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# **Follow up report to Justice under Siege:** *a report on the rule of law in Poland*

September 2008

An International Bar Association  
Human Rights Institute Report  
Supported by the IBA Charitable Trust

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# **Follow up report to Justice under Siege:** *a report on the rule of law in Poland*

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# Executive Summary

In September 2007, the International Bar Association's Human Rights Institute (IBAHRI) and the Council of Bar and Law Societies of Europe (CCBE) conducted a joint mission to the Republic of Poland (Poland). The mission assessed concerns that a number of passed and proposed legislative amendments initiated by the government had or would have a negative impact upon the rule of law.

In October 2007, a new government was elected in Poland. The IBAHRI and CCBE released a report – *Justice under Siege: A report on the rule of law in Poland*<sup>1</sup> (the 'November 2007 report') – on their findings at a press conference in Warsaw in November 2007. The November 2007 report urged the new government to commit itself to the rule of law and the separation of powers doctrine and to implement 20 recommendations deemed necessary by the IBAHRI and CCBE to redress the problems identified.

This follow-up report is the result of a subsequent visit to Poland undertaken by the IBAHRI and CCBE 11-13 June 2008 (the 'follow-up visit'). It was conducted to determine the status of recommendations made by the November 2007 report. This follow-up report assesses progress made since November 2007. The IBAHRI would like to thank the trustees of the IBA Charitable Trust for their support of this visit.

## *Delegation members*

The IBAHRI and CCBE are grateful to Wilbur A Glahn III, trial lawyer and former Assistant Attorney-General of New Hampshire, United States, and John Fish, former President of CCBE (2002), Ireland, who conducted the follow-up visit on behalf of the IBAHRI and CCBE respectively.

## *Interviews and consultation*

During the course of the follow-up visit in June 2008, the delegation met with the Minister for Justice, Mr Zbigniew Cwiakalski, and representatives of: the National Council of the Judiciary (NCJ); the Human Rights Ombudsman; the Polish Bar Council; the National Council for Legal Advisers; and Iustitia, the Polish Judges Association.

## **Summary of conclusions**

In contrast to the tense atmosphere identified in the November 2007 report, it was clear during the follow-up visit that the overall climate that precipitated the initial fact-finding mission has significantly improved. The IBAHRI and CCBE attribute these changes to: the new government's abandonment of some of the attitudes and proposals of the previous administration; the willingness of the Minister of Justice to engage with the judiciary and the established legal professional bodies;

<sup>1</sup> The report is available in English and Polish at [www.ibanet.org/images/downloads/11\\_2007\\_Nov06\\_Report\\_Poland\\_Justice\\_under\\_Siege\\_Final\\_English.pdf](http://www.ibanet.org/images/downloads/11_2007_Nov06_Report_Poland_Justice_under_Siege_Final_English.pdf)

and the positive influence of the November 2007 report itself. The IBAHRI and CCBE welcome these changes. The new recommendations are in a text box on page 9.

## **Analysis of recommendations**

### *Overall recommendations*

The November 2007 report concluded that the former government of Poland appeared to have embarked on a campaign to gain control over the entire justice system. The November 2007 report made a number of overall recommendations to the Polish government, urging it to:

- respect the separation of powers doctrine;
- end the campaign of its predecessor against the judiciary, legal profession and prosecution system;
- recognise Constitutional supremacy; and
- engage with members of the judiciary, legal profession and prosecution service to discuss the areas identified as cause for concern.

The follow-up visit found that significant progress has been made in these areas by the new Polish Government. The IBAHRI and CCBE commend the government for the changes and progress that has been made.

### *Recommendations concerning the judiciary*

The November 2007 report made a number of recommendations concerning the judiciary. Many of the issues raised have been resolved by the new Polish government by the time of the follow-up visit. Some recommendations, however, still require action.

- The IBAHRI/CCBE found that the Minister retains the power to second or transfer a judge to a different court in a different location for up to six months, or to the Ministry of Justice for up to three months, without his or her consent. The November 2007 report expressed concern that this power might be used to pressurise or punish judges with whom the Minister disagreed. During the follow-up visit, the Minister of Justice indicated that he considers that he should retain this power, although he is committed to doing so only with the consent of the judge. The IBAHRI and CCBE remain concerned that this inappropriate power should be repealed, and note that a complaint on this has been filed with the Human Rights Ombudsman. Further, the IBAHRI and CCBE note that the Ministry of Justice is working on an amendment to this act, and await this with interest.
- The concerns raised by the November 2007 report relating to assessors<sup>2</sup> and trainee judges were two-fold. First, that insufficiently qualified assessors should not be granted full judicial powers, and second, that trainee judges, when appointed, should not serve an initial fixed term of four

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<sup>2</sup> Assessors are a category of trainee judges in Poland.

years. The Constitutional Tribunal has since ruled that the grant of such powers to assessors was unconstitutional. The proposal for appointment of judges to a limited four-year initial term was also abandoned as a result of the change in governments. The IBAHRI/CCBE's concerns in this area have therefore been addressed.

