducing the role of the NCJ in those appointments and giving the Minister of Justice greater influence over the composition of the judiciary; and
7. Increase interference by the executive in the composition and administration of the Constitutional Tribunal.

Another specific issue of concern is the unprecedented refusal of the President of Poland to appoint judges proposed to various courts by the NCJ.

These issues will now be considered in greater depth.

1. Power of the Minister of Justice to move judges without their consent

Under Article 180(2) of the Polish Constitution, judges may not be moved or transferred without their consent unless by virtue of a court judgment and only in circumstances provided for in statute. Despite this, the delegation was informed that amendments incorporated in the Act of June 29, 2007 amending the Act – the Law on the system of common courts and certain other acts (the 29 June Courts Act) (most of which entered into force on 31 August 2007) have undermined this guarantee and potentially may even breach the Constitutional protection. Under the 29 June Courts Act, changes to Article 77 of the Law on the System of Common Courts permit the Minister of Justice to second a judge to a different court in a different location without his or her agreement for a period of up to six months. This power is of serious concern, and has the potential to be abused. The relevant provision reads as follows:

- in Article 77:

a) § 1 shall read as follows:

‘§ 1 The Minister of Justice may second a judge, with his approval, to perform the duties of a judge or administrative functions:

- 1) in another court,
- 2) in the Ministry of Justice or another organisational unit subordinated to the Minister of Justice or overseen by him,
- 3) in the Supreme Court – on the motion of the First President of the Supreme Court,
- 4) in an administrative court – on the motion of the President of the Supreme Administrative Court

for a limited time, not longer than two years, or for an unlimited time.’”

- In Article 77:

e) after § 7, § 7a and 7b shall be added with the following wording:

“§ 7 a If it is in the interest of the judiciary, the secondment of a judge in circumstances referred to in § 1 sub para 1 may take place even without his consent, for a period not longer than six months. The secondment of a judge without his consent may be repeated not earlier than after a lapse of three years.

§ 7 b. The secondment of a judge in circumstances referred to in § 1 sub para 2 may take place even without his consent, for a period not longer than three months within a year. The secondment of a judge without his consent may be repeated not earlier than after a lapse of two years.’;

In the explanatory material to this Act, these provisions were justified on grounds of administration of justice.

The interests of the administration of justice often require that judges be delegated outside the place where they perform their duties, which gives rise to a number of inconveniences. ... The delegation of a judge, even without his consent, in order to strengthen a judicial body for a certain period is a necessary instrument for supervision.

The explanatory material notes that the NCJ rejected the proposal to extend the secondment of judges to situations without a judge's consent and against his or her will. In the course of its enquiries, the delegation was made aware that most members of the judiciary are strongly opposed to this amendment and are highly suspicious of the government's motives. It is thought that this provision will permit the government to remove judges for political reasons. This is of particular concern where a case involves government interests, as the government has the power to alter the composition of the court in its favour. There is also a fear that this amendment could be used as a form of pressure or punishment for a judge whose judgements are unpopular with the government. The delegation was informed about a senior judge who was removed to a low-level village court where it appears that the only motive for doing so was because her father allegedly had Communist ties. Such reports are of serious concern and suggest that these powers may have been abused.

Members of the judiciary interviewed by the delegation insisted that provisions dealing with secondment of judges against their will were unnecessary. The delegation was told that cases where there are insufficient judges in a particular area, there are measures in place to arrange for voluntary secondment or an alternative arrangement. Even if there were cases in which the movement of judges against their will was administratively necessary, the IBAHRI and CCBE consider that this kind of power should only be exercised by a court or with the consent of the judge, should never take place during a case, and should incur no forfeiture of his or her original appointment.

International law, various charters, statutes and principles of the European and the international legal community protect judges from being moved to another court or elsewhere without their consent. Article 3.4 of the European Charter on the Statute for Judges states:

A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

The explanatory memorandum for that Charter then states:

3.4 The Charter enshrines the irremovability of judges, which means that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is provided for within a disciplinary framework, when a lawful re-organization of the court system takes place involving for example the closing down of a court or a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute. Nevertheless, since the problem of transferring a judge without his or her consent is highly sensitive, it is recalled that under the terms of paragraph 1.4 he or she has a general right of appeal before an independent authority, which can investigate the legitimacy of the transfer. In fact, this right of appeal can also remedy situations which have not been specifically catered for in the provisions of the Charter where a judge has such an excessive workload as to be unable in practice to carry out his or her responsibilities normally.

The IBAHRI and CCBE are therefore of the opinion that this amendment is likely to breach both the Polish Constitution and regional and international law, and allows an unacceptable level of executive interference with the judiciary. The IBAHRI and CCBE are extremely concerned that this measure is already in place. Even if the measure is not abused, the IBAHRI and CCBE are concerned that the power may threaten judges who fear that an unwelcome decision may result in their secondment. Furthermore, the existence of such a threat, even if never used, undermines both the appearance of judicial independence and public confidence in the judicial system.

2. Assessor judges

The delegation was informed of the existence in the Polish judicial system of trainee judges, known colloquially as ‘assessors’. Under Article 134 § 1 of the Act of 27 July 2001 on the Common Court System, the Minister of Justice is empowered to appoint as an assessor a person who has completed articling as a judge or prosecutor has passed relevant examinations, and who meets the conditions specified in the said Act (which includes being a Polish citizen, being capable of fully exercising his or her civil and civic rights and being of irreproachable character). Under Article 135 § 1 of the Act on the Common Court System, the Justice Minister can, upon agreement of the regional court board, entrust a judge’s functions in a district court to an assessor for a definite period not exceeding 4 years.

The delegation was informed that the conferring of full judicial powers on assessors has been challenged in the Constitutional Tribunal. While the Constitutional Tribunal has not yet made a decision on the challenge, it has indicated that it is likely to hold the amendment to be inconsistent with the Constitution. Article 45 of the Constitution guarantees a fair trial before a ‘competent, impartial and independent court’. A challenge was mounted in which it was asserted a court case decided by a trainee judge who was authorised to act as such under statute was a case ‘resolved by

an organ which was not a sovereign and independent court'.⁶ The challenge was supported by the Human Rights Ombudsman, who stated in his 2006 report:

'The Commissioner joined two complaints before the Constitutional Tribunal claiming that the provisions of the Act organising the courts of general jurisdiction, which entrust trainee judges with the activities intended for judges, are inconsistent with the Constitution. The Commissioner agreed with the claimants that the provisions cited in the complaint violate the right to trial before court, which is one of the most fundamental rights guaranteed by the Constitution as it entrusts judicial functions to persons not having the status of a judge. The Constitutional Tribunal indicated to the Sejm that it was necessary to amend the laws establishing the administration of justice so as to ensure full implementation of the constitutional standards for the right to trial.'⁷

Members of the legal community are opposed to assessors on the grounds that they are appointed by the Minister of Justice and are therefore considered 'political' and 'dependent', thereby jeopardising the independence of the judiciary. As this issue is already being considered by the Constitutional Tribunal, the delegation did not examine the legislation in detail. However, the IBAHRI and CCBE are concerned about the implications of the legislation, which appears to bestow judicial powers on persons not suitably qualified for judicial office.

3. Limited tenure of trainee judges

The delegation was informed that, in response to the likely declaration by the Constitutional tribunal of invalidity of the act governing assessors considered above, the government has prepared the Presidential draft Act amending the Constitution of the Republic of Poland,⁸ which has completed its first reading and is now being referred to a parliamentary committee. This amendment proposes to amend the Constitution to allow trainee judges to be appointed for a finite initial training period. It appears that the former government considered this amendment would overcome objections to the assessor issue examined above. Many stakeholders in Poland are concerned that this amendment threatens judicial security of tenure and independence.

The draft Act seeks, inter alia, to amend article 179 of the Constitution to dispose of the guarantee of the indefinite tenure of first time judges and to establish an initial appointment of two to four years.

Article 179 of the Constitution currently states:

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

⁶ Taken from 'Justification' document, explanatory material to the Presidential draft Act amending the Constitution of the Republic of Poland

⁷ Summary of Report of the Commissioner for Civil Rights Protection with Results from the Activity of his Office in 2006 submitted to the Sejm and Senate Pursuant to Article 212 of the Constitution of the Republic of Poland (*Rzecznik Praw Obywatelskich* 2006), 11-12.

⁸ At the time of writing, this draft Act had been introduced into the Sejm, the lower house of parliament, and had been referred to a parliamentary committee after its first reading.

The amended article would state:

- (1) Judges shall be appointed by the President of the Republic of Poland, on the motion of the National Council of the Judiciary;
- (2) Judges are appointed for an indefinite time, however, judges of courts ruling exclusively at the first instance are appointed for the first time for two to four years.

Further, the amendment proposes that any trainee judge serving on the day of this Act's coming into effect be given an appointment as a fully-fledged judge for a period of four years or in 'justified cases' (undefined in the draft Act), an indefinite appointment after six months of this Act taking effect and provided the trainee has two years' experience.⁹

The previous government justified this amendment stating that:

'The new position replacing that of trainee judge is designed as an intermediate stage between court articling and the proper judicial service guaranteed by the attribute of irremovability. It consists on one hand in guaranteeing full sovereignty to the judge appointed for the first time and, on the other, it should ensure that the judicial service is performed only by people possessing high professional and moral qualifications. The National Council of the Judiciary, which is obligated to set the criteria for evaluating candidates of the position of judge, will determine the criteria for assessing the qualifications of a judge standing for the first time for a permanent appointment.'

This proposal has generated significant opposition throughout the legal community. On one level, members of the judiciary fear an erosion of the standards and level of professionalism that they have spent much time building and maintaining over the years by ill-qualified and under-trained adjudicators. As with assessors, the proposal to confer on trainee judges full judicial rights (excluding security of tenure) is resented by a large proportion of the judicial community. There are also serious concerns about the independence of these trainee judges throughout the duration of their initial trial appointment. It is feared that trainee judges will not make decisions contrary to government policy as they will be seeking permanent appointment at the end of this period. However, this is unlikely to occur as the legislation specifically requires the NCJ to set the criteria for evaluating candidates for permanent appointment. Most stakeholders viewed the proposal as one measure of many aimed at gradually reducing and destroying the independence of the judiciary. However, some stakeholders were less concerned as they considered that the provision only concerned trainee judges and the NCJ remained the primary body for appointing judges to a permanent position, so there would be little impact on judicial independence.

Information provided in the explanatory material to this draft Act indicated that district courts, as at October 2006, employed 5237 judges and of those, 1637 were trainee judges. This means almost a quarter of judges working in district courts are trainee judges, suggesting that the legislation may have a significant impact.¹⁰

⁹ Draft Article 2 Presidential draft Act amending the Constitution of the Republic of Poland.

¹⁰ Taken from 'Justification' document, explanatory material to the Presidential draft Act amending the Constitution of the Republic of Poland

A judge's right to security of tenure is protected in international law and by most Constitutions. However, as noted in the draft Act's supporting documentation, the concept of a trial period for new judges exists in the German system (*Richter auf Probe*) and is not prohibited under international law.

There are differing opinions in international law concerning the significance of indefinite tenure in guaranteeing judicial independence. In a number of rulings and concluding observations the UN Human Rights Committee (HRC) has strongly endorsed safeguards surrounding judicial tenure as a prerequisite for judicial independence.

The former government of Poland offered the 1998 European Charter of the Statute for Judges as support for their cause.¹¹ Article 3.3 of the Charter states the following:

Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion.¹²

Unfortunately, the Charter does not define what is meant by 'necessarily short'.

It should be noted that the Charter also envisages, however, that an authority independent of the executive and legislative arms of government be permitted to intervene on matters such as the appointment, career progression and termination of office of a judge. Articles 1.3 and 3.1 are relevant in this regard:

1.3 In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

...

3.1 The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by an independent authority referred to at paragraph 1.3 or on its proposal, or its recommendation or with its agreement or following its opinion.

More on this 'independent authority' is offered in the explanatory memorandum to the European Charter on the Statute for Judges at clause 1.3:

¹¹ Taken from 'Justification' document, explanatory material to the Presidential draft Act amending the Constitution of the Republic of Poland

¹² Article 3.3 European Charter on the statute for judges, available at www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf, 10 September 2007.

1.3 The Charter provides for the intervention of a body independent from the executive and the legislature where a decision is required on the selection, recruitment or appointment of judges, the development of their careers or the termination of their office.

The wording of this provision is intended to cover a variety of situations, ranging from the mere provision of advice for an executive or legislative body to actual decisions by the independent body.

Account had to be taken here of certain differences in the national systems. Some countries would find it difficult to accept an independent body replacing the political body responsible for appointments. However, the requirement in such cases to obtain at least the recommendation or the opinion of an independent body is bound to be a great incentive, if not an actual obligation, for the official appointments body. In the spirit of the Charter, recommendations and opinions of the independent body do not constitute guarantees that they will in a general way be followed in practice. The political or administrative authority which does not follow such recommendation or opinion should at the very least be obliged to make known its reasons for its refusal to do so.

The wording of this provision of the Charter also enables the independent body to intervene either with a straightforward opinion, an official opinion, a recommendation, a proposal or an actual decision.

The question arose of the membership of the independent body. The Charter at this point stipulates that at least one half of the body's members should be judges elected by their peers, which means that it wants neither to allow judges to be in a minority in the independent body nor to require them to be in the majority. In view of the variety of philosophical conceptions and debates in European States, a reference to a minimum of 50 per cent judges emerged as capable of ensuring a fairly high level of safeguards while respecting any other considerations of principle prevailing in different national systems.

The Charter states that judges who are members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature.

There would be a risk of party-political bias in the appointment and role of judges under such a procedure. Judges sitting on the independent body are expected, precisely, to refrain from seeking the favour of political parties or bodies that are themselves appointed or elected by or through such parties.

Finally, without insisting on any particular voting system, the Charter indicates that the method of electing judges to this body must guarantee the widest representation of judges.

...

3.3 The recruitment procedure in some national systems provides for a probationary period before a permanent judicial appointment is made, and others recruit judges on fixed-term renewable contracts.

In such cases the decision not to make a permanent appointment or not to renew an appointment can only be taken by the independent authority referred to at paragraph 1.3 hereof or upon its proposal, recommendation or following its opinion. Safeguards must therefore be provided through the intervention of the independent authority. In so far as the suitability for appointment to judicial office of an individual who is the subject of a trial period may be under discussion, the Charter lays down that the right to make a reference to an independent authority, as referred to in paragraph 1.4, is applicable to such an individual. The draft legislation incorporates this requirement, specifying the NCJ to be responsible for determining appointment criteria. The Polish Constitution further reinforces this, stating that judges are appointed by the President on the motion of the NCJ (article 179).

The proposed trial period of Polish trainee judges aligns with the ‘Consultative Council of European Judges (CCJE) Opinion no 1 (2001) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe’ on standards concerning the independence of the judiciary and the irremovability of judges. The relevant articles are pasted below:

48. European practice is generally to make full-time appointments until the legal retirement age. This is the approach least problematic from the viewpoint of independence.

49. Many civil law systems involve periods of training or probation for new judges.

50. Certain countries make some appointments for a limited period of years (eg In the case of the German Federal Constitutional Court, for 12 years). Judges are commonly also appointed to international courts (eg The European Court of Justice and the European Court of Human Rights) for limited periods.

...

52. The CCJE considered that where, exceptionally, a full-time judicial appointment is for a limited period, it should not be renewable unless procedures exist ensuring that:

- (i) the judge, if he or she wishes, is considered for re-appointment by the appointing body, and
- (ii) the decision regarding re-appointment is made entirely objectively and on merit and without taking into account political considerations.

53. The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance. In addition, the proposal for a finite tenure for trainee judges is supported by the UN Principles on the Independence of the Judiciary.

The UN General Principles on the Independence of the Judiciary

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

The IBAHRI and CCBE therefore do not consider the proposed amendment conflicts with current international law, provided that permanent appointments are made on the recommendation of the NCJ only, and that the government is not responsible for appointing judges to indefinite tenure at the expiration of the trial period (excluding the automatic approval role envisaged by the Constitution). As the preceding paragraphs show, trial periods or finite periods of tenure may and are pursued in other European countries and there is little to suggest that such would automatically impinge upon the independence of the judiciary.

However, it must be recognised that in Poland's particular political climate, the existence of probationary periods or renewal requirements could constitute a threat to judicial independence. If judges serving a trial period fear that the President of Poland may refuse to appoint them to a permanent position as he has recently done in respect of an entire list of recommended candidates, their independence during that trial period could be severely compromised.

The amendment is of additional concern when considered in conjunction with the range of legislative proposals recently passed or introduced by the last Polish government. Consequently, the IBAHRI and CCBE are concerned about the potential for abuse of this provision.

The IBAHRI and CCBE fear that, given the number of other executive encroachments on judicial independence, appointed trainee judges may be subjected to unwarranted political pressure during their initial period of appointment. There is also significant concern that the President's recent refusal to appoint judges reflects an intention to increase his influence over appointments while decreasing the role of the NCJ. The IBAHRI and CCBE therefore remain concerned that, as expressed by much of the Polish legal community, the amendment may constitute an attempt by the former government to gain an unacceptable level of influence over the judiciary.

4. Amendments to the disciplinary procedures for prosecuting judges who commit intentional crimes

Under Article 181 of the Polish Constitution, judges are immune from automatic criminal responsibility and from being detained, although they may be arrested and detained when apprehended in the commission of an offence:

Article 181

A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall neither be detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

Judges working in the Constitutional Tribunal have the same protection under Article 196:

Article 196

A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.

According to the explanatory material to the 29 June *Courts Act*, 'judicial immunity' in Poland:

'... is connected with the specific social role that judges play in the state, justified by constitutionally protected values and serving to ensure the impartial exercise of the administration of justice, and in consequence implementation of the principles of legalism and legal order. It is an element of the functioning of the democratic social order and a guarantee of due protection of constitutional freedoms and rights of the individual.'

Prior to the enactment of the 29 June *Courts Act*, judges in Poland were 'immune' from being held criminally responsible or having their liberty in any way impeded until decided otherwise by an appropriate court (a disciplinary court), except in cases involving the commission of an intentional offence. This means that a judge in Poland could not face criminal proceedings without the approval of the disciplinary court. If and when a judge was apprehended in the commission of an

offence and was subsequently detained, the president of the relevant court could order immediate release whilst a disciplinary court decided whether or not to grant consent for proceedings to commence against the judge. Only the president of a court could order the suspension of a judge after their arrest and this is noted to have occurred only where a judge was apprehended while committing an offence such as driving whilst intoxicated. The delegation was informed that decisions by the disciplinary courts on whether or not to remove a judge's immunity could last up to seven months.

Judicial immunity in this form, while unusual, also exists in Russia and Hungary. In the former, all judges possess immunity from criminal prosecution, subject to removal only by the judicial qualification commissions. The prosecution may not open an investigation against a judge without the commission lifting the immunity. The purpose of immunity is to protect judges not from the consequences of their actual misdeeds but from politically motivated, even contrived, prosecutions launched against judges unpopular with law enforcement chiefs or political officials. In Hungary, except when apprehended in the act, the institution of criminal proceedings is possible only with the consent of the President of Poland.

The grounds for the draft Act explain further:

'Judges constitute a specific body among the legal professional, differing from other public functions not only in terms of their high level of qualifications but also their guarantee of independence. These guarantees are regarded as a necessary element of the legal status of a judge in the state and constitute a condition for his exercise of the administration of justice. Judicial immunity is connected with the specific social role that judges play in the state, justified by constitutionally protected values and serving to ensure the impartial exercise of the administration of justice, and in consequence implementation of the principles of legalism and legal order. It is an element of the functioning of the democratic social order and a guarantee of due protection of constitutional freedoms and rights of the individual....Judges in Poland are entitled to formal immunity, understood as a negative procedural condition regarding criminal proceedings (in the broad sense of that term), material immunity as regards liability for an offence and the privilege of inviolability. Maintenance of the above institution is justified in the grounds that immunity (to the appropriate extent) may serve to ensure the impartiality of a judge and ensure his freedom to assess the state of affairs, whilst restricting the possibility of pressure being asserted by instigating unjustified court proceedings against him, and providing him with greater decision-making freedom. Judicial immunity is intended to ensure the proper administration of justice. Therefore, it should not be regarded as a privilege of the person holding judicial office, but rather as a guarantee of proper performance of a social function.'

The new article 130 of the Law on the system of common courts and certain other acts extends the power to order a judge's immediate suspension to the Minister of Justice in cases where the judge was arrested after being apprehended committing an intentional offence or in situations where the nature of the act committed by a judge necessitates his or her 'prompt removal' due to the solemnity of the court or important interests of service, until the matter is heard by a disciplinary court.

Article 130. § 1. If a judge was arrested because he was caught in the commission of an intentional offence or if, on account of the nature of the act committed by a judge the solemnity of the court or important interests of service necessitate prompt removal of such judge from the performance of his duties, the president of a court or the Minister of Justice may order an immediate break in the performance of such judge's duties until a disciplinary court issues a resolutions, but not longer than for one month.

§ 2. If a judge referred to in § 1 performs the function of a court president, the Minister of Justice shall order a break in the performance of his duties.

§ 3. The president of a court or the Minister of Justice shall notify the disciplinary court about the issue of an order referred to in § 1 within three days of the date of its issue. The disciplinary court shall promptly, but not later than before the lapse of the time frame for which such break was ordered, shall issue a resolution to suspend the judge in his duties or shall repeal the decision ordering a break in his duties. The disciplinary court shall notify the judge about the sitting, if it deems it appropriate.

Although it is understandable what is meant by a judge being apprehended in the commission of an offence, the situation in which the Minister of Justice may order the immediate suspension of a judge where the Minister considers that 'the solemnity of the court' or the 'important interests of service' is vague and undefined in the act. This is capable of being interpreted to allow the Minister to remove a judge on grounds that are purely subjective in a broad range of circumstances and is therefore open to being abused.

An amendment to Article 80 §2c of the Act of 27th July 2001 - Law on the common courts system obliges the disciplinary court to issue a resolution consenting to the prosecution of a judge where there is a sufficiently justified suspicion that he or she has committed an offence. Previously, the disciplinary court had the discretion whether or not to allow the prosecution to proceed (this will remain in force until 1 January 2008, when the new arrangements will commence).

29) In Article 80:

(b) § 2 c shall read as follows:

'§ 2c. The disciplinary court shall adopt a resolution to allow pressing criminal charges against a judge, provided there is a sufficiently grounded suspicion that he or she has committed an offence. The resolution contains a decision permitting the pressing of criminal charges against a judge together with the grounds thereof.'

(c) after §2c, §2d-2h are added with the following wording:

'2d. The disciplinary court shall examine a motion to permit pressing criminal charges against a judge within fourteen days of as of the day such motion is filed with the disciplinary court, subject to Article 80(a) § 1.

§2e. Prior to adopting a resolution, the disciplinary court holds a hearing of the disciplinary spokesman and a judge who represents the authority or the person who applied for permission, if they reappear. Their non-appearance shall not stop the examination of the motion.

§2f. The judge affected by the proceedings shall have the right to see the documents which have been attached to the motion, unless the public prosecutor when filing the motion made it clear that such documents or a part thereof may not be made available to such judge in the interest of preparatory proceedings.

§2g. In the event referred to in §2f, the president of the disciplinary court declines the judge's request to see documents in the scope specified by the public prosecutor.

§2h. If a public prosecutor when filing the motion to permit the pressing of criminal charges against a judge also motions for permission to detain the judge pending trial, the resolution permitting pressing criminal charges against the judge also includes permission to arrest the judge and to detain him pending trial, unless the disciplinary court rules otherwise.'

Where a crime which has a maximum punishment of less than eight years has been committed, a deadline of 14 days now applies to the issuing of the resolution calculated from the date the disciplinary tribunal receives the application for consent to prosecute a judge. In these cases, the disciplinary tribunal **must** issue the resolution allowing charges to be pressed if there is a sufficiently grounded suspicion that he or she has committed an offence. This appears to remove from the disciplinary tribunal the discretion as to whether or not to allow prosecution to occur.

Where the crime is punishable by a maximum punishment of at least eight years, the situation is different:

30) after Article 80, Articles 80a-80d are added with the following wording:

'Article 80a. § 1. If a judge has been arrested and the public prosecutor files a motion to permit pressing criminal charges against such judge for having committed an offence or an intentional misdemeanour liable to punishment of imprisonment of up to at least 8 years, and at the same time motions for permission to detain such judge pending trial, the disciplinary court shall examine such motion within 24 hours as of the time it was filed. The judge shall be brought to a sitting of the disciplinary court by the authority which arrested him.

§ 2. The public prosecutor shall promptly deliver a copy of the motion referred to in § 1, together with a copy of the documents enclosed with the motion to the First President of the Supreme Court.

§ 3. the filing of an appeal shall not stay the implementation of the appealed resolution. However, the First President of the Supreme Court, on the motion of the judge, may stay its implementation in the part concerning permission for detention pending trial. If the implementation of such resolution is stayed, the public prosecutor, with the participation of a

judge, may perform only acts related to legal proceedings.

§ 4. A judge may file a motion to stay the implementation of a resolution in the part concerning permission for detention pending trial to the minutes immediately after the resolution is adopted to permit pressing criminal charges against the judge and to detain him pending trial. The judge should be instructed about his right to file such motion.

§ 5. A copy of the motion referred to in § 4, including a copy of the minutes from the sitting shall be delivered promptly by the disciplinary court to the First President of the Supreme Court.’

Thus, for crimes with a maximum penalty of at least eight years’ imprisonment, the resolution must be issued within 24 hours. The resolution consenting to the prosecution of a judge may also be made in his or her absence and *without* the need to hear the judge. This latter change was justified by the former government as being aimed at guaranteeing the interests of administrative justice and avoiding any unjustified delay.

An additional amendment to Article 80 §3 of the Act of 27th July 2001 - Law on the Common Courts System introduced a deadline for the second instance disciplinary tribunal considering any appeal, thereby expediting the procedure for issuing consent to prosecute a judge.

In explanatory material, the intention of Article 130 is stated as being to grant the Minister of Justice the right to order the suspension of a judge apprehended in the act of committing an offence specifically when:

‘...the president of the relevant court has desisted from issuing the relevant decision without due cause. In order to enable the Minister of Justice to exercise the rights conferred to him, an obligation is imposed for the president to immediately inform the Minister of Justice of the reasons for desisting from ordering the suspension of a judge from his duties. This amendment, however, gives rise to a need to amend art. 131 §1 of the Act (art. 1 (31) and (32) of the draft). This amendment was rejected by the National Judiciary Council.’

The explanatory material also asserts that the amendments concerning the disciplining of judges were made to ‘eliminate the possibility of [any] denial of consent to prosecute a judge where there is a justified suspicion that he has committed an offence and expedition of the procedure to obtain such consent’.

In the course of its enquiries, the delegation was made aware of widespread dissatisfaction with the changes made to provisions dealing with judges’ immunity on the ground that it gave the Minister of Justice control over certain aspects of the disciplinary process applicable to members of the judiciary (ie by being able to order the immediate suspension of a judge). Most persons and associations interviewed by the delegation viewed these amendments as an attempt by the then-Minister of Justice and the former government generally to increase government influence over the judiciary, to interfere with their independence and to weaken the power and role of bodies such as the NCJ.

Another view of the legislation, however, is that it was necessary to address some of the concerns

about the judiciary which are currently causing concern in Poland. According to this source, there is a widely held perception of the judiciary that it is slow, incompetent and corrupt. To the public, the judiciary is something of an enigma: it is a closed community and the disciplinary proceedings taking place within it are not publicised. Previously, when presidents of courts were the only persons with the power to remove a judge's immunity, there was a perception that this would rarely occur and that presidents were less likely to be impartial when assessing the behaviour of one of their own.

It is a well established principle of international law that judges who are subject to a charge or complaint against them in their judicial and professional capacity shall have the charge or complaint dealt with expeditiously and fairly in accordance with an appropriate procedure. Similarly, international law contains the principle that a judge can be suspended or removed only for reasons of incapacity or behaviour that renders him or her unfit to discharge his or her duties. Judges must also be granted a fair trial.

Allowing the Minister or Justice to suspend a judge could be perceived as undue interference by the executive and therefore unconstitutional. It may also mean that this provision breaches Article 1.3 of the European Charter on the Statute for Judges which envisages intervention in matters concerning judges by an authority independent of the executive and legislative arms of government:

1.3 In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

This statute goes further and envisages the imposition of a sanction upon a judge having committed a dereliction of his duties only where a tribunal or authority composed of one half of elected judges has decided, proposed, recommended or agreed to such imposition.

5. Liability

5.1 The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed of at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

Notably, at the end of Article 5.1 above, the decision to impose a sanction by an executive authority (such as the Minister of Justice) is open to an appeal to a higher judicial authority, something which is not included in the provision introduced by the former Polish government.

The United Nations Basic Principles on the Independence of the Judiciary permits suspension of a judge for reasons of incapacity or behaviour ‘that renders them unfit to discharge their duties’. Similar to the European Charter on the Statute for Judges, the Principles suggest that all decisions in disciplinary, suspension or removal proceedings should be subject to independent review. It is important to note that these instruments do not guarantee criminal immunity for judges. The relevant provisions of the Principles are as follows:

Immunity:

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper act or omissions in the exercise of their judicial functions.