- The November 2007 report also expressed concern over the Minister of Justice's power to order the immediate suspension of a judge in certain circumstances, and criticised the removal of discretion from the judicial disciplinary tribunal as to whether to allow a prosecution. Since the release of the November 2007 report, these provisions have been challenged in the Constitutional Tribunal. It is understood that the Minister of Justice recognises the need to amend the areas identified as cause for concern and is preparing a new bill. The IBAHRI and CCBE commend this decision to rectify the problems identified in their report.
- The November 2007 report called for the amendment of legislation allowing the Minister of Justice to appoint the court president. This legislation remains in place, as the Minister considers that the power is appropriate and warranted. The IBAHRI and CCBE continue to hold concerns about the unfettered nature of this power.
- The November 2007 report noted that the President of Poland had refused to appoint judges recommended to him by the NCJ and refused to provide reasons for this decision. This matter remains outstanding, despite the IBAHRI and CCBE's recommendation to resolve the problem.
- The proposed changes to the Constitutional Tribunal were highlighted as of greatest concern in the November 2007 report. All of these proposals were eliminated by the change in the government, and the Minister of Justice has indicated that they will not be reintroduced. The IBAHRI and CCBE commend the Polish Government for abandoning these proposals, which were a serious threat to the rule of law in Poland.
- The IBAHRI and CCBE made a series of general recommendations regarding the relationship between the Ministry of Justice and the judiciary. The IBAHRI and CCBE believe that the Polish government should be commended for its efforts in improving its relationship with the judiciary.

### *Recommendations concerning the legal profession*

The November 2007 report found that the relationship between the government and the legal profession was characterised by mistrust. Significant improvement to this situation was observed during the follow-up visit, however some outstanding recommendations remain.

- The November 2007 report called for the government to amend legislation granting the Minister of Justice the power to supervise the independent legal professional bodies, and in particular, to review all resolutions of those bodies. No action has yet been taken to repeal or limit the legislation granting this power. This question is now before the Constitutional Tribunal. The IBAHRI and CCBE consider that the legislation provides opportunity for abuse and infringes the independence of the professional associations.
- The November 2007 report expressed concerns over proposals by the Minister of Justice to establish a third category of lawyers under his supervision. In accordance with the IBAHRI/CCBE

recommendation, these proposals have now been withdrawn. However, the Minister of Justice plans to introduce new legislation for the training and admission of lawyers. The IBAHRI and CCBE will continue to monitor this.

- Proposed legislation outlining an increased role for the Minister of Justice in disciplinary proceedings for lawyers was criticised by the November 2007 report as an intrusion on the independence of the legal professional organisations. These proposals have now been abandoned, although there remains a complaint before the Constitutional Tribunal challenging the validity of such legislation.
- The proposals to introduce fee-capping, personal asset declarations and submission of client contracts for advocates and legal advisors were strongly criticised by the November 2007 report. The IBAHRI and CCBE are pleased to note that these proposals have now been fully withdrawn, and commend the Minister of Justice for indicating that he will not reintroduce them.
- The November 2007 report highlighted concerns regarding a lack of lawyers in Poland. This situation continues to be the case. While the November 2007 report recommended that the Polish Bar Council and the National Council of Legal Advisors liberalise their training and admission programmes, it appears that the Minister of Justice has initiated a proposal to address these concerns. It is important, however, that any efforts to address this problem are conducted with the full participation of the independent legal professional bodies.
- The November 2007 report also made a number of general recommendations concerning the relationship between the Polish Government and the legal profession. These include that the Polish Government should:
  - desist from pursuing legislative measures compromising the independence of the legal profession;
  - ensure that lawyers are able to perform their professional functions without intimidation or harassment;
  - engage in constructive dialogue with the legal profession to resolve ongoing tensions; ensure that there is no influence exerted on the legal profession which compromises its independence; and
  - respect the self-government of legal professional associations.

It appears that the Polish Government has broadly addressed these issues, which is commended by the IBAHRI and CCBE.

### *Recommendations concerning the prosecution system*

Among other problems, the November 2007 report identified concerns about pressure on prosecutors by the government.

- The November 2007 report urged the Polish Government to separate the functions of Prosecutor General and Minister of Justice. The intention to take this action was announced shortly after the



new government took office. The IBAHRI and CCBE look forward to the draft legislation on this being passed.

- Recommendations calling on the government to cease its attacks against, and public criticisms of, prosecutors were also made in the November 2007 report. It appears that the new government has refrained from such actions.
- The November 2007 report recommended that the government enters into constructive dialogue with regulatory bodies and professional associations to discuss any acceptable solutions to existing problems with the functioning of the Polish justice system. While it does not appear that this has yet taken place, the IBAHRI and CCBE will continue to monitor the situation.

## **Other areas of concern**

In addition to the outstanding recommendations highlighted in this report, the IBAHRI and CCBE note that there continue to be problems with the effective functioning of the judiciary in Poland. In particular, the courts system is overburdened and decisions are often delayed. Alternatives, including court management systems and compulsory arbitration, are raised as possibilities for the government to consider.

### **New Recommendations**

- While substantial progress appears to have been made, the IBAHRI and CCBE continue to recommend that the Polish Government strives to respect the separation of powers doctrine and constitutional supremacy in all its efforts to address perceived problems in the Polish justice system.

#### *The judiciary*

- The IBAHRI and CCBE continue to 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 can happen only by virtue of a court decision and in terms of a clear set of criteria under which a judge may be seconded.
- The IBAHRI and CCBE recommend the repeal of those legislative provisions allowing the Minister of Justice to appoint court presidents, or in the alternative, to amend the Act to reflect the Minister of Justice's approach that the final decision lies with the NCJ.
- The IBAHRI and CCBE call on the President of Poland to issue reasons for the refusal to appoint the judges, and at a minimum, to engage with the NCJ on the issue of the appointment of judges.