Removal:

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

The potential for misuse of this power in the current political climate is of concern and the delegation was informed of an occasion where such misuse may have occurred. According to one source, a judge was suspended recently on grounds that they had been apprehended committing the act of receiving a bribe. This source alleged that the crime was a set-up to remove a judge who had fallen out of favour with the ruling party. The delegation was unable, however, to corroborate this story. The report is nonetheless useful to demonstrate the potential consequences of the legislative changes. This change appears to be another attempt by the ruling party to control and interfere with the judiciary.

The IBAHRI and CCBE are highly suspicious of the motive for the legislative change conferring on the Minister of Justice the ability to suspend a judge. It is an established principle of international law that judges be subject to suspension and other sanctions by an independent authority, such as the NCJ or a disciplinary tribunal. The IBAHRI and CCBE are also concerned about the constraints imposed on the disciplinary tribunal to issue its consent to the commencement of proceedings against a judge. As raised above, it appears that the disciplinary tribunal’s power has been curbed significantly, such that the decision whether or not to consent to proceedings against a judge is no longer within its remit.

5. Changes to disciplinary proceedings

An Act dealing with disciplinary proceedings for legal professionals was introduced to Parliament on 7 September 2007: The Act on Disciplinary Proceedings against Certain Legal Professionals (the Disciplinary Proceedings Act). Under this Act, a new disciplinary division is created within an appellate court for the purpose of adjudicating disciplinary cases.

The delegation investigated the implications of the Disciplinary Proceedings Act for lawyers during the mission (see chapter three), but did not examine the implications for the judiciary. However, it is of concern that the Act appears to increase the role of the Minister of Justice over the judiciary in disciplinary cases. Unfortunately, due to time constraints during the mission, it was not possible to examine these implications further.

6. Judicial Appointments

The 29 June Act also includes several amendments dealing with judicial appointments which may be of concern and which have caused consternation amongst the Polish judicial and legal community. These amendments include granting new powers to the Minister of Justice to:

- appoint presidents to certain courts;
- appoint temporary presidents; and
- create vacant judge's positions, and nominate persons for those positions.

APPOINTMENT OF COURT PRESIDENTS

The 29 June Courts Act makes provision for the Minister of Justice to appoint presidents to the circuit and district courts, after obtaining the opinion of a general meeting of judges and the president of the relevant superior court. Previously, whilst the Minister of Justice was responsible for the appointment of the presidents of these courts, he had to receive the agreement of the relevant General Assembly of Judges to do so. If he did not receive the agreement he could appeal to the NCJ and if the NCJ did not give its agreement, he could not appoint his preferred person.

The relevant provisions read as follows:

7) § 1 of Article 24 shall read as follows:

§ 1. The president of a circuit court shall be appointed by the Minister of Justice from among judges of the court of appeals or the circuit court, after obtaining the opinion of a general meeting of judges of the circuit and the opinion of the president of the superior court of appeals.

8) in Article 25, §§ 1 and 2 shall read as follows:

§ 1. The president of a district court shall be appointed by the Minister of Justice from among judges of the circuit court or the district court, after obtaining the opinion of the committee of the superior circuit court and the president of the superior circuit court.

§ 2. Provisions of Article 23 § § 2-5 shall apply respectively to the appointment of a president of a district court, and committee shall be bound by a time limit of fourteen days to issue its opinion.”

TEMPORARY PRESIDENT OF THE COURT

The 29 June Courts Act also makes provision for the Minister of Justice to designate a judge to the role of president of a court of appeals, a circuit court and a district court where a president ‘was not appointed’, for reasons undisclosed in the Act, and in cases where there is more than one deputy president or where a deputy president was not appointed, for a temporary period of six months.

6) in Article 22:

a) after §1, §1a shall be added with the following wording:

‘§1a. The president of a court of appeals shall decide about the assignment of work in a court of appeals, and the president of a circuit court shall do the same in a circuit court and in district courts operating in a judicial circuit, by the end of November of each year at the latest, and shall also decide about the rules governing replacements of judges and court clerks and the rules governing the assignment of cases to individual judges and court clerks, unless the Act provides otherwise.’,

b) after §5, §6 shall be added with the following wording:

‘§6. If the president of a court was not appointed, his function shall be performed by the deputy president. In a court where more than one deputy president was appointed, the functions of the president shall be performed by a deputy president designated by the Minister of Justice, and if a deputy president was not appointed, then a judge of this or superior court designed by the Minister of Justice for a six-month period. A judge who last performed the function of a president of this court may not be designed under this procedure.’

The explanatory material to this Act asserts that this amendment was introduced as a means of ‘endeavouring to make the operation of courts administration more efficient and ... to enable a unit to be managed where the president’s term of office ends or acts of God occur.’

During the mission, the delegation became aware of a widespread fear that, under the new provisions, the Minister of Justice may attempt to delay the appointment of a president or deputy president in these courts for some time so that he may appoint a temporary candidate of his choice (for example, someone with an allegiance to his political cause), secure in the knowledge that if he or she proves unsuitable, the term of their appointment is limited to six months. Further, there were concerns that the Minister of Justice could make these temporary appointments repeatedly, thereby avoiding usual appointment procedures.

CREATION OF VACANT JUDGE'S POSITIONSS

The Act also provides that the Minister of Justice 'having regard to rational use of the staff of common courts of law, the demands arising from the workload of respective courts, shall assign new judge's positions to individual courts'. Provision is also made for the Minister of Justice to put forward candidates for vacant judge's positions to the NCJ.

22) Article 59 shall read as follows:

'Article 59. The Minister of Justice may also put forward a candidate for every vacant judge's position referred to in Article 55 § 2 to the National Council for Judiciary. Provisions of Article 58 §§ 1-3 shall not apply. Provision of Article 57 shall apply to information presented by a candidate for a judge's position in the application form.'

All three of these changes were reported by members of the judiciary and the legal profession alike as being part of a general initiative by the then-Minister of Justice to increase his influence over all aspects of the judicial system. It is not known at this stage what weight the Minister of Justice must now give to the opinions of the General Assembly of Judges and the presidents of superior courts when appointing presidents to courts. The concern expressed to the delegation, therefore, is that the Minister of Justice could use his powers to appoint presidents to the circuit and district courts upon whom he felt he could exert political influence or who displayed a particular political leaning, while disregarding the opinions of the General Assembly of Judges and/or the NCJ.

The delegation also heard reports of concerns about the weakened role of the NCJ, which is seen by those in the legal profession as a cornerstone for upholding and protecting the independence of the judiciary in Poland. At the time of the visit, the delegation was informed repeatedly that the government (then led by the Law and Justice Party), and particularly the Minister of Justice and the President of Poland, were highly suspicious of legal associations such as the NCJ and intended to weaken them as much as possible. At a meeting with the International Academy of Trial Lawyers on their visit to Poland on 6 October 2006 the President of Poland commented that judges have

'...enormous power over people; ...that their authority is controlled only within their professional association. ...[J]udges are controlled only and exclusively by judges and their power is actually greater indeed than that of a politician, greater often than that of someone who has extensive property. This is a special privilege but also a special responsibility. This responsibility – as things are in this sinful world – is shown well by some and is abused by others.'¹⁴

There is nothing in international law which stipulates specifically the appropriate method of judicial selection. Principle 10 of the Basic Principles on the Independence of the Judiciary

¹⁴ 'The mission should be carried out with integrity', Speech by Lech Kaczbski, President of the Republic of Poland speaking at a meeting with the International Academy of Trial Lawyers on their visit in Poland, available at <http://www.president.pl/x.node?id=2011993&eventId=7027193> 9 September 2007

requires that the method chosen for selection, however, ‘shall safeguard against judicial appointments for improper motives’.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Article 14 (1) of the ICCPR provides that everyone is entitled to a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’. The same right is guaranteed under article 45 of the Polish Constitution. The HRC considered this requirement in its general comment No 13 and noted that it raises several issues with regard to ‘the manner in which judges are appointed, the qualifications for appointments, and the duration of their terms of office, the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.’

There are serious concerns that the Minister of Justice’s powers under this Act could be used in an inappropriate manner to influence the composition of the judiciary and the appointment of the president of courts. While it may be acceptable for the Minister of Justice to exercise these powers after seeking the opinion of the General Assembly of Judges, the NCJ, and the relevant president of a court, the exercise of the powers without these opinions would threaten judicial independence.

In a democratic society, judges are seen as the guardians of human rights and fundamental freedoms and their independence from the executive and legislature is paramount to ensuring that these rights and freedoms continue to be protected. Given the statements made against the judiciary by the former government, and the apparent campaign of legislative measures designed to undermine the judiciary, the IBAHRI and CCBE are suspicious of the motivation for the proposed change concerning the selection of court presidents on a permanent and temporary basis and the nomination of judges for vacant judge positions.

7. Changes to the Constitutional Tribunal

Perhaps the most significant and worrying proposals are those contained in a series of proposed changes to the Constitutional Tribunal. These amendments are in the Draft law on amending the law on the Constitutional Tribunal (the Constitutional Tribunal Act), which has been submitted to the Parliament. These amendments:

- i. require due consideration to be given to hearing cases in the order in which the applications are received rather than in order of priority;

- ii. change the rules for appointing the President and Deputy President of the Constitutional Tribunal;
- iii. require the Tribunal to have at least 11 of its 15 judges consider all cases, rather than the current option of having between three and five judges ruling on a given case; and
- iv. introduce time constraints to proceedings, instituting a rule to ensure cases are heard at least three months after the application is received but in less than six months.

I. CASES HEARD IN ORDER OF RECEIPT

Presently, the President of the Constitutional Tribunal decides the order of cases to be heard by the Tribunal. Where he decides that one case should be given higher priority than another, he has the power to adjust the order of cases accordingly. The Constitutional Tribunal Act proposes to change this by requiring the Tribunal to give due to consideration to hearing cases in the order of their receipt. Draft article 37 reads as follows:

6) Article 37 shall read:

'Article 37.1. The Tribunal orders that petitions, legal questions and constitutional complaints, where no formal pediments exist that preclude their hearing, be heard; and assigns the terms of the hearing with due consideration of the sequence of incoming cases.'

Should the proposed changes be instituted, it is feared that the President's power would be diminished significantly and a backlog of cases would build quickly, although this will depend how closely the tribunal will follow this article. As the article states that only 'due consideration' should be given, it is possible that this may be ignored where a case or cases are of a significantly high priority. If, however, the article is followed in practice, stakeholders expressed significant concern that the amendment will create a backlog that will prevent applications to the Tribunal about these and any other legislative changes being considered quickly in the future. A worst case scenario was envisaged whereby the system was paralysed through an influx of less significant cases, delaying indefinitely the hearing of important cases.

The explanatory memorandum to the Constitutional Tribunal Act merely states 'The purpose of the change in article 37(1) is to adjust the language to the full panel principle adopted in the bill'. This clearly fails to explain the true impact of this amendment and its alleged justification by the government is unclear.

International law does not explicitly prohibit the inclusion of legislative provisions determining the order that cases should be heard by a particular court. The concern with this proposed amendment falls under the more general prohibition against any interference with judicial process as contained in Article 4 of the UN Principles on the Independence of the Judiciary.

...

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Imposing restrictions on court administration, which ordinarily falls in the domain of a president of a court, is likely to constitute 'inappropriate or unwarranted interference'. The impact of this provision is heightened by the fact that it involves interference with the working of the highest court in Poland; the Court that bears the responsibility for assessing the constitutionality of legislative proposals. The delegation was informed that there is already a delay in having matters considered by the Tribunal. In requiring it to consider matters in the order of their receipt, new matters including those raised in connection with this and other legislative proposals will not be considered for a lengthy period of time.

II. SELECTION OF PRESIDENT AND VICE-PRESIDENT OF THE CONSTITUTIONAL TRIBUNAL

Currently, the President and Vice-President of the Constitutional Tribunal are appointed by the President of Poland from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal. Article 194 of the Polish Constitution provides as follows:

Article 194

(1) The Constitutional Tribunal shall be composed of 15 judges chosen individually by the House of Representatives (Sejm) for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.

(2) The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

Pursuant to Article 15 of The law of 1 August 1997 regarding the Constitutional Tribunal (Journal of Legislation No 102, Entry 643 as amended later), the President of Poland was presented with two candidates to choose from for the position of President or Vice President of the Tribunal. In the Constitutional Tribunal Act, it is proposed that this Article be amended and the number of candidates increased to three, as follows:

Article 1. The law of August 1, 1997 regarding the Constitutional Tribunal (Journal of Legislation No. 102, Entry 643 as amended later) is hereby amended as follows:

1) Article 15 shall now read:

‘Article 15.1. The President and Vice President of the Tribunal are appointed from among three candidates presented for each of those positions by the General Assembly. The nomination is for three years but for no longer than until the end of the term for the Tribunal judge.

2. Candidates for the office of President or Vice President of the Tribunal are selected by the General Assembly from all Tribunal judges who received the largest number of votes in a consecutive secret ballot.

3. Selection of candidates for the office of President or Vice President of the Tribunal should be made no earlier than three months and no later than one month prior to the end of the term of office of the [outgoing] President or Vice President and if the position of President or Vice President becomes vacant – within one month.

4. The General Assembly meeting in its part dealing with candidate selection for the position of President or Vice President of the Tribunal is presided over by the oldest Tribunal judge participating in the General Assembly.’

The former government justified this amendment by stating:

‘By giving the President authority to name the President or Vice-President of the Tribunal, the statute intended to have the operations of the Tribunal managed by a person enjoying the trust of the other judges, (therefore the President is bound by the guidance of the general assembly) as well as the trust of the head of the State. It must be concluded that the current language of Article 15 of the law regarding the Constitutional Tribunal, by limiting the number of candidates presented to two, i.e. to the lowest possible number of candidates compatible with the Constitution, is a significant impediment to the President’s selection of persons sufficiently trustworthy to perform those functions. The result of the limitation of the number of candidates to only two is that it makes it much easier to exert pressure on the President of the Republic to make a specific choice. Subjecting the head of state to this kind of pressure actually denies him his constitutional prerogative to make an actual choice from among the candidates.

For all of the above reasons, it should be concluded that it is justified to increase the number of candidates for the position of the Constitutional Tribunal President or Vice-President to three persons. Such a change, while retaining the principle of selection for each of these positions of a person enjoying the support of the other Tribunal judges, at the same time enables the President of the Republic to exercise his constitutional right to choose.’

Although this justification at first sight appears reasonable, legal stakeholders in Poland fear that the amendment would allow the President of Poland to delay the process of appointing a President and Vice-President to the Constitutional Tribunal until after a number of currently serving judges have reached the end of their term (the selection of candidates must take place no later than three months before the end of the term of the incumbent President and Vice-President). The delegation

was informed that a number of judges are shortly to reach the end of their term. These judges would then be replaced by a parliamentary vote, pursuant to Article 194 of the Polish Constitution, which may be decided by the ruling coalition. If that is the case, it is possible that a significant number of the new judges will be those with a political leaning towards the Law and Justice party. Increasing the pool of candidates for President and Vice-President of the Constitutional Tribunal would then enable one of these new judges sympathetic to the party to be chosen by the President of Poland. The executive could then have influence over the highest and most powerful level of the judiciary. It is arguable that this level of involvement of the executive in the composition of the highest court in Poland could constitute a violation of the principle of separation of powers.