### *The Legal Profession*

- The IBAHRI and CCBE recommend that the legislation granting the Minister of Justice a supervisory role over the legal professional bodies should be repealed, or at a minimum the Minister of Justice and the legal professional bodies should seek to negotiate a workable compromise.
- The IBAHRI and CCBE recommend that the Government of Poland consults and collaborates with the National Council for Legal Advisers and the Polish Bar Council in the development of alternative entrance arrangements for the legal profession.

# Chapter one: Introduction

- 1.1 In September 2007, the International Bar Association’s Human Rights Institute (IBAHRI) and the Council of Bar and Law Societies of Europe (CCBE) conducted a joint mission to the Republic of Poland (Poland). The mission assessed concerns that a number of passed and proposed legislative amendments initiated by the government had or would have a negative impact upon the rule of law. Of particular concern were the actual and proposed increases in power and control over the judiciary and the legal profession by the then Minister of Justice and apparent inappropriate governmental interference in the prosecution system.
- 1.2 In October 2007, a new government was elected in Poland. The IBAHRI and CCBE released a report - *Justice under Siege: A report on the rule of law in Poland*<sup>3</sup> (the ‘November 2007 report’) - on their findings at a press conference in Warsaw in November 2007. The report urged the new government to commit itself to the rule of law and the separation of powers doctrine and implement 20 recommendations necessary to redress the problems identified.
- 1.3 This follow-up report is the result of a visit to the undertaken by the IBAHRI and CCBE to Poland on 11-13 June 2008 (the ‘follow-up visit’). The follow-up visit was conducted to determine the status of recommendations made by the November 2007 report. This follow-up report assesses progress made in addressing the concerns identified by the November 2007 report. The IBAHRI would like to thank the trustees of the IBA Charitable Trust for their support of this visit.
- 1.4 The delegation’s terms of reference were:
  - 1) To determine the status of the recommendations made by the November 2007 report to restore the rule of law in Poland, including the status of passed and proposed legislative amendments;
  - 2) To meet with the Minister of Justice to obtain a clearer picture of the new government’s position on the rule of law, and if possible to secure a commitment to implementing any of the remaining recommendations made by the November 2007 report;
  - 3) To meet with the Polish National Council for Legal Advisers, the Polish Bar Council, the Human Rights Ombudsman, the National Council for the Judiciary and Iustitia (the Polish Judges Association) in order to assess any changes or improvements in the state of the rule of law since the IBAHRI/CCBE’s September 2007 mission; and
  - 4) To make recommendations for any additional or outstanding steps required to be taken by the government or other bodies in Poland to restore or improve the state of the rule of law.

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<sup>3</sup> The report is available in English and Polish at [www.ibanet.org/images/downloads/11\\_2007\\_Nov06\\_Report\\_Poland\\_Justice\\_under\\_Siege\\_Final\\_English.pdf](http://www.ibanet.org/images/downloads/11_2007_Nov06_Report_Poland_Justice_under_Siege_Final_English.pdf)

## **Organisation of the mission**

- 1.5 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 IBA, 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.
- 1.6 Created in 1960, the 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 ten 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*

- 1.7 The IBAHRI and CCBE are grateful to Wilbur A Glahn III, a trial lawyer and former Assistant Attorney General of New Hampshire, from the United States, and John Fish, Former President of CCBE (2002), from Ireland, who conducted the mission on behalf of the IBAHRI and CCBE respectively.

### *Interviews and consultation*

- 1.8 During the course of the mission, the delegation met with the Minister for Justice, Mr Zbigniew Cwiakalski, and representatives of: the National Council of the Judiciary (NCJ); the Human Rights Ombudsman; the Polish Bar Council; the National Council for Legal Advisers; and Iustitia, the Polish Judges Association.
- 1.9 The delegation had the services of various interpreters during most meetings.
- 1.10 The IBAHRI, CCBE and the delegation members wish to express their gratitude and appreciation to those they interviewed during their visit.

## **Background to follow-up visit**

- 1.11 The November 2007 report made 20 recommendations to the new Polish Government identified as necessary to be implemented to restore the rule of law in Poland. These recommendations addressed concerns in three general areas: the judiciary; the legal profession; and the prosecution system. In each of these areas, the report outlined concerns about legislation, policies or constitutional amendments, either proposed or enacted, that affected the rule of law in Poland.

- 1.12 Although the November 2007 report expressed significant concerns identified during the September 2007 mission about initiatives taken by the government (then controlled by the Law and Justice Party), it recognised that initiatives of the previous government might be changed by the incoming government. However, many of the initiatives of the previous government had been adopted into law. The November 2007 report therefore urged the new government to repeal certain legislation, which the IBAHRI and the CCBE deemed to be contrary to the rule of law. The November 2007 report also urged the new government to announce publicly its intention not to pursue the proposed amendments identified as of concern to the rule of law in Poland.
- 1.13 Information including the history, government, judicial system, legal system and full analysis of the situation in Poland as understood from the September 2007 mission can be found in the November 2007 report, which is available online in English and Polish.