Article 195 of the Constitution guarantees the independence of Constitutional Tribunal judges:

Article 195

(1) Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.

The European Charter on the Statute for Judges clearly details the need for independence from the executive in the appointment of judges:

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

...

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.¹⁵

The UN Principles on the Independence of the Judiciary too, contains provisions guaranteeing the promotion of judges on objective grounds as opposed to political.

¹⁵ European Charter on the Statute for Judges, adopted at a multilateral meeting organised by the Council of Europe, at www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf (8 to 10 July 1998)

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

...

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

The IBAHRI and CCBE are aware that the particular environment in Poland at this time has resulted in these amendments causing concern. However, the amendment cannot be said to violate the independence of the judiciary as it only adds one more candidate to the selection pool and retains the important requirement that candidates for these positions be nominated by the General Assembly of the Constitutional Tribunal. Given that nominees must be approved by at least 50 per cent of the Sejm, the influence of the Law and Justice Party is lessened somewhat. In stating this, the IBAHRI and CCBE will continue to monitor the situation to assess whether it appears that the power is being used inappropriately.

III. INCREASE IN THE NUMBER OF JUDGES TO CONSIDER CASES

The Constitutional Tribunal Act also introduces an amendment requiring at least 11 judges to consider all cases, rather than the current option to have between three and five judges ruling on a given case:

3) Article 25 shall read as follows:

‘Article 25.1. The full Tribunal must be present to adjudicate.

2. Adjudication by a full Tribunal requires participation of at least 11 judges. Each hearing is presided over by either the President or Vice President. If this is not feasible – the oldest Tribunal judge presides.’

The judicial community in Poland views this amendment with alarm. Requiring so many judges to decide each case would have the obvious effect of significantly prolonging the time taken to consider cases and, when considered in conjunction with the amendment on the order of hearing cases, may allow unconstitutional laws to remain in force for an inappropriately prolonged period. The combined effect of the two provisions is likely to cripple the administration of the Constitutional Tribunal.

Aside from hindering the business of the Tribunal, this provision is perceived as further unwarranted interference by the Polish government in the judiciary, which falls foul of Article 4 of the UN Basic Principles on the Independence of the Judiciary.

...

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

IV. TIME CONSTRAINTS

The new amendments also propose the introduction of time constraints to proceedings dealt with by the Constitutional Tribunal under which cases must be heard at least three months but less than six months after the application is received. Stakeholders reported that this proposal is practically impossible, particularly when combined with the necessary delays that would occur as a result of the other amendments.

The government justification for this amendment is not known, although it is possible that it was introduced to suggest that the government is in favour of cases being decided more swiftly. Such an intention appears to be negated by the other amendments that will cause significant delay. If such constraints were introduced and imposed, it is very likely that cases would not be able to be considered in a comprehensive and just fashion.

In the absence of sound justification for instituting these changes, and particularly those discussed in (i) and (iv), it would seem that the former government was launching a serious attack on judicial independence and potentially crippling the one institution which can scrutinise and overturn legislation on grounds of unconstitutionality. This is particularly of concern when viewed in conjunction with the number of proposed and passed pieces of legislation that have recently been declared unconstitutional, have been referred to the Constitutional Tribunal, or have been considered likely to be unconstitutional by the IBAHRI and CCBE. Such amendments will then be able to remain in force despite their serious concerns. The IBAHRI and CCBE regard this amendment as a flagrant disregard of the independence of the highest ranking court in Poland and as evidence that the motives of this and the other legislative proposals discussed in this report are improper and unconstitutional.

Recent refusal of the President to appoint judges

Merely days before the IBAHRI/CCBE delegation visited Poland, the President of Poland had for the first time in history refused to appoint all persons nominated by the NCJ to various courts throughout the country. The IBAHRI and CCBE understand that the refusal to appoint these judges still stands. Pursuant to article 179 of the Constitution, the President has the responsibility (ie he shall) appoint judges. Article 179 reads as follows:

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Most of the Polish legal community interpret this article of the Constitution as conferring on the President a responsibility to appoint, but not a right to refuse to appoint judges once a motion of the NCJ has been submitted; an interpretation that is supported by the text. The President did not give any reason for his recent refusal to appoint the nominated judges. Some in Poland interpret this as a deliberate breach of the Polish Constitution and a sign of things to come: that is, that the influence of the executive over the judiciary is set to increase thereby diminishing the independence and clear separation of powers. Others are content to 'wait and see', suggesting that the President will appoint judges at some point in the future. Stakeholders reported that these judges who have undergone full judicial training are now without employment.

It is a matter of serious concern that the President of Poland appears to be challenging the constitutionally established procedure for the appointment of judges. The IBAHRI and CCBE will continue to monitor this situation.

Chapter Three: Threats to the Legal Profession in Poland

The independence of the legal profession, while not enshrined in a binding international treaty, is an important element of the rule of law. It has been recognised by the General Assembly in the UN Basic Principles on the Role of Lawyers, by the Council of Europe in its ‘Recommendation’ (2000)21; and in numerous Human Rights Commission resolutions.¹⁶

In 1994 the Commission on Human Rights, in Resolution 1994/41, created the position of UN Special Rapporteur on the Independence of Judges and Lawyers. This was in response to weakening safeguards for lawyers and judges and increased attacks on their independence throughout the world. These efforts indicate the importance placed on the independence of lawyers and the key role they play in maintaining a fair justice system.

A number of pieces of legislation have been proposed in Poland that may impact negatively on the independence of lawyers and their professional associations. As outlined in Chapter 1, the provision of legal advice and the representation of parties before the courts lie within the domain of two professions: advocates and legal advisors.

At the end of 2004, the draft Act Amending the Acts on Advocates, Aegal Advisers and Notaries was drafted and passed by the Parliament. It introduced substantial amendment to the laws regulating the legal professions and led to an opening of these professions without the need for entrants to undergo a traineeship or even pass an examination. As a consequence, the self-governing bodies of the legal professions were deprived of any influence over entry to the profession. The self-governing bodies of advocates and legal advisers submitted complaints to the Constitutional Tribunal. The Constitutional Tribunal, in response to the complaint issued by the Polish Bar Council in April 2006 and the complaint issued by the National Council of Legal Advisers in November 2006, ruled against the provisions and consequently they lost force.

Since that time, the former government introduced additional legislation dealing with the legal profession, some of which remains in draft form and is being considered by Parliament and some of which has already been passed. The legislative proposals include the following:

1. supervision of legal profession professional bodies by the Minister of Justice;
2. the introduction of a new three-licence third category of the legal profession under the direct supervision of the Minister of Justice;
3. changes to disciplinary proceedings of lawyers to increase the powers of the Minister of Justice;
4. the capping of advocates’ and legal advisers’ fees;
5. the requirement for those in the legal profession to make a personal asset declaration; and
6. the requirement for those in the legal profession to maintain a list of contracts with clients and submit these contracts to the courts.

¹⁶ European Charter on the Statute for Judges, adopted at a multilateral meeting organised by the Council of Europe, at www.coe.int/t/e/legal_affairs/legal_co-operation/legal_professionals/judges/instruments_and_documents/charte%20eng.pdf (8 to 10 July 1998) including Commission on Human Rights resolutions E/CN.4/RES/1994/41, E/CN.4/RES/1995/36, E/CN.4/RES/1996/34, E/CN.4/RES/1997/23, E/CN.4/RES/1998/35, E/CN.4/RES/1999/31, E/CN.4/RES/2000/42, E/CN.4/RES/2002/43, E/CN.4/RES/2003/39, E/CN.4/RES/2003/43, E/CN.4/RES/1993/44

1. Supervision of legal professional bodies by the Minister of Justice

In March 2007, the 29 March 2007 Amending the Act on the Legal Profession and certain other acts ('the 29 March 2007 Act') entered into force. This Act increases the supervisory powers of the Minister of Justice toward lawyers' self-governing professional bodies, including in relation to disciplinary proceedings. The relevant extract of the 29 March Act reads as follows:

2. The Minister of Justice shall supervise the activities of the professional self-government to the extent and in the manner specific in the Act.

Amendments introduced in this Act included:

- The requirement for legal professional associations to convey to the Minister of Justice a copy of all of their resolutions within 21 days of its adoption¹⁷, which reads as follows:

The following Art. 13a shall be added after Art. 13:

'Art. 13a. The Bar and law society governing bodies shall forward a copy of every resolution to the Minister of Justice within 21 days of its adoption.'

- Introduction of the power of the Justice Minister to request the Supreme Court to overturn resolutions of the Bar's governing bodies which are contrary to law. While not covered in the Act, the delegation heard unsubstantiated reports that the Minister of Justice can suspend association resolutions pending the Supreme Court's decision. With respect to advocates, the relevant provision reads as follows:

3) Para 1 and 2 in Art. 14 shall read thus:

'1. The Minister of Justice shall request the Supreme Court to repeal resolutions of the Bar's governing bodies which are contrary to the law within a period of three months from the date of their passing. When a resolution appealed against constitutes a flagrant violation of the law, that period shall be six months.

2. The Supreme Court shall either uphold the resolution appealed against or shall repeal the resolution and send the matter back for re-consideration to the appropriate body of the Bar or law society together with instructions as to how the matter should be resolved. A motion which is filed behind schedule shall not be considered.';

¹⁷ Article 13a of the Advocates' Law, which is identical to article 47.1 of the Act on Legal Advisers.

Regarding legal advisers, the provision reads:

5) Art. 47 shall read thus:

‘Art. 47. 1. Professional self-government bodies forward a copy of every resolution to the Minister of Justice within 21 days of their adoption.

2. The Minister of Justice shall request the Supreme Court to repeal illegal resolutions of a professional self-government body which are contrary to the law within a period of three months from the date of their delivery. When a resolution appealed against constitutes a flagrant violation of the law, that period shall be six months. The Supreme Court shall either uphold the resolution appealed against or shall repeal the resolution and send the matter back for re-consideration to the appropriate body of the professional self-government together with instructions as to how the matter should be resolved. A motion which is filed behind schedule shall not be considered.’

- The establishment of an avenue of appeal to the Minister of Justice against a resolution of the Presidium of the Polish Bar Council or Polish Council of Legal Advisers or against rulings ending disciplinary proceedings;

With respect to advocates, the provision reads:

6) In Art. 68:

a) The following Para. 6a and Para. 6b shall be added after Para. 6:

‘6a. Resolutions of the Presidium of the Polish Bar Council may be appealed against to the Minister of Justice in accordance with the Administrative Procedure Code.

6b. Valid decisions of the Minister of Justice may be complained against by the interested party or the Presidium of the Polish Bar Council to the administrative court within 30 days of their delivery.’

11) The following Art. 88a shall be added after Art. 88:

‘Art. 88a. Judgements and rulings ending disciplinary proceedings can be appealed against by the parties and by the Minister of Justice within 14 days of the delivery of a copy of the judgement or ruling jointly with its justification and instructions as to when and how such appeal can be filed.’

Regarding legal advisers, the provision reads:

b) The following Para. 6 and Para. 7 are added after Para. 5:

‘6. Resolutions of the Presidium of the Polish Council of Legal Advisers may be appealed against to the Minister of Justice in accordance with the Administrative Procedure Code.

7. Valid decisions of the Minister of Justice may be complained against by the interested party or by the Presidium of the Polish Council of Legal Advisers to the administrative court within 30 days of their delivery.’

Art 70⁴ Judgements and rulings ending disciplinary proceedings can be appealed against by the parties and the Minister of Justice within 14 days of the delivery of a copy of the judgement or ruling jointly with its justification and instructions as to when and how such appeal can be filed.

- Empowering the Minister of Justice to recommend the institution of an investigation or proceedings before a disciplinary court against an advocate or trainee advocate:

12) Para 2 in Art. 90 shall read thus:

‘2. The Minister of Justice may order the commencement of an investigation or proceedings before the Disciplinary Court against an advocate or trainee advocate.’

A similar provision exists for legal advisers and trainee legal advisers:

11) In Art. 68, the following Para. 1a is added after Para 1:

‘1a. The Minister of Justice may order the commencement of an investigation or proceedings before the Disciplinary Court against a legal adviser or trainee legal adviser.’

These articles were published in the *Journal of Laws* 2007 No 99 item 664 and have been in force since 20 June 2007.

According to the National Council of Legal Advisers and the Polish Bar Council, the self governing professional bodies were given an opportunity to participate in the debate on this draft legislation. Both organisations expressed a preference for requiring the disciplinary proceedings of the legal professional bodies to be transparent and remain with the legal professions rather than being influenced by the Minister of Justice. This was apparently disregarded by the government. The two organisations oppose the legislation on the grounds that the powers granted to the Minister of Justice are too wide. They argue that the legislation grants the Minister of Justice the authority not only to order the disciplinary spokesman to institute an investigation, but also to institute

disciplinary proceedings before a disciplinary court even if, in the spokesman's opinion, there are insufficient grounds or evidence for doing so. These two organisations assert that there has been a subsequent amendment, the Act dated 9 May 2007 Amending the Act on Code of Criminal Procedure, which included a new provision entitling the Minister of Justice to act as a party to the disciplinary proceedings conducted at his request by the disciplinary spokesman. The delegation was not able to obtain any further information about this amendment but remains concerned about its possible implications.

While cooperation with the government and compliance with the law is important, bar associations must maintain independence and must not be subjected to undue interference. This means that a bar association should be run by its own members and should be instrumental in setting standards for the profession.

Unusually, article 17 of the Polish Constitution explicitly provides for the creation of self-governing bodies to ensure the proper practice of the profession the body is created to govern:

Article 17

1. By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.
2. Other forms of self-government shall also be created by means of statute. Such self-governments shall not infringe the freedom to practice a profession nor limit the freedom to undertake economic activity.

Article 58 requires that a self-governing body act in accordance with the Constitution and statutes.

Article 58

1. The freedom of association shall be guaranteed to everyone.
2. Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited. The courts shall adjudicate whether to permit an association to register or to prohibit an association from such activities.
3. Statutes shall specify types of associations requiring court registration, a procedure for such registration and the forms of supervision of such associations.

At international law, Article 22 of the ICCPR provides for freedom of association, meaning that forming a bar association is a human right for members of the legal profession. Undue governmental interference with a non-governmental organisation is potentially a breach of this article.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The European Convention on Human Rights and Fundamental Freedoms also protects this right:

Article 11 – Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or the administration of the State.

The General Principles on the Role of Lawyers too, contain provisions supporting lawyers' entitlement to freedom of association and right not to be threatened with 'prosecution.... Or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.'

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

23. Lawyers like any other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisation and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful association. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.

The COE Recommendation Rec (2000)21 on the Freedom of Exercise of the Profession of Lawyer also contains relevant provisions:

Principle V - Associations

1. Lawyers should be allowed and encouraged to form and join professional local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.
2. Bar associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.
3. The role of Bar associations or other professional lawyers' associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected.
4. Bar associations or other professional lawyers' associations should be encouraged to ensure the independence of lawyers and, *inter alia*, to:
 - a. promote and uphold the cause of justice, without fear;
 - b. defend the role of lawyers in society and, in particular, to maintain their honour, dignity and integrity;
 - c. promote the participation by lawyers in schemes to ensure the access to justice of persons in an economically weak position, in particular the provision of legal aid and advice;

- d.* promote and support law reform and discussion on existing and proposed legislation;
 - e.* promote the welfare of members of the profession and assist them or their families if circumstances so require;
 - f.* co-operate with lawyers of other countries in order to promote the role of lawyers, in particular by considering the work of international organisations of lawyers and international intergovernmental and non-governmental organisations;
 - g.* promote the highest possible standards of competence of lawyers and maintain respect by lawyers for the standards of conduct and discipline.
5. Bar associations or other professional lawyers' associations should take any necessary action, including defending lawyers' interests with the appropriate body, in case of:
- a.* arrest or detention of a lawyer;
 - b.* any decision to take proceedings calling into question the integrity of a lawyer;
 - c.* any search of lawyers themselves or their property;
 - d.* any seizure of documents or materials in a lawyers' possession;
 - e.* publication of press reports which require action on behalf of lawyers.

The IBAHRI and CCBE are extremely concerned that the 29 March 2007 Act seriously infringes the right to the self-government of professional organisations, as enshrined both in the Polish Constitution and international guarantees of freedom of association. The delegation was informed that a constitutional challenge was initiated to the 29 March 2007 Act on 12 October 2007, when legislation to introduce maximum fee caps was introduced to the Sejm. The delegation was concerned to hear an unsubstantiated report that no challenge had been taken to the constitutionality of this act previously as the bar associations feared that the former government would set maximum fee caps (considered further below) if such action was taken. If these reports are true, the IBAHRI and CCBE are disturbed by the implication that the former government was deliberately intimidating lawyers in an effort to prevent them from challenging the constitutionality of legislation. The IBAHRI and CCBE would remind the Polish government that the Constitution provides:

Article 7

The organs of public authority shall function on the basis of, and within the limits of, the law.

Article 8.1

The Constitution shall be the supreme law of the Republic of Poland.

Article 126.2

The President of the Republic of Poland shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory.

2. New three-licence category of the legal profession

During its visit, the delegation was made aware of another legislative proposal in the draft Act on the Terms of Providing Legal Services and on Licenses to Practice Law (The Licences Act). This Act proposes to allow for the provision of legal services by persons who are not practicing advocates or legal advisers but who instead hold one of three categories of legal licences. Draft Article 2 of the Act defines 'legal services':

2. Providing legal services means conducting a business activity which consists in the performance of the following acts associated with law:
- 1) Giving legal advice, drawing up legal opinions, draft contracts and other statements of will, and preparing drafts of procedural submissions;
 - 2) Representing clients before courts and tribunals;
 - 3) Appearing before organs authorised to act in preparatory proceedings related to criminal offences and fiscal offences and misdemeanours, and before organs with vested entitlements of the public prosecutor in misdemeanour cases;
 - 4) Appearing before organs of public administration and entities entrusted with public administration tasks.¹⁸

Draft Article 27 stipulates the rights and duties of law licence holders:

Article 27

Law licence holders are required to represent the interest of their clients in accordance with legal regulations and knowledge, and perform all actions which can be performed within the legal and contractual boundaries in the interest of the entity on whose behalf they are performed.

Draft Articles 4, 5 and 6 prescribe the requirements for being granted a Level I, II and III licence respectively.

Chapter 2

Terms of granting law licence

Article 419

1. The Level I Law Licence is granted to a natural person who:
 - 1) Possesses full capacity to enter into legal transactions and fully exercises public rights;

¹⁸ The most current draft to the act does not contain the definition of 'legal services' cited here.

¹⁹ This article is now article 16 of the draft.

- 2) Enjoys impeccable reputation;
- 3) Has graduated in law from a higher educational institution in the Republic of Poland and has obtained the degree of Master of Law.

2. The Level I Law Licence entitles its holder to:

- 1) Provide legal advice, draw up legal opinions, draft procedural submissions, contracts and other declarations of will, appear before organs of public administration and entities performing public administration tasks;
- 2) Appear before courts and tribunals under a delegation of powers granted by a holder of a law licence not lower than Level II, advocate or legal adviser, except in family and guardianship matters, or in proceedings concerning young offenders or criminal and criminal fiscal offences.

Article 5²⁰

1. The Level II Licence is granted to a natural person who fulfils all requirements specified below:

- 1) Has held the Level I Law Licence for at least two years;
- 2) Has appeared as an attorney *ad litem* on terms specified in art. 4.2.2 in at least 50 court trial hearings, in no less than 10 matters.

2. The requirements listed in paragraph 1 shall not apply to a person who meets the requirements of art. 4.1 and who additionally fulfils one of the following prerequisites:

- 1) Possesses the scientific degree of Doctor of Legal Sciences;
- 2) Has passed the examination to become a judge or prosecutor after 1 January 1991;
- 3) For at least 3 months has held the position of notary trainee or practiced as a notary;
- 4) For at least 3 months has held the position of judicial officer;
- 5) For at least 1 year has held the position of assistant judge;
- 6) For at least 3 months has held the position of bailiff trainee or practiced as a bailiff;
- 7) Is a registered tax consultant;
- 8) Is a registered patent agent;
- 9) Within the period of 8 years preceding the date of filing a law licence application has worked for at least 3 years in a government or public administration institution in a position that required legal knowledge and was directly related to legal services in that institution or to legislative activities.

3. The requirement of paragraph 1.2 does not apply to a person who has successfully completed the term of training referred to in art. 17.

4. The Level II Law Licence entitles its holder to:

- 1) Perform the functions specified in art. 4.2.1;
- 2) Appear before courts and tribunals, except in family and guardianship matters or in

²⁰ This article is now article 17 of the draft.

proceedings concerning young offenders, and penal and penal fiscal offences.

Article 6²¹

1. The Level III Law Licence is granted to a natural person who meets all requirements specified below:

- 1) Holds the Level II Law Licence;
- 2) Has successfully passed the legal examination and, subsequently,
- 3) Has appeared before courts under a delegation of powers granted by a holder of a law licence not lower than Level III, advocate or legal adviser, in at least 20 court trial hearings in criminal or criminal fiscal matters, and in at least 10 court trial hearings in family, guardianship or young offender matters.

2. The requirements specified in paragraph 1 do not apply to a person who meets the requirements specified in art. 4.1 and additionally fulfils one of the following prerequisites:

- 1) Possess the scientific title of Professor or the scientific degree of Doctor Habilitated of Legal Sciences;
- 2) For at least 3 months has held the position of judge trainee or judge;
- 3) For at least 3 months has held the position of prosecutor trainee or prosecutor;
- 4) Is a registered advocate;
- 5) Is a registered legal adviser;
- 6) Has worked for at least 3 months in the position of counsellor or senior counsellor in the State Treasury General Prosecutor's Office.

3. The requirement specified in paragraph 1.3 does not apply to a person who fulfils the prerequisite of art. 5.2.1 or 5.2.2.

4. The requirement of paragraph 1.3 does not apply to a person who has successfully completed the term of training referred to in art. 17.

5. The requirement of paragraph 1 does not apply to lawyers from the European Union referred to in the Act of 5 July 2002 on Legal Assistance Provided by Foreign Lawyers in the Republic of Poland (Journal of Laws no. 126, pos. 1069, as amended), who can demonstrate that for a period of at least 3 years they have been actively and consistently engaged in an uninterrupted practice of law binding in the Republic of Poland, including law of the European Union, on terms specified in Chapters 1 and 2 of Part II of the Act of 5 July 2002 on Legal Assistance Provided by Foreign Lawyers in the Republic of Poland.

6. The Level III Law Licence entitles its holder to offer the full range of legal services, specifically:

- 1) Perform the functions specified in art. 4.2.1, and;
- 2) Appear before courts and tribunals without the limitations specified in art. 5.4.2.

²¹ This article is now article 18 of the draft.

The Licences Act also establishes a Law Licence Commission to oversee law licence holders, decide on matters concerning granting law licences and accreditations, keep a register of regulated activities and administer the legal examination.

As expressed in draft Article 36 of the Licences Act, the Law Licence Commission is overseen by the Minister of Justice and is therefore not an independent body.

Article 36

....

2. The Minister of Justice oversees the Law Licence Commission.²²

When submitted for evaluation, the Licences Act was critically assessed by both the National Council of Legal Advisers and the Polish Bar Council, according to whom some of the provisions ‘remain in non-conformity with the constitutional mission of the bar, its objective and... its entitlement to ensure the proper practice of the profession in public interest’.²³

There are three primary concerns regarding this draft act. Firstly, stakeholders alleged the Licences Act would undermine the professional and ethical standards of lawyers as presently required of advocates and legal advisers by their respective associations. Secondly, the new category of lawyers is not independent, as they are directly managed by the Ministry of Justice. Thirdly, the amendment appears designed (particularly when read in conjunction with the proposed fee-capping legislation) to force independent advocates and legal advisers to seek a Level III licence and to therefore lose their independence.

The legal profession in Poland strongly opposes the draft legislation, perceiving the new category of lawyers as being under-qualified quasi-lawyers who would be influenced heavily by the Minister of Justice, who can grant and cancel licences. Maintenance of a high standard of professionalism is required under the UN Basic Principles on the Role of Lawyers, which states:

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.

There is no provision currently included in the Act enabling the new category of lawyers to establish an independent self-governing organisation to maintain these standards. However, the Licences Act states:

²² Article 10.3 of the new version of the draft legislation allows interested parties to file a complaint against an administrative decision issued by the Law Licence Commission to the Minister of Justice.

²³ Taken from a joint submission from the National Council of Legal Advisers and the Polish Bar Council to the CCBE on legislative changes concerning the legal professions of public trust which are conducted or planned in the Republic of Poland.

Article 27²⁴

Law licence holders are required to represent the interest of their clients in accordance with legal regulations and knowledge, and perform all actions which can be performed within the legal and contractual boundaries in the interest of the entity on whose behalf they are performed.

Article 28

Law licence holders are required to disengage themselves from performing legal actions when the matter concerns a person with whom they are in a relationship which may cause them to infringe the interest of the entity on whose behalf they perform these actions.

Article 29.1

Law licence holders are required to maintain the secrecy of facts and information to which they became privy in the course of performing legal actions.

Article 30

In performance of legal actions, law licence holders benefit from the freedom of the spoken and written work within the boundaries specified by the law and the substantive need.

It is evident that, whilst not reaching the standards of ethics and responsibilities usually established by self-governing professional organisations, there has been an effort made to establish a minimum level of ethical standards for lawyers.

Further the required standards for Level II and Level III licences include trial hearings and other experience to a standard that on first reading, appears acceptable. Therefore, the only concern with the professional standards of the Law Licences relates to the Level I Law Licence, which is granted to a person who has only graduated with a Master of Law degree. This appears to be a low standard, although it is further noted that such persons may only appear before courts and tribunals under a delegation of powers granted by a Level II or III licence holder, or from an advocate or legal adviser. Given that trainee lawyers around the world are allowed to operate under such supervision, it appears that these standards are adequate. Therefore, IBAHRI and CCBE hold no immediate concerns regarding the professional and ethical standards of the lawyers holding law licences as proposed by the Act.

However, the lack of independence of the new category of lawyers gives rise to serious concerns. As stated specifically in the Licences Act, the Minister of Justice, through the Law Licence Commission, is empowered to grant and withdraw licences in specific cases, including where the responsibilities in articles 27-30 are breached. Whilst the cases for disbarment are specified in the Licences Act, it remains of significant concern to the IBAHRI and CCBE that the Minister of Justice oversees the organisation. As outlined above, self-governing organisations are protected by the Polish Constitution and international standards. There are concerns that the Minister of Justice could

²⁴ These articles are now articles 41-44 of the draft legislation.

wield significant power over lawyers admitted under the licensing system, which could have potential consequences in situations where a lawyer was required to represent interests that conflict with the government.

Of particular significance is article 16 of the UN Basic Principles on the Role of Lawyers, which states:

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference

The IBAHRI and CCBE are alarmed about the potential impact of the new licensing categories on the independence of advocates and legal advisers in Poland. Whilst there is no obligation to enter the licensing system rather than the independent bar associations, it is important to note that the proposed fee-capping legislation (considered below) does not apply to Law Licence holders. If passed, this would result in significant restrictions placed on independent lawyers only, and not to lawyers managed by the licensing system. Consequently, many advocates and legal advisers would find themselves ‘forced’ to obtain a Level III licence, which, under Article 6(2)(4) and (5)²⁵, can automatically be granted to such applicants.

An alternative view offered to the delegation is that this third category of legal professional is a necessity, given the closed nature of the legal profession in Poland. Every year, there are approximately 10,000 law graduates in Poland seeking work in the legal profession and very few find places with the established associations. In addition, once a member of the established bar associations loses membership, they can not practice again. The delegation was told of a situation where an advocate let his membership lapse and he did not pay his fees. When he became aware of the situation he indicated a willingness to rectify it but was denied the opportunity to do so. Although it may be necessary to expand the legal profession, any such expansion should, however, be managed and overseen by an independent self-governing organisation, and preferably should take place within the existing independent organisations.

The government’s intention to remove self-governing professional associations has been stated publicly. In a recent speech by then-Prime Minister Jaroslaw Kaczyński during a convention of the Law and Justice party held on 22-23 September 2007, Mr Kaczyński labelled the organisations as ‘something bad, a sort of public anomaly’. He claimed that the organisations ‘by their actions restrict the right of others to advance professionally; they restrict, by their high prices, the real right of access to legal services’. Finally, he stated that the removal of self-governing legal professional bodies was the only option available to encourage Polish emigrants to return: ‘We have undertaken this task because it is in the most obvious interest of Poland’ he added. These statements are seriously disturbing to the IBAHRI and CCBE, and reflect a disturbing intention of the last government to breach the Polish Constitutional and international standards guaranteeing self-government and free association.

The proposal to introduce a third category to the Polish legal profession appears to breach Principle I of the COE Recommendation Rec(2000)21 on the Freedom of Exercise of the Profession of

²⁵ These articles are now articles 18.2.2, 18.4 and 18.5 of the draft.

Lawyer which requires that decisions concerning the authorisation to practise as a lawyer should be taken by an independent body.

Principle I

2. Decisions concerning the authorisation to practice as a lawyer or to accede to this profession, should be taken by an independent body. Such decisions, whether or not they are taken by an independent body, should be subject to a review by an independent and impartial judicial authority.