# Chapter Two: Analysis of status of recommendations

## The current climate in Poland

2.1 In contrast to the tense atmosphere which existed during the September 2007 mission to Poland and which is evident from the tone of the November 2007 report, a considerably more relaxed atmosphere was apparent during the follow-up visit. It is clear that the overall climate which precipitated the first fact-finding mission has significantly improved. The IBAHRI and CCBE attribute these changes to: the new government's abandonment of some of the attitudes and proposals of the previous administration; the willingness of the Minister of Justice to engage with the judiciary and the established legal professional bodies; and the positive influence of the November 2007 report.

## The meeting with the Minister of Justice

- 2.2 The IBAHRI and CCBE had attempted to arrange a meeting with the former Minister of Justice during their first mission, but these requests were rejected. When the press conference for the November 2007 report was held, the new government was yet to be officially called, so it was not possible to meet with the new Minister of Justice. Therefore, conducting a meeting with the Minister of Justice was a priority for the follow-up visit.
- 2.3 The Minister made it clear to the IBAHRI and CCBE from the outset that he had read the November 2007 report fully and subscribed to many of its conclusions. He stated that he had a responsibility to try to reconcile the different interests within Poland with the public interest.
- 2.4 The Minister noted several changes in the situation described in the November 2007 report which are outlined in detail below. In addition, nearly all of the representatives with whom the delegation met expressed their opinion that the situation in Poland today is much improved from that described in the November 2007 report. In particular, the Minister of Justice indicated that he has made an effort to meet regularly with the judiciary and the legal professional bodies. He described what he believed to be 'profound and substantial changes' affecting some of the issues raised in the November 2007 report and in the relationship between the Ministry of Justice, the judiciary and the legal professional bodies. While not all of the representatives with whom the delegation met agreed entirely with the Minister's characterisation, all agreed that he has made an effort to effect change, and to involve them in the process. The majority of concerns expressed focussed on the failure of the new government to repeal some of the legislation identified as cause for concern in the November 2007 report.
- 2.5 Broadly, the IBAHRI and CCBE were encouraged by the Minister's positive approach to the issues raised in the November 2007 report. In the absence of repeals of a number of provisions which remain a cause for concern, the good faith shown by the Minister during the course

of his meeting with the delegation and largely confirmed during the course of the further meetings with other interested parties is encouraging. However, as discussed below, there remains a need for certain legislative changes to be made to restore fully the rule of law in Poland.

- 2.6 Despite these improvements, many stakeholders consulted identified continuing problems within the judiciary, and in particular on the efficiency with which justice is delivered. The change apparent thus far is fragile and requires the continued efforts of all parties.
- 2.7 This report is structured to follow the recommendations made in the November 2007 report. In each section below, the recommendations of the November 2007 report are set forth, followed by a discussion of the status of these recommendations based on facts learned during the follow-up visit and, where applicable, the further recommendations of the IBAHRI/CCBE.

## **Overall recommendations**

- 2.8 The November 2007 report made a number of overall recommendations to the Polish government:

### Recommendation 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 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.

### Recommendation 2

The Polish government must observe constitutional supremacy and must act in accordance with the Constitution and international standards at all times.

### Recommendation 3

The executive is urged to end immediately the previous government's campaign of hostility against the judiciary, legal profession and prosecution system.

### Recommendation 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.

- 2.9 As examined above, it appears that significant progress has been made in these areas by the new Polish Government. In particular, the Minister of Justice has made an effort to meet with the judiciary and the legal professional bodies and to involve them in efforts to propose legislation or amend existing laws.



## Conclusion

2.10 The IBAHRI and CCBE continue to affirm these recommendations as a priority for the Polish Government, and commend the progress that has been made in the months since the release of the November 2007 report.

## The Judiciary



2.11 Chapter Two of the November 2007 report outlined the concerns of the IBAHRI and the CCBE regarding a number of passed and proposed legislative amendments affecting the Polish judiciary that had been initiated by the former government. The ‘principle of discontinuity’ whereby the proposed legislation of a former government is automatically withdrawn, meant that the November 2007 change in government saw the end of all of the legislative proposals of the former government

that had not yet been passed. However, given that the Civic Platform Party, which is now in government, formerly supported some of these proposals in Parliament, the November 2007 report called on the new government to affirm its intention not to revive any of these proposals.

2.12 In practice, it appears that in nearly all cases, the approach of the new government differs significantly from its predecessor and the previously proposed legislation has not been reintroduced. The Minister of Justice advised and has reportedly assured the judiciary and the legal professional bodies that such legislative proposals will not be reintroduced. The IBAHRI and CCBE welcome this commitment. In several areas addressed in the November 2007 report the Ministry of Justice is working with the judiciary and the legal professional bodies on new legislation. The IBAHRI and CCBE await these new proposals with interest.

### ***Power of the Minister of Justice to move judges involuntarily***

#### Recommendation 6:

Given their views about undue executive interference in the judiciary..., 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 include no forfeiture of the judge’s original appointment.

2.13 The Act of 29 June 2007 amending the Act – the Law on the system of common courts and certain other acts (the ‘29 June Courts Act’) changed Article 77 of the Law on the System of

Common Courts to permit the Minister of Justice to ‘second’ or transfer a judge to a different court in a different location for of up to six months, or to the Ministry of Justice for up to three months, without his or her consent. The November 2007 report expressed concern that this power might be used to pressure or punish judges with whom the Minister disagreed. These concerns were heightened by other measures giving the Minister increased power over the judiciary and judicial discipline, and by statements made by the prior Minister that were highly critical of the judiciary. The standard for seconding a judge set out in the 29 June Act was both vague and subjective namely, ‘to strengthen a judicial body’ or in the ‘interests of the administration of justice’.

- 2.14 As the 29 June Courts Act was passed into law, a legislative amendment is required to remove these provisions. The provisions of concern identified have not yet been repealed since the release of the November 2007 report.
- 2.15 Unfortunately, this is an area in which the Minister remains in disagreement with the November 2007 report and the judiciary. During his meeting with the delegation, the Minister expressed the view that the workload of the courts sometimes requires the Ministry to have the power to transfer judges. At the same time, he indicated that the power has been used very infrequently, that he had not exercised that power, and that he would do so only where necessary and with the consent of the judge. Despite the improved climate and the Minister’s assurance that transfers would not be made without the consent of the judge, the existence of the legislation without the mandatory requirement that the judge’s consent be obtained remains of concern to the IBAHRI and CCBE and may serve as a potential threat against judges, or may be used improperly by future Ministers.
- 2.16 A complaint on this aspect of the 29 June Courts Act has been filed with the Human Rights Ombudsman. The Ministry of Justice is working on a proposed amendment to the 29 June Act, but the Minister believes that he should have the power to transfer judges under limited circumstances. Given what was described by representatives of the judiciary and the Ombudsman as a significant backlog and an imbalance in workload in the courts, especially at the lower levels, there may at times be a need to transfer judges to address these problems. However, the need for such transfers to be involuntary and at the instigation of the government has not been proved.

### *Conclusions and recommendation*

- 2.17 The immediate concerns over the power to transfer judges have been alleviated, particularly in light of the Minister’s assurances that he would employ the power very sparingly and only with the consent of the judge. However, the possible misuse of the power by a future Minister of Justice is of continued concern, as is the potential threat that the power may represent to judges considering cases today, even if the power is not used in practice. Given that legislation may be introduced on this provision, or that the Constitutional Tribunal may address it in the near future, the status of the Act is unclear. However, due to the potential for future abuse of this power to pressure or punish judges by a different government, the IBAHRI and the CCBE

continue their recommendation that this portion of the 29 June Courts Act be repealed. The IBAHRI and CCBE remain of the view that involuntary secondments should be abolished, or if retained, the legislation should specify that involuntary secondments can only occur by virtue of a court judgement and under a clear set of criteria.

### **Assessor and trainee judges: powers and trial period**

#### Recommendation 7a

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, 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.

- 2.18 Two concerns were raised in the November 2007 report concerning assessor<sup>4</sup> and trainee judges: (1) that insufficiently qualified assessors should not be granted full judicial powers; and (2) that trainee judges, when appointed, should not serve an initial fixed term of four years. Among other concerns, the IBAHRI and CCBE considered that a four year temporary appointment under the control of the Ministry of Justice had the potential to subject trainee judges to political pressure. The November 2007 report noted that the granting of judicial power to assessors had been challenged in the Constitutional Tribunal.
- 2.19 Subsequent to the November 2007 report, the Constitutional Tribunal ruled that the granting of such powers to assessors was unconstitutional. As a consequence of the decision, assessors may not exercise judicial powers and must be appointed as judges. The impact of this decision is substantial. Nearly a quarter of all judges in Poland are assessors. If assessors are not eligible to be appointed as full judges by the President after meeting the necessary qualifications of a judge, the impact on the system would be substantial. Many of the assessors, either by virtue of their age or training, would not currently qualify to be judges.
- 2.20 Rather than immediately disqualifying all assessors, the Constitutional Tribunal stayed its decision until May 2009, in order to give the government time to address the consequences of the decision through legislation. The government and the NCJ are working on a legislative proposal to reduce the age at which an assessor may be appointed a judge (from 29 to 28 years) and to reduce the training period so that a greater percentage of assessors will be eligible for appointment to the bench in May 2009. Because the legislation has not been finalised, the details of the new bill were not available. It appears, however, that the Ministry, the NCJ and the judiciary are working cooperatively to address the issue while also attempting to meet the needs of the courts. Both the Minister and the NCJ indicated that the proposals will require that an assessor may only be appointed as a judge after meeting the required standards. In the absence

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4 Assessor judges are a category of trainee judges in Poland.

of such an appointment an assessor could not perform the functions of a judge. All such appointments must be for life, with no fixed term.

2.21 The proposal for appointment of judges to a limited four-year initial term was abandoned as a result of the change in governments. It has not been reintroduced, and the Minister indicated that he is firmly of the opinion that no such limitation should apply.

### *Conclusion*

2.22 The concerns set out in the November 2007 report regarding the training and appointment of assessors to perform judicial functions have been addressed by the Constitutional Tribunal's decision. The IBAHRI and CCBE await the details of the new legislation with interest. The IBAHRI and CCBE commend the Minister's decision to abandon the limitations on tenure for trainee judges as recommended by the November 2007 report.

### ***Amendments to the Disciplinary Procedures for Prosecuting Judges who Commit Intentional Crimes***

#### Recommendation 7b

The IBAHRI and CCBE call upon the Polish Government to 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 issues its consent to the commencement of proceedings against a judge.