Principle II

2. All necessary measures should be taken in order to ensure a high standard of legal training and morality as a prerequisite for entry into the profession and to provide for the continuing education of lawyers

The IBAHRI and CCBE consider it unusual for a country to pursue the creation of a third category of lawyer and particularly, a category created by the government and overseen by a government agency (the Law Licence Commission). Whilst acknowledging the closed nature of the legal profession in Poland and the need to open the profession so as to accommodate the country's ever-expanding lawyer population, IBAHRI and CCBE are deeply concerned about the independence of this new category of lawyer and the impact of this proposal on existing legal professionals and their associations. They consider that any shortage of lawyers is a matter that can be rectified through dialogue with the existing professional associations.

3. Changes to disciplinary proceedings

As examined above, the Disciplinary Proceedings Act changes the disciplinary procedures for legal professionals. Under this draft Act, a new disciplinary division is created within an appellate court for the purpose of adjudicating disciplinary cases, thereby depriving the legal profession's self-governing professional bodies of their powers in relation to administering disciplinary proceedings.

In accordance with the Disciplinary Proceedings Act, disciplinary proceedings are to be conducted by disciplinary spokesmen appointed for a six year tenure by the President of the Supreme Court from among prosecutors of the State Prosecution or appellate prosecution '...at the request of the Prosecutor General, after obtaining opinions of the NCJ, the Council of Prosecutors by the Prosecutor General, the Polish Bar Council, the National Council for Legal Advisers and the National Council of Notaries and the National Council of Bailiffs'.²⁶ The Disciplinary Spokesman will 'perform his/her duties by the Minister of Justice – the Prosecutor General.'²⁷ The Spokesman's basic power will be to institute explanatory proceedings (preceding the referral of an application to a disciplinary court) – on his own initiative or at the request of the Justice Minister. The professional rules and principles of ethics remain the basis for disciplinary responsibility and disciplinary penalties.

²⁶ Article 10 of The Act on Disciplinary Proceedings against Certain Legal Professionals.

²⁷ Draft Article 12.1 of The Act on Disciplinary Proceedings against Certain Legal Professionals.

The Disciplinary Proceedings Act will apply to: common court judges and assistant judges; prosecutors and assistant prosecutors of public prosecution units; retired common court judges and retired prosecutors of public prosecution units; advocates and trainee advocates; legal advisors and trainee legal advisors; court bailiffs, assistant and trainee bailiffs; and notaries, assistant and trainee notaries. Significantly, the Act does not appear to intend to apply to Law Licence holders.

Several of the provisions within the Act appear to increase the supervisory powers of the Minister of Justice over the disciplinary proceedings relating to legal professionals. These amendments include, among others:

- obliging the disciplinary court to deliver to the Justice Minister official copies of its first instance decisions;²⁸
- empowering the Justice Minister to request the instigation of explanatory proceedings against an advocate or trainee advocate;²⁹
- empowering the Justice Minister to appeal against a decision to discontinue the explanatory proceeding to the first instance disciplinary court with capacity to adjudicate the case;³⁰ and
- empowering the Justice Minister to appeal against decisions of the disciplinary court at first instance per draft Article 25 of the Act.

Article 25.1. Rulings passed by the first instance disciplinary court and decisions and orders which hinder adjudication, may be appealed against by the parties, the Minister of Justice – the Prosecutor-General and the disciplinary supervisor or the authority that requested instigation of the explanatory proceeding, as well as the National Council of Judiciary in cases involving judges, retired judges and assistant judges of common courts.

While governments may have a role to play in establishing the regulatory framework for lawyers, legal professional associations must have the right to retain primary responsibility for disciplining members of the legal profession. The proposed act appears to undermine this right, and appears also to constitute a breach of the right of bar associations to associate freely and remain independent, which is guaranteed by the Polish Constitution and international law. Further, the act may constitute an unwarranted interference in the operation of bar associations.

The UN Basic Principles on the Role of Lawyers provides that disciplinary proceedings against lawyers must be brought before a disciplinary committee established by the legal profession, an independent statutory authority or before a court. Principle 28 specifically provides for independent judicial review.

²⁸ Articles 17.4, 31.2, 31.3, 31.4 of The Act on Disciplinary Proceedings against Certain Legal Professionals.

²⁹ Article 16.2 of The Act on Disciplinary Proceedings against Certain Legal Professionals.

³⁰ Article 17.5 of The Act on Disciplinary Proceedings against Certain Legal Professionals

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles.

Principle IV of COE Recommendation provides that bar associations should be responsible for or at least entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

1. Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings.

2. Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers.

3. Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision.

4. The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.

The IBAHRI and CCBE are concerned about the number of and motives for the new powers being granted to the Minister of Justice by this Act. The IBAHRI and CCBE consider it inappropriate for the Minister of Justice to hold so much power over the discipline of lawyers, and fear that these powers could be abused in situations where a lawyer is needed to represent interests conflicting with those of the government.

4. Fee capping for advocates and legal advisers

The draft Amending Act on the Advocates' Profession and some other acts (the Fee-capping Act) proposes to amend both the Law of the Advocates' Profession of 26 May 1982 and the Legal Advisers Act of 6 July 1982 to institute a cap on the remuneration for advocates' and legal advisers' professional legal services. As noted above, this maximum fee cap would not apply to lawyers who operate under the proposed Licence Act. Proposed Article 16.1 of the Law of the Advocates'

Profession of 26 May 1982 stipulates that 'Remuneration for advocates' professional legal services is determined by agreement with the client, but the provisions below shall be taken into account'. Draft Article 22[9].1. of the Legal Advisers Act of 6 July 1982 proposes a similar arrangement for legal advisers' professional services. The Act speaks of preliminary and final rates and differentiates between professional legal services which are performed before judicial authorities and those that are not. The amending Act also makes provision in both of the existing Acts on advocates and legal advisers for the Minister of Justice to determine, by ordinance, the final rates for advocates' and legal advisers professional legal services.

In the Act dealing with advocates, the relevant provisions read as follows:

Art 16.1 Remuneration for advocate's professional legal services is determined by agreement with the client, but the provisions below shall be taken into account.

2. The advocate's for professional legal services performed before judicial authorities may not be higher than a fee in the final rate, enlarged by the amount of the reimbursement of necessary, documentary evidenced expenses of the advocate's legal assistance in the case.

3. The advocate's remuneration for professional legal services which are not performed before judicial authorities shall be determined by the required work load on the part of the advocate, but it may not be higher than the amount being equivalent to 30% of the minimum remuneration for work per hour specified in the Minimum Remuneration Act...The remuneration is enlarged by the amount of the reimbursement of the necessary, documentary evidenced expenses of advocate's legal assistance in the case.

...

Art. 16b. 1. The Minister of Justice after obtaining an opinion from the Polish Bar Council shall determine by ordinance the fees in the final rates for advocate's professional legal services performed before judicial authorities taking into account the type and complexity of the case, required work load on the part of the advocate, social benefit in guarantees of an appropriate access to the legal assistance.

2. The Minister of Justice after obtaining an opinion from the Polish Bar Council shall determine by ordinance the fees in the final rates for some advocate's professional legal services which are not performed before judicial authorities taking into account the type and complexity of the case, required work load on the part of the advocate, social benefit in guarantees of an appropriate access to the legal assistance.

In the Act dealing with legal advisers:

Art.22[9].1. Remuneration for legal adviser's professional services who practise his/her profession in legal adviser's offices, or in the partnerships specified in art. 8 s.1, or is employed under the contract of the civil law [the remuneration] is determined by agreement with the client, but the provisions below shall be taken into account.

2. The legal adviser's remuneration for professional services performed before judicial authorities may not be higher than a fee in the final rate, enlarged by the amount of the reimbursement of necessary, documentary evidenced expenses of the legal adviser's assistance in the case.

3. The legal adviser's remuneration for professional services which are not performed before judicial authorities shall be determined by the required work load on the part of the legal adviser, but it may not be higher than the amount being equivalent to 30% of the minimum remuneration for work per hour specified in the Minimum Remuneration Act ... The remuneration is enlarged by the amount of the reimbursement of the necessary, documentary evidenced expenses of legal adviser's assistance in the case.”.

...

Art. 22[11]. 1. The Minister of Justice after obtaining an opinion from the National Council of Legal Advisers shall determine by ordinance the fees in the final rates for legal adviser's services performed before judicial authorities taking into account the type and complexity of the case, required work load on the part of the legal advisor, social benefit in guarantees of an appropriate access to the legal assistance.

2. The Minister of Justice after obtaining an opinion from the National Council of Legal Advisers shall determine by ordinance the fees in the final rates for some legal adviser's services which are not performed before judicial authorities taking into account the type and complexity of the case, required work load on the part of the legal adviser, social benefit in guarantees of an appropriate access to the legal assistance.

The draft Minister of Justice regulation on level of fees for advocates work carried out before judicial authorities and level of fees for certain advocates work not carried out before judicial authorities provides that the fee for a divorce or annulment will be PLN 1,000 and for the declaration of the existence or non-existence of marriage, PLN 700.³¹ In the absence of translated copies of other pieces of existing legislation to which this draft Act refers, the delegation was unable to determine the exact fee structure being proposed. Persons interviewed by the delegation, however, asserted that the fees were unacceptably and unrealistically low.

Persons in the legal profession interviewed by the delegation perceive the legislation as an attempt by government to punish advocates and legal advisers for having enjoyed a relatively independent position protected by their respective self-governing associations and to reduce their ability to

³¹ At the time of writing, 1 Polish Zloty was worth EUR€0.27, GBP£0.19 and USD\$0.37

profit from providing legal services. As previously explained, the proposal is viewed as a tool for threatening the legal profession to accept other, potentially unconstitutional acts, and, if passed, to force the independent legal profession to work within the new licensing structure proposed by the Ministry of Justice. If, as the delegation heard, the maximum fees introduced under the fee capping proposal are unreasonably low, the government will thereby prevent lawyers from being able to continue working profitably. This is of serious concern to the rights of lawyers and to their independence, as enshrined in the Polish Constitution.

The fee capping measure is seen by most legal professionals as unwarranted interference by the executive into the private business of advocates and legal advisers and view it as unfair, given that there does not appear to be any fee-capping measures for other sectors such as doctors, engineers or accountants. Those interviewed believe the fee capping measure and other measures affecting the legal profession are being pursued because the ruling party is highly suspicious of the profession and its perceived power. It is believed that the Law and Justice Party sees the profession as closed, elitist and profiting excessively given the lack of regulation on fees for legal services. When in power, the party wanted to change this by forcing the profession to open up and become more accessible to the public. Should the amendment be introduced, advocates and legal advisers alike are concerned about its impact on the profitability of legal services business, with some asserting that the proposed fee structure will cripple their business. Many are seriously concerned about the impact this will have on international firms operating in Poland, and believe that it may consequently undermine Poland's economic role within the EU.

An alternative view of the fee capping proposal, as proffered by the National Council of Legal Advisers and the Polish Bar Council, is that it is necessary to address problems associated with access to legal services in Poland due to the excessive fees charged by a very small number of advocates and legal advisers. The two councils, however, assert that the proposed fee structure is not the product of a proper analysis of the costs involved in running a law office, the amount of labour involved, particularly in complex cases, and the level of professionalism required. The National Council of Legal Advisers passed a resolution on this law, asserting that the proposed fee cap infringes constitutional principles of freedom of business activity and equal rights. The delegation was made aware of rumours that the draft has encountered opposition at the interdepartmental consultation stage.

There is a belief within the Polish legal community that if the proposed fee structure is implemented, legal advisers and advocates, in order to stay in business, will seek creative means to circumvent the imposed limit on their fees. This could be by billing clients on some basis other than the provision of specific legal services, or taking payment in cash, or some other means; and the introduction of this fee structure may even force the legal community to pursue criminal means to secure their ordinary fees.

The IBAHRI and CCBE consider that one of the fundamental aims of the European Community is to provide greater competition by ensuring that internal markets are not artificially distorted. Article 3(g) of the Treaty Establishing the European Community states:

Article 3

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: ...

(g) a system ensuring that competition in the internal market is not distorted.

Article 28 further provides:

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 10 states:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

At the macro level, the Polish fee-capping legislation would distort the market for legal services in Poland by making it uneconomical for the higher-end of the international legal market to offer their services there. Such distortion is a clear breach of the principles of the European Community, which Poland is required to uphold under article 10 above. Further, the legislation appears to be a clear breach of article 28, which prohibits the restriction of imports and all measures having an equivalent effect.

From a human rights law perspective, the IBAHRI and CCBE are not aware of anything in international law proscribing the capping of lawyers' fees. Article 22 of the Polish Constitution too, may even support the imposition of such fees if justified on 'important public reasons'.

Article 22

Limitations on the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

At this stage, it is not immediately apparent what public reason would justify the excessive restriction of fees.

Principles 16 and 22 of the General Principle of the Role of Lawyers state that:

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;..

22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Pursuant to Article 23 of the General Principles on the Role of Lawyers, however, lawyers are entitled to enjoy membership of a lawful association without suffering professional restrictions by reason of such membership. As the fee-capping proposal would only apply to independent advocates and solicitors, it is arguable that these lawyers will suffer professional restrictions (eg capped fees) by reason of their membership of their respective bar associations. Article 23 reads as follows:

23. Lawyers like any other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisation and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful association. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognised standards and ethics of the legal profession.

Despite the lack of international law and standards on the specific fee-capping proposal, the IBAHRI and CCBE believe that the measure is ill-considered (as it does not reflect the value of legal work) and may also have been inappropriately utilised as a threat against lawyers in Poland to force them to accept other infringements on their independence. The IBAHRI and CCBE further regard the provisions as being a breach of the Treaty Establishing the European Community. The IBAHRI and CCBE consider further that their practical implications constitute an unacceptable threat to the independence of the legal profession and international human rights standards.

5. Personal asset declarations for legal professionals

The Fee-capping Act also proposes to require advocates and legal advisers to ‘make a financial statement’ regarding their ‘personal property and his/her marital community property’.³² The statement must include ‘information regarding the cash, real estates, shares and stocks in a company, and additionally, regarding acquired property in the way of the auction from the State Treasury or another state or local government legal entity by the person making the statement or his/her spouse’.

In the case of advocates, one copy of this statement is to be transmitted to the Dean of the District Bar Council and be scrutinised by the Council by 30 June each year, the results of that scrutiny then transmitted to the General Meeting of the Local Bar Chamber. One copy is to be transmitted

³² Draft Article 16f of the Law of the Advocates’ Profession of 26 May 1982 and 22[11] of the Legal Advisers Act of 6 July 1982.

to the Inland Revenue. The Dean of the District Bar Council must make a statement to the National Congress of the Bar. Similar provisions apply to legal advisers, but their statements must be transmitted to the Dean of the District Chamber of Legal Advisers, with the Dean making a statement to the National Council of Legal Advisers.