2.23 The 29 June Courts Act gave the Minister of Justice the power to order the immediate suspension of a judge in certain circumstances and appeared to remove from the disciplinary tribunal the discretion as to whether to allow a prosecution to occur. The November 2007 report expressed concerns that 'allowing the Minister of Justice to suspend a judge could be perceived as an undue interference by the executive.'

2.24 Since the release of the November 2007 report, these provisions have been challenged in the Constitutional Tribunal. It is the understanding of the IBAHRI/CCBE that the Minister of Justice recognises the need, on constitutional grounds, to amend the existing provisions relating to the immunity of judges, the requirement that the disciplinary tribunal acts within 24 hours and the prohibition on access to files by an accused judge. It is further understood that in anticipation of the Constitutional Tribunal's decisions, the Minister intends to introduce a new Bill which will deal with changes to the existing provisions and which will also deal with the same issues as they apply to prosecutors.

## *Conclusion and recommendation*

2.25 The concerns regarding the disciplinary proceedings for judges outlined in the November 2007 report appear to have been addressed by the Ministry's changed position before the Constitutional Tribunal.<sup>5</sup> Although the Minister has not indicated precisely which changes he has in mind, the IBAHRI/CCBE, which attaches significant importance to these provisions, urges the Minister to ensure that in accordance with its recommendation, that these provisions are revoked. However, the final outcome of these provisions must await the decision of the Constitutional Tribunal.

## **Appointment of the court president**

### Recommendation 7c

The IBAHRI and CCBE call on the Polish Government to amend legislation to remove the role of the Minister of Justice in appointing presidents to certain courts and temporary judges.

2.26 The November 2007 report expressed concerns that the 29 June Courts Act granted the Minister of Justice the power to appoint presidents of courts. The concern was that this power would allow the Minister to assert influence over the courts by influencing the composition of the judiciary by nominating and appointing persons of his preference.

2.27 As the power to appoint court presidents and to assign vacant positions was granted by legislation an amendment is required to effect a change in the Minister's power.

2.28 This is an area where the Minister of Justice continues to disagree with the recommendations of the November 2007 report and the NCJ. The Minister expressed the view to the delegation that the role of the court president is purely administrative and that since the president administers the court budgets it is necessary for the Ministry, which has the responsibility of those budgets, to have some voice in the appointment of the presidents. Although describing the president's role as 'purely administrative', the Minister also noted that a court president may also sit a judge, but that the Minister has no control over his or her judicial functions. The Minister also indicated that his power only extends as far as the NCJ; that is, the Minister recommends a president to the judges of a court and if they disagree with the selection, he may appeal to the NCJ but the decision of the NCJ is final. It appears that this arrangement is by agreement only, and is not incorporated into the legislation.

2.29 By contrast, the NCJ considers that a court president is not purely an administrative position because a court president has the power to assign cases and workload within the court, thereby influencing decisions of the court on substantive matters. The NCJ believes that the power to

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5 The Report noted that an Act dealing with disciplinary proceedings for legal professionals had been introduced in the Polish Parliament in September 2007 and that the delegation had not had the opportunity to examine the implications of the proposed act on the judiciary. See item 5 in Part Two of the Report. Under the proposal, a new disciplinary division was to be created within an appellate court. The proposal appears to have died with the change in governments and has not been reintroduced.

appoint presidents is a substantial one that should not reside with the Minister of Justice. At the same time, the NCJ would be willing to agree to a proposal in which the Minister is bound by the decision of the NCJ on the appointment.

### *Conclusion and recommendation:*

2.30 It appears that legislative amendment is still required in order to change the 29 June Courts Act and to limit the Minister of Justice's powers to appoint presidents so that the Minister is bound by decisions of the NCJ. Despite the Minister's intention to be bound by the decisions of the NCJ on appointment of court presidents, the IBAHRI and CCBE continue to hold concerns about the lack of such a limitation in the legislation. Therefore, the IBAHRI and CCBE recommend the repeal of contrary provisions in the 29 June Court Act, or the amendment of the Act to reflect the intention of the Minister of Justice.

### ***Refusal of the President to Appoint Judges***

#### Recommendation 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 further urge the President of Poland to observe the Constitution and to appoint judges as recommended by the NCJ.

2.31 The November 2007 report noted that the President of Poland had refused to appoint judges recommended to him by the NCJ. In addition, the President declined to provide reasons for his refusals.<sup>6</sup> It is the understanding of the IBAHRI and the CCBE that prior to this refusal, the President had always accepted the nominees of the NCJ. Coupled with other legislation designed to give the government greater power over the judiciary, this refusal appeared to be part of a concerted effort to control the composition of the judiciary for political purposes.

2.32 Article 179 of the Polish Constitution reads as follows: 'Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council on the Judiciary'. The President reportedly contends that his appointment power is discretionary, whereas the NCJ asserts that the President must appoint all judges recommended to him by the NCJ. The NCJ believes that because it evaluates candidates and their credentials, the President has no basis to conduct further evaluation or analysis. The matter appears to be one of continuing conflict between the President and the NCJ. Unless the President relents, or the President and the NCJ can arrive at a compromise, the resolution of the issue will likely require a decision of the Constitutional Tribunal.

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<sup>6</sup> Based on facts learnt in the June 2008 visit, it appears that the President refused to appoint nine of approximately 600 judges recommended to him by the NCJ.

## ***Conclusion and Recommendation:***

2.33 Some of the circumstances that exacerbated the concerns over the unwillingness of the President to make all of the appointments of the NCJ have been mitigated by the change in governments, but the resolution of this issue is an important one. The IBAHRI and CCBE continue to call on the President of Poland to issue reasons for the refusal to appoint the judges, and at a minimum, to engage with the NCJ on the issue of the appointment of judges.

## ***Changes to the Constitutional Tribunal***

### **Recommendation 9**

The executive must desist immediately from interfering 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, the number of judges required to hear each case and the time constraints on considering cases must be withdrawn.

2.34 As the November 2007 report stated, '[p]erhaps the most significant and worrying proposals are those contained in a series of proposed changes to the Constitutional Tribunal.' These changes would have substantially interfered with the workings of the Constitutional Tribunal by requiring cases to be heard in the order in which they were filed, under severe time constraints, and would have required at least 11 of the 15 justices of the Constitutional Tribunal to hear all cases. Representatives with whom the IBAHRI and CCBE delegation met in September 2007 expressed great concern over these proposals and the IBAHRI and CCBE spoke out strongly against them.

2.35 All of these proposals were eliminated by the change in the government, and the Minister of Justice has indicated that they will not be reintroduced. All of the representatives met by the delegation expressed the view that the proposals appear to have been abandoned.

## ***Conclusion***

2.36 The IBAHRI and CCBE commend the Polish Government for abandoning these proposals, which were a serious threat to the rule of law in Poland.

## ***General Recommendations***

2.37 The IBAHRI and CCBE made a series of general recommendations regarding the relationship between the Ministry of Justice and the judiciary.

### Recommendation 5

The executive must act in accordance with the rule of law, recognising in particular the fundamental principle of the independence of the judiciary.

### Recommendation 10

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 attacking judges personally.

2.38 Based on the statements of the individuals with whom the delegation met, progress has been made on these recommendations. The IBAHRI and CCBE have not heard of situations in which the new Government has attacked judges or excessively criticised judicial decisions.

### *Conclusion and recommendation*

2.39 There is widespread agreement that the current government has improved its relationship with the judiciary and that as a result, the prior sense that the judiciary system was under attack has changed. The IBAHRI and the CCBE applaud these efforts and hope that the government continues to build trust between the three branches of power. The IBAHRI and CCBE further urge the Polish Government to implement the recommendations made in this report to rectify the remaining problems identified.

## **The Legal Profession**



2.40 Part Three of the November 2007 report addressed ‘Threats to the Legal Profession in Poland.’ Mirroring the situation with the judiciary, the relationship between the government and the legal professional bodies, (particularly as evidenced by comments of the Minister of Justice concerning the legal profession and its representative bodies), was one of mistrust.

2.41 Fortunately, these relationships have improved under the new government. While there are still issues of disagreement, during the follow-up visit representatives of the legal profession indicated that relations between the government and the legal professional bodies have improved and that there has been a genuine effort by the Minister of Justice to solicit their comments on government proposals and to meet with them to obtain their views on other matters. The climate therefore appears to be rapidly improving.



## ***Supervision of legal professional bodies by the Minister of Justice***

### Recommendation 14.1

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.

- 2.42 As indicated in the November 2007 report, legislation passed in March 2007, the 29 March 2007 Act Amending the Act on the Legal Profession and certain other acts (the '29 March 2007 Act'), increased the supervisory powers of the Minister of Justice over the National Council of Legal Advisors and the Polish Bar Council by requiring those bodies to forward all resolutions to the Minister of Justice, and by allowing the Minister to review all such resolutions and to seek to overturn them in the Supreme Court. The law provided no standard by which this review was to be conducted and no basis on which the Minister might seek to overturn the resolutions. Once again, because this change has been implemented by legislation, an act to repeal or amend the 29 March Act is necessary to implement the change. Despite the IBAHRI and CCBE's recommendation, no action has been taken to repeal the legislation.
- 2.43 This subject remains an area of disagreement among the legal professional bodies and the Minister of Justice. The Minister believes that he should be entitled to determine whether resolutions of the National Council of Legal Advisors and the Polish Bar Council are illegal and, if so, to seek to overturn them in court. As examples, the Minister pointed to resolutions imposing a high entry fee for the purpose of keeping membership low or shortened training periods which might have resulted in a reduction of quality in the legal profession. The Minister defended his right of review by asserting that he cannot unilaterally overturn the resolutions. By contrast, the National Council of Legal Advisors and the Polish Bar Council see the wholesale review of all of their resolutions, particularly those addressed to their internal affairs, as an unnecessary intrusion on their independence.
- 2.44 The question of the Minister's power to review resolutions of the legal professional bodies is now before the Constitutional Tribunal. Representatives of both legal professional organisations expressed the view that the Minister of Justice has been willing to discuss this issue with them, but that no changes have been made. The interests expressed by both sides have some validity; however, the IBAHRI and CCBE consider that the legislation provides opportunity for abuse and infringes on the required independence of the professional associations. One possible solution proposed by a representative with whom the delegation met was to permit the Minister to review resolutions that have an 'external' impact that is, on the public or on admission to the organisations, while leaving 'internal' matters to the associations. This may be a possible resolution to the conflict.