Whilst this provision is not welcomed by the legal profession in Poland, the IBAHRI and CCBE does not consider this to breach the Polish Constitution or international law. Personal assets declarations are, in fact, commonplace in many countries, particularly in financial sectors where, for example, directors of companies make similar declarations to ensure transparency.

The IBAHRI and CCBE have assumed that this asset declaration proposal is designed primarily to detect cases where advocates and legal advisors have circumvented the fee-capping restrictions. However, in the sense that this will further efforts to cap fees, the IBAHRI and CCBE do not support the proposal.

6. Submission of client contracts

The Fee-capping Act also proposes to institute provisions requiring advocates and legal advisers to keep a written record of their contracts for each calendar year for a period of five years. These records must contain, inter alia, clients' full names or name and address, the date of the agreement and the amount of remuneration claimed by the advocate or legal adviser.

In the Act dealing with advocates:

Art. 16e. 1. An advocate shall keep a record of advocate's contracts in writing for each calendar year separately.

2. Each page of the record of advocate's contracts shall be signed and sealed by the advocate.

3. A registration to the record of advocate's contracts shall contain:

1) numeration of a current registration from the beginning of the calendar year

2) client's surname and names [person's full name] or name and address of a client [another entity]

3) date of the agreement specified in art. 16 s.1;

4) amount of the remuneration specified in art. 16 s.1.

4. The record of advocate's contracts shall be kept in his/her advocate's professional place of business for 5 years from the end of the calendar year it is started.

5. In the event of removing an advocate from the list of advocates under art. 72 s 1 pt.1,2,4,4a,5,7 and 8 the record of advocate's contracts shall be kept in the District Bar Council within jurisdiction constituted by the last advocate's professional place of business.

In the Act dealing with legal advisers:

- Art. 22[14]. 1. A legal adviser who practice his/her profession in another form then through employment under the contract of the civil law shall keep a record of legal adviser's contracts in writing for each calendar year separately.
2. Each page of the record of legal adviser's contracts shall be signed and sealed by the legal adviser.
 3. A registration to the record of legal adviser's contracts shall contain:
 - 1) numeration of a current registration from the beginning of the calendar year
 - 2) client's surname and names [person's full name] or name and address of a client [another entity]
 - 3) date of the agreement specified in art. 22[9] s.1;
 - 4) amount of the remuneration specified in art. 22[9] s.1.
 4. The record of legal adviser's contracts shall be kept in his/her legal adviser's professional place of business for 5 years from the end of the calendar year it is started.
 5. In the event of removing a legal adviser from the List of Legal Advisers under art. 29 the record of legal adviser's contracts shall be kept in the District Chamber of Legal Advisers within jurisdiction constituted by the last legal adviser's professional place of business.

Pursuant to a proposed change to the Act of 17 November 1964 – the Code of Civil Procedure, advocates and legal advisers must submit, with the trial bundle, a copy of the lawyer-client agreement regarding remuneration. Pursuant to draft Article 89 § 5 of the aforementioned Act, courts will refuse advocates and legal advisers to participate in proceedings if he or she has not submitted a copy of the agreement. The same provision is made for defence counsel in proposed changes to the Act of 6 June 1997 – the Code of Criminal Procedure.

Advocates and legal advisers alike expressed concern about this legislative amendment, particularly over what effect it would have on lawyer-client confidentiality. Persons interviewed were also concerned about the increase in unwarranted government interference.

There is nothing in the Polish Constitution preventing the collection of and access to information from persons provided it is on the basis of statute. Article 51 provides:

1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.
2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.
- ...
5. Principles and procedures for collection of and access to information shall be specified by statute.

COE Recommendation Rec (2000)21 states:

Principle I - General principles on the freedom of exercise of the profession of lawyer

1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.

...

6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.

Lawyer-client confidentiality is a principle of law recognised by most legal systems around the world, and is therefore likely to be considered a principle of international law. However, as the proposed amendment requires advocates and legal advisers to provide details of remuneration only and not the detail of their dealings with clients, the IBAHRI and CCBE feel that it would be difficult to challenge this provision on grounds of breaching client confidentiality. However, when read in conjunction with the proposed provision on fee-capping, it would seem that the impetus for the requirement to provide copies of lawyer-client remuneration contracts is twofold: to ensure that lawyers' are using the fee structure appropriately (that is, are not charging more for their services than is permitted by regulations issued by the Minister of Justice); and to increase the supervisory power of the government over the legal profession. Viewed in this light, this provision is arguably another example of government interference. It is, however, of less significance to the independence of the legal profession than the other amendments examined above.

Chapter Four: Threats to the prosecution system in Poland

As it is part of the government system, international standards do not demand the same standard of independence for the prosecutors' office as for the judiciary or the legal profession. However, there are certain limitations on the extent to which the executive may interfere in the prosecutorial role. At a minimum, prosecutors must be sufficiently independent from the government to enable them to commence prosecutions, where appropriate, against public officials. The international standards governing prosecutors are set out primarily in the Guidelines on the Role of Prosecutors.

The public prosecution service in Poland was previously fully separated from the courts and the executive by the Prosecution Service Act 1950, which established the prosecution service as an independent body controlled by the Council of State. However, in 1985, the new Act on the Public Prosecutors Office compromised this independence, combining the role of Prosecutor General, the highest level of the prosecutor's office, with the Minister of Justice:

Art. 1.

1. The Prosecutors Office comprises the Public Prosecutor General and prosecutors from public and military units of the prosecutor's office that are subordinate to him and prosecutors from the National Remembrance Institute – Commission for the Prosecution against the Polish Nation
2. The Public Prosecutor General is the Supreme Body of the Prosecutor's Office. The Justice Minister acts as the Public Prosecutor General.

Under the Prosecution Services Act 1985, the Prosecutor General may undertake all tasks within the duties of the public prosecution service and may delegate tasks. The Prosecutor General also has the power to refer laws to the Constitutional Tribunal. The Polish Constitution does not regulate the organisation of the prosecution service.

Four amendments concerning the prosecution system have been passed in recent months, with the last one being passed on 31 August 2007. One of these amendments allows the Minister of Justice to move prosecutors from their place of appointment to any other place in the country. This increases the power of the Minister of Justice over prosecutors' actions.

Excessive Governmental Interference

The delegation was informed that in 2003 the Polish government passed legislation prohibiting the Prosecutor General from intervening in particular cases. Between 2004 and 2005, the then Minister of Justice was diligent in following this rule and did not intervene in individual cases. This changed in November 2005, when the Minister of Justice held his first press conference in which he began to comment on individual cases.

The delegation heard widespread reports that the then-Minister of Justice was increasingly interfering in the prosecution process through such press conferences, in which he criticised ongoing cases and instructs prosecutors to take particular responses.

For example, the delegation heard one report of a case where an aggressive man was killed by people in a village. The local prosecutor charged these people with manslaughter. The Minister of Justice instructed the local prosecutor to release them, as their actions were a result of not being assisted by the police. All charges were then dropped. Such action is likely to undermine public confidence in the prosecutor's office.

The delegation also heard reports that the Minister of Justice had demoted a prosecutor who had been responsible for failing him on his initial prosecutor's examination. According to these reports, the woman responsible for his initial failure was working at the highest rank of prosecutor. In alleged retribution for failing him, the Minister of Justice demoted her to the lowest prosecution office in a very small village. The delegation was unable to verify this report.

The delegation also heard reports that the combination of the role of Minister of Justice and Prosecutor General means that every change in government also results in a change in all the heads of the prosecution bodies in Poland.

The Guidelines on the Role of Prosecutors contain several provisions requiring the impartiality of the prosecution service to be upheld:

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

...

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law and, where authorised by law or consistent with local practice, the investigation of such offences.

...

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations.

Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to

independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

...

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial.

The IBAHRI and CCBE are concerned by these reports of government interference in the prosecution service, and will continue to monitor the situation under the new government.

Threats against individual prosecutors

As a result of this governmental interference, conflicts between prosecutors and the Polish government were increasing in recent months.

Following the 9th Annual Conference of the Polish Prosecutors' Association in Poznan on 23 June 2007, the Association released an appeal in *Gazeta Wyborcza*. The Polish Prosecutors' Association is an independent organisation representing prosecutors in Poland. The association has lobbied for the separation of the Minister of Justice from the Prosecutor General. Amongst other things, the appeal reminded prosecutors of their duties to be reliable, objective, impartial, and free from fulfilling political or party expectations. It noted that public confidence in the prosecutor's office is lacking. The appeal emphasised that the prosecutors of Poland are not parties, governments or ministers. It noted that a prosecutor's office is supposed to maintain law and order and prosecute crimes while respecting the Prosecutors Ethics Code. Further, the appeal called for the creation of a prosecutors' office which is specialist, objective and free from influence and political interests. The appeal called on prosecutors to keep the dignity and good name of the prosecutors office, which is a law-abiding and independent organ devoted to justice.

The delegation was informed that immediately after this appeal was published, the head of the Polish Prosecutors' Association, Mr Krzysztof Parulski, who was also the Deputy District Military Prosecutor in Poznan, was called on by the Military Prosecution Office in Warsaw to provide a list of all those prosecutors who participated in the appeal. Mr Parulski refused to do this, reportedly stating that the initiation of investigations into the appeal was illegal as the Prosecutors' Association was a non-profit organisation and not a public body. Such investigations were only permitted into the activities of public bodies. Mr Parulski was asked to appear as a witness in investigations against the prosecutors involved in writing and releasing the appeal. Mr Parulski repeatedly refused to provide the names or to involve himself with the investigation.

After significant pressure, Mr Parulski resigned from his position, although he remains head of

the Polish Prosecutors' Association. Criminal charges of exceeding public authority, which have now been dropped, were brought against Mr Parulski. Calls by the Polish Prosecutors' Association to provide the evidence supporting the charges against Mr Parulski were allegedly refused by the then-Minister of Justice. The delegation was also concerned by unverified reports that the Minister of Justice publicly criticised Mr Parulski's prosecution record and alleged that he had previously been a member of the communist party, PZPR. These allegations were denied by Mr Parulski. The delegation heard further that the former Minister of Justice never met Mr Parulski.

This case attracted significant attention within Poland, with support expressed by the Polish National Lawyers' Association and the Association of Judges, and also has attracted the concern of international groups, including The Magistrats Européens pour la Démocratie et les Libertés (MEDEL), which wrote to the Minister of Justice objecting to these events. Arguably, it was as a result of this support and significant media attention that the criminal charges were dropped.

These reports raise serious concerns not only for the effective functioning of the prosecution system, but also due to the apparent breaches of Polish prosecutors' rights to freedom of association and freedom of expression. The delegation also heard reports that prosecutors throughout Poland are feeling intimidated by the steps taken against Mr Parulski, and may be more likely to be influenced by government pressure and priorities.

The Polish Constitution guarantees a freedom of expression and association:

Article 54

1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

...

Article 58

1. The freedom of association shall be guaranteed to everyone.

...

Article 59

1. The freedom of association in trade unions, socio-occupational organisations of farmers, and in employers' organisations shall be ensured.

...

This freedom is also well established at international law. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

Article 10 – Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 19 of the International Covenant on Civil and Political Rights provides:

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 22

1. Everyone shall have the right to freedom of association with others...

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Section 6 of the Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to Member States guarantees the freedom of expression, belief, association and assembly, including the right to take part in public discussion of matters concerning the law, the administration of justice and protection of human rights, for prosecutors specifically:

Section 6

States should also take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation.

Similar guarantees are provided in guidelines 8 and 9 of the UN Guidelines on the Role of Prosecutors:

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognised standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

The IBAHRI and CCBE are concerned that the constitutionally guaranteed and universally protected freedom of association and expression for Polish prosecutors is in jeopardy. The actions of the former government in the recent case of Mr Parulski suggest that Polish prosecutors were heavily under its influence and any further attempt to rectify the situation could be met with similar disapproval and remedial government action.

The IBAHRI and CCBE consider the combination of the roles of Minister of Justice and Prosecutor General to be inappropriate in the context of Poland's political climate, and it is apparent that this combination has already led to problems.

Separation between court and prosecutors

Another serious concern regarding the combination of the role of Minister of Justice and Prosecutor General arises from the need to separate prosecutors from the court.

The new amendments enshrined in the 29 June 2007 Act, which has just entered into force, also raise concerns about the prosecution system's authority over the courts.

As considered earlier, the Act proposes a number of changes to increase the power of the Minister of Justice, and therefore the Prosecutor-General, over judges. This includes increased powers of appointment of circuit court judges and appeal court judges; the power to suspend a judge's activities in cases where a judge has been apprehended in the commission of an offence; and the power to delegate a judge to a different court and a different location without his or her consent for up to six months at a time. The separation of the prosecutor and the courts is another very important element in the rule of law.

The Guidelines on the Role of Prosecutors contain provisions requiring the separation of prosecutors from judicial functions, the impartial carrying out of duties by prosecutors and their giving due attention to crimes committed by public officials:

Guideline 10. The office of prosecutors shall be strictly separated from judicial functions.

Guideline 13. In the performance of their duties, prosecutors shall:

- (a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination...

Guideline 15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognised by international law, and where authorised by law or consistent with local practice, the investigation of such offences.

The IBAHRI and CCBE believe the situation in Poland, where the power and responsibilities of two distinct roles (that is, the Minister of Justice and the Prosecutor General) are vested in one individual, compromises the impartiality and independence of the Polish prosecution service. It is possible that a Minister of Justice could suspend a judge who was apprehended in the commission of an offence, and then acting in his capacity as Prosecutor General, could have control over criminal proceedings against the judge.

The delegation heard two different proposals to address the issues encountered in the prosecution system. The NCJ promoted the merits of introducing the post of investigative judge into the Polish legal system. An investigative judge would decide whether to instigate criminal proceedings and would identify which material evidence to use. This would reduce the role of the prosecutors, and therefore would also reduce executive interference in the administration of justice. The Polish Prosecutors' Association has lobbied for the separation of the powers of the Minister of Justice and the Prosecutor General, believing that a more independent Prosecutor General would provide a

solution to most of the problems encountered by prosecutors in recent years.

The IBAHRI and CCBE agree that both these proposals have merit, and that it is important for Poland to take some action to resolve the problems arising from the combination of the role of Minister of Justice and Prosecutor General.

Chapter Five: Conclusions and Recommendations

General

CONCLUSIONS

The former government of Poland, led by the Law and Justice Party, appears to have been embarking upon a campaign to gain control over the courts, the legal profession and the prosecution system. This campaign primarily took the form of numerous legislative amendments designed to empower the Minister of Justice with a variety of controls over these bodies. The Polish government was unconcerned with Constitutional limitations and binding international law, and had openly declared its animosity towards the judiciary, legal professional associations and prosecutors. It is not yet known what the position of the new government will be on these important issues.

Genuine attempts to reform the legal system to bring about greater efficiency in the administration of justice are always to be welcomed, provided that in doing so they do not endanger the access of justice rights of citizens to fair and impartial judicial decisions and they are not motivated by a desire on the part of the government to seize control of the judiciary and legal advisory procedures. It is with regret that the IBAHRI and CCBE in the course of its investigations, concludes that the former government had introduced the changes for the sole purpose of assuring compliance by all those engaged in the justice system with the will of the state authorities; namely the changes in the law relating to, inter alia, the appointment, transfer and discipline and removal of judges, the administrative changes to the Constitutional Tribunal, the changes to the self-regulatory role of the established legal professions and the creation of a third legal profession subject only to the control of the Minister of Justice, coupled with the controversies relating to the independence of the prosecution system.

In this context the IBAHRI and CCBE note that in his letter dated 31 August 2007, then-Vice-Minister of Justice, Andrzej Kryze, stated that the adopted and planned changes in the Polish legal system do not constitute any danger for the independence of legal professionals and are aimed at the implementation of 'the constitutional rule of subordinated role played by those professions in relation to public interest'. In these few chilling words, the Minister demonstrated the true objectives of his government.

RECOMMENDATIONS

- The Polish government must respect the separation of powers doctrine which guarantees separation of the executive, legislature and judiciary. Separation between these three arms of power is paramount in upholding the rule of law in any country, and is enshrined in Poland's Constitution as well as binding international law.
- The executive is urged to end immediately the campaign of its predecessor against the judiciary, legal profession and prosecution system.

- The executive is urged to recognise Constitutional supremacy, and to act in accordance with the Constitution and international standards at all times.
- The Polish government should, as a matter of urgency, engage with members of the judiciary, legal profession and prosecution service to discuss the legislative proposals outlined in this paper which are of concern to these sectors and to the IBAHRI and CCBE alike.

Specific

Threats to the judiciary in Poland

CONCLUSIONS

The independence of the judiciary is universally accepted as the cornerstone to the rule of law and is imperative for the protection of human rights. Judicial independence necessarily requires institutional independence from the other branches of power and individual independence of judges, entitling them to exercise their judicial powers in accordance with the law and free from any harassment, interference or intimidation. Any threats to the independence of the judiciary have significant implications for the rule of law, good governance and public confidence in the legal system.

Over the course of its enquiries, several pieces of legislation concerning the judiciary were brought to the attention of the delegation for consideration. Taken individually, whilst some of the legislation appears innocuous, most contain amendments which grant, or will grant, to the Minister of Justice and the executive more generally, increased powers to interfere in the business and operation of the judiciary. In many instances, the former government justified the proposed changes on grounds of administrative justice, efficiency and ensuring the independence of the judiciary. When considered cumulatively, the effect of the legislation is far greater, hinting at something more systematic on the part of the government to heavily influence and control the judiciary.

In particular:

- The ability of the Minister of Justice to second judges between courts or other locations against their will constitutes an unacceptable level of interference in the judiciary by the executive, and is very likely to breach the Polish Constitution. IBAHRI and CCBE fear that this power will be misused to remove judges who are not liked by the ruling party or with whose decisions the ruling party do not agree.
- The conferring of full judicial powers to trainee judges who may be inadequately trained is of concern to the IBAHRI and CCBE, but of greater concern is the limitation of tenure of these judges to a trial period. Despite the continued significance of the NCJ in appointing judges, the refusal of the President to follow its recommendations in recent weeks cause the IBAHRI and CCBE to fear that the trial periods could be used by government to weed out judges who do not follow the party line.
- Empowering the Minister of Justice to suspend a judge who has committed an intentional crime is not justified under the circumstances and breaches international law. It is an established

principle of international law that judges be subject to suspension and other sanctions only by an independent authority or a court, and not by a member of the executive. Not unlike the preceding amendment, IBAHRI and CCBE consider that this power may be used to suspend judges who are not liked by the ruling party or with whose decisions the ruling party do not agree.

- The ability of the Minister of Justice to appoint presidents of certain courts, temporary presidents and create vacant judges' positions and nominate persons for those positions is cause for concern. The IBAHRI and CCBE consider that these amendments would allow the Justice Minister to influence the composition of the judiciary by nominating and appointing persons of his preference. The IBAHRI and CCBE are worried about the implications for judicial independence given the other encroachments on the judiciary and the likelihood that these powers could be abused.
- The proposed changes to the Constitutional Tribunal and in particular those requiring that cases be heard in the order in which the applications are received rather than in order of priority and requiring the Tribunal to have at least 11 of its 15 judges consider all cases deeply alarm the IBAHRI and CCBE. These amendments, while facially not objectionable, are likely to cripple the Constitutional Tribunal, which has been a robust defender of the Polish Constitution and the rights which it enshrines. The IBAHRI and CCBE believe that these amendments, taken cumulatively, are aimed at reducing the power of the Constitutional Tribunal to speedily consider the constitutionality of legislation as and when it is introduced. Whilst the Tribunal's remit remains the same, these amendments would negatively impact upon its business and administration, causing unwarranted delays during which legislation which may be unconstitutional could continue in force until considered by the Tribunal. The IBAHRI and CCBE welcome the proposals to reduce the political influence over appointments of judges to the Constitutional Tribunal.
- The IBAHRI and CCBE are also deeply concerned about the President of Poland's recent refusal to appoint judges and can only assume that his motives are inappropriate given that he has provided no indication of any reason for his refusal. In light of the other changes examined above, this is particularly worrying as it suggests that the President may start to take a more active role in judicial appointments, thus encroaching on the separation of powers in Poland.

RECOMMENDATIONS

- The executive must act in accordance with the rule of law, recognising in particular the independence of the judiciary.
- Given their fears about undue executive interference in the judiciary highlighted in the conclusions above, the IBAHRI and CCBE urge the Polish government to repeal the provisions permitting the involuntary secondment of judges for a temporary period. If such involuntary secondments are necessary, any legislation allowing this should ensure that this will happen only by virtue of a court judgment and in terms of a clear set of criteria under which a judge may be seconded.

- The IBAHRI and CCBE also call upon the Polish government to:
 - withdraw the proposed constitutional amendment to introduce a trial period for trainee judges, or alternatively, guarantee that the President of Poland will act on recommendations from the NCJ, ensuring that trial period decisions are made independently and impartially;
 - repeal the provisions granting the Minister of Justice a role in the newly introduced disciplinary proceedings relating to judges and the time constraints imposed on the disciplinary tribunal to issue its consent to the commencement of proceedings against a judge; and
 - amend legislation to remove the role of the Minister of Justice in appointing presidents to certain courts and temporary judges.
- The IBAHRI and CCBE call upon the President of Poland to issue forthwith reasons for his recent refusal to appoint judges proposed to various courts by the NCJ to avoid any further speculation and reduce the fear in the judicial community that it was for improper reasons. The IBAHRI and CCBE further urge the President of Poland to observe the Constitution and to appoint judges as recommended by the NCJ.
- The executive must desist immediately in the interference with the composition and administration of the Constitutional Tribunal initiated by its predecessor. All provisions seeking to interfere with the order of cases considered by the Tribunal and the number of judges required to hear each case should be withdrawn. The IBAHRI and CCBE remain alarmed at the potential implications of this legislation, particularly in light of the numerous pieces of legislation that have recently been declared unconstitutional and the many others assessed in this report as being likely to be unconstitutional.
- The IBAHRI and CCBE urge the Polish government to be temperate in its criticism of judicial decisions, to refrain from criticising ongoing cases and to avoid all personal attacks upon judges.

Threats to the Legal Profession in Poland

CONCLUSIONS

The independence of the legal profession, while not enshrined in a binding international treaty, is an important element of the rule of law and is supported in numerous international instruments.

A number of pieces of legislation have been proposed in Poland that may impact negatively on the independence of lawyers and their professional association. The IBAHRI and CCBE particularly highlight the following:

- supervision of legal professional bodies by the Minister of Justice is inappropriate and infringes the right to the self-government of professional organisations, as enshrined in the Polish Constitution, and international guarantees of freedom of association;
- the introduction of a new three-licence category of the legal profession overseen by the Minister of Justice empowers the Minister of Justice to wield significant power over lawyers admitted under the licensing system, which could have potential consequences in situations where a lawyer was

required to represent interests that conflict with the government. The IBAHRI and CCBE are particularly concerned about the impact of this proposal on the independence of advocates and legal advisers. Many advocates and legal advisers will likely find themselves forced to transfer to the licensing regime to overcome other constraints placed upon their profession such as fee capping. As a result, a large percentage of Polish lawyers may have to work under the Minister of Justice and the self-government of the legal profession will be effectively destroyed;

- the proposed creation of a new disciplinary division within an appellate court for the purpose of adjudicating disciplinary cases against lawyers, which deprives the legal profession's self-governing professional bodies of their powers in relation to administering disciplinary proceedings, is also of concern. In particular, several of the provisions contained within the relevant legislation increase the supervisory powers of the Minister of Justice over the disciplinary proceedings relating to legal professionals. While governments may have a role to play in establishing the regulatory framework for lawyers, legal professional associations must have the right to retain primary responsibility for disciplining members of the legal profession. This proposal undermines this right, and constitutes a breach of the right of legal professional associations to associate freely and remain independent, which is guaranteed by the Polish Constitution and international law. Further, the proposal appears to constitute unwarranted executive interference;
- the IBAHRI and CCBE are also concerned about the proposed fee-capping measures for advocates and legal advisers and believe it breaches the Treaty Establishing the European Community. The motives for this proposal appear to be suspect. The measure has been ill-considered (as it does not reflect the value of legal work) and it is possible that it is being inappropriately wielded as a threat against independent lawyers in Poland. The proposal is discriminatory in its application (it only applies to advocates and legal advisers and not licensed lawyers supervised by the Minister of Justice). It therefore breaches the *General Principles on the Role of Lawyers* which supports lawyers' entitlement to enjoy membership of a lawful association without suffering professional restrictions by reason of such membership. Its likely effect will be to force advocates and legal advisers to transfer to the licensing regime proposed by the Polish government; and
- The IBAHRI and CCBE are also uncomfortable with the proposals for those in the legal profession to make a personal asset declaration and to maintain a list of contracts with clients and submit these contracts to the courts. Whilst these requirements do not appear to be unconstitutional or in breach of international law, the IBAHRI and CCBE assume that they are designed primarily to detect cases where advocates and legal advisers have circumvented the fee-capping restrictions. In this sense, the IBAHRI and CCBE do not support these proposals. To the extent that the filing of client contracts is intended to increase the supervisory power of the government over the legal profession, the IBAHRI and CCBE consider this to be evidence of further inappropriate interference of the government in the legal profession.

The last Polish government exhibited hostility and suspicion in its dealings with the legal profession, treating the legal profession (comprising individual members and legal professional associations) as a threat. Recent comments made about the legal profession by the former government evidence

the government's intention to destroy the independent self-governing organisations within the legal profession. These steps clearly breach the Polish Constitution, international standards protecting freedom of association, and the UN Basic Principles on the Role of Lawyers and the new government must ensure that this does not continue.

The constraints proposed or imposed by the last Polish government upon lawyers seriously undermine the effective functioning of the justice system and the ability of lawyers to carry out professional duties freely. They also undermine public confidence in the justice system.

The delegation notes that there are issues in Poland regarding the closed nature of the legal profession. These should also be addressed by both the government and the legal profession working collaboratively.

RECOMMENDATIONS

- The IBAHRI and CCBE call on the Polish government to desist immediately from pursuing legislative measures that may compromise the independence of the legal profession.
- The government must ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. The Polish government is therefore called upon to repeal enacted and withdraw proposed legislative provisions that undermine the independence of the legal profession in Poland, including those that:
 - institute the supervisory role of the Minister of Justice over legal professional associations;
 - introduce a third category of lawyer (licensed lawyer);
 - institute the supervisory role of the Minister of Justice over disciplinary proceedings relating to legal professionals and reduce the role of legal professional associations;
 - impose unreasonable caps on fees earned by advocates and legal advisers;
 - require the making of a personal asset declaration by persons in the legal profession in Poland; and
 - require the keeping of a list of contracts dealing with remuneration between lawyer and client and submitting these contracts to court.
- The IBAHRI and CCBE also urge the Polish government to engage in constructive dialogue with the legal profession to resolve ongoing tensions. Regular liaison meetings should be held with the legal profession to address issues of common interest and to resolve potential conflicts.
- There must be no influence exerted on the legal profession by the executive or any State organ in a manner which compromises the independence of the legal profession or the ability of individual lawyers to exercise their professional duties freely.
- The IBAHRI and CCBE urge the Polish government to respect the self-government of legal

professional associations. These associations must maintain their independence and must not be subjected to undue interference. This requires that a bar association should be run by its own members and should be instrumental in setting standards for the profession.

- The IBAHRI and CCBE urge the Polish Bar Council and the National Council for Legal Advisers to reassess their entrance procedures and limitations on admission to reflect both the demand for lawyers in Poland and the number of law graduates entering the workforce.

Threats to the prosecution system in Poland

CONCLUSIONS

It is apparent that the combination of the roles of Minister of Justice and Prosecutor General has led to an inappropriate level of executive interference in the prosecution system. In the context of recent government action, the combined roles are also a threat to the essential separation of the prosecution from the judiciary.

Personal attacks and inappropriate criminal charges pressed by the Minister of Justice against prosecutors are unacceptable, and violate the government's responsibilities to defend freedom of expression and association as guaranteed under international law and the Polish Constitution. Such criticism also undermines public confidence in the justice system.

RECOMMENDATIONS

- The government of Poland and prosecutors throughout Poland must respect the UN Guidelines on the Role of Prosecutors.
- The government of Poland is urged to separate the functions of Prosecutor General and Minister of Justice.
- Failing the separation of these roles, the IBAHRI and CCBE call on the Minister of Justice to refrain from making public criticisms of ongoing cases, and to avoid personal criticisms for prosecutors in the manner experienced by Mr Parulski. Should disciplinary action be required this should be done in accordance with established and transparent procedures.
- The IBAHRI and CCBE give their full support to Mr Parulski and the Polish Prosecutors' Association, and call on the government of Poland to respect the rights of prosecutors to free expression and association, as guaranteed by the Polish Constitution and international law.
- The IBAHRI and CCBE call on the Minister of Justice to refrain from making public criticisms of ongoing cases, and to avoid personal criticisms of prosecutors in the manner experienced by Mr Parulski. Should disciplinary action be required, this should be done in accordance with established procedures.
- The IBAHRI and CCBE encourage the government to enter into constructive dialogue with regulatory bodies (such as the NCJ) and professional associations (such as the Polish Prosecutors' Association and the Polish Judges' Association) to determine whether it is appropriate to introduce the role of investigative judge, and to discuss any other acceptable solutions to existing problems with the functioning of the Polish justice system.