### *Conclusion and recommendation:*

2.45 The IBAHRI and CCBE continue to be concerned over the impact of the legislation on the independence of the professional organisations and repeat their call for the repeal of the legislation in this area. Alternatively, they urge the Minister of Justice and the professional associations to negotiate a workable compromise.

### **Proposed new licence category of lawyers**

#### Recommendation 14.2

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...introduce a third category of lawyers (licensed lawyer) under the supervision of the Minister of Justice.

2.46 The November 2007 report expressed concerns over proposals by the Minister of Justice to establish a third category of lawyers under his supervision, in addition to the Polish Bar Council and the National Council of Legal Advisors. Coupled with proposals to cap fees and to require disclosure of lawyers' assets and contracts with clients unless they were members of this new licensed category, these proposals raised serious concerns.

2.47 All proposals concerning this third category of licensed lawyers have now been withdrawn. However, the Minister plans to introduce new legislation to allow flexibility in the training of lawyers. The Minister of Justice is reportedly concerned that the legal profession needs to be opened up to enable law graduates a greater opportunity of being admitted as full members of the existing legal professional bodies. The Minister has indicated that his department is working on a new bill which will propose a two tiered examination system that will provide an alternate path for training. He has also expressed his intent to work with the legal professions on this legislation.

### *Conclusion and recommendation*

2.48 The IBAHRI and CCBE commend the government's withdrawal of the third category of lawyer under the supervision of the Minister for Justice. Although the Polish Bar Council and the National Council of Legal Advisors have expressed some concern over the preliminary concepts of the new training programme proposed by the Minister of Justice, as no concrete legislation has yet been submitted any substantive comment is premature. The IBAHRI and CCBE will continue to monitor the situation. The IBAHRI and the CCBE encourage the Minister of Justice, the Polish Bar Council and the National Council of Legal Advisors to continue their efforts to address the need for young lawyers to enter the profession while at the same time ensuring proper training and ethical standards.

## **Changes to disciplinary proceedings**

### Recommendation 14.3

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 disciplinary proceedings relating to legal professionals and reduce the role of legal professional associations.

2.49 At the time of the November 2007 report, legislation had been proposed outlining an increased role for the Minister of Justice in disciplinary proceedings for lawyers. The IBAHRI and CCBE criticised these proposals as an intrusion on the independence of the legal professional organisations and an interference with their operation.

2.50 As a result of the principle of discontinuity, these proposals have been abandoned. Despite that fact, there is a complaint before the Constitutional Tribunal challenging the validity of such legislation. The Minister of Justice indicated that he has not yet taken a formal position on the matter in the Tribunal and has not yet been asked to do so. Representatives of the professional organisations met indicated that the Minister has advised them that he will not be involved in the discipline of lawyers. They also indicated that the discussion with the Minister on issues of this nature is 'very different' from what it was in the past. For now, the resolution of this question must await the position of the Minister before the Constitutional Tribunal.

### **Conclusion and recommendation**

2.51 The IBAHRI and CCBE consider that the discipline of lawyers is best handled by the legal professional bodies and the judiciary. It appears that the proposal for the Minister of Justice to become involved in the discipline of lawyers will not be revived by the new administration. This is welcomed by the IBAHRI and CCBE. The constitutionality of the issue remains under consideration by the Constitutional Tribunal. The IBAHRI and CCBE will continue to monitor the situation with interest.

## ***Fee capping, personal asset declarations and submission of client contracts for advocates and legal advisors***

Recommendation 14.4, 14.5 and 14.6

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...impose caps on fees charged by advocates and legal advisors; 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.

2.52 The November 2007 report expressed significant concern over the proposals of the Minister of Justice to establish fee limits for advocates and legal advisors and to require asset disclosures and the submission of client contracts. These proposals were perceived as an attack on the legal profession and an invasion on lawyer-client confidentiality. When coupled with the allegation that these requirements would have applied only to those not licensed by the Minister, they appeared to be a transparent attempt to force all lawyers to be subject to the Minister's control. All of these proposals have now been withdrawn, and the current Minister of Justice has indicated that he disagrees with the proposals and will not reintroduce them.

### ***Conclusion***

2.53 The withdrawal of these proposals appears to have contributed significantly to the improved climate of trust and cooperation between the legal professional bodies and the government. The IBAHRI and CCBE commend the government for abandoning these proposals.

## ***Expansion of the legal profession***

Recommendation 16

The IBAHRI and CCBE urge the Polish Bar Council and the National Council for Legal Advisors 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.

2.54 The IBAHRI and CCBE were concerned following their first mission that there are inadequate numbers of lawyers to address the needs of Polish citizens before the courts and there are also many young university graduates who wish to become lawyers but have been unable to do so. Recommendation 16 was intended to encourage the Polish Bar Council and the National Council of Legal Advisors to liberalise training programmes. As examined above, it appears that the Minister of Justice has initiated a proposal to address the concern over the lack of lawyers in

Poland. The IBAHRI and CCBE were provided with a translation of the key elements of the new law, as announced by the Minister of Justice recently.

### **Act on State Law Examinations – Basic Information**

#### Aims of implementation of the Act on State Law Examinations

1. Facilitation of access to legal assistance through transferring, to a new category of law graduates (those who passed 1st degree examination), competences to act before district courts and undertaking other legal activities. Those persons (due to revising their knowledge with the 1st degree examination) shall ensure appropriate level of preparation to render legal services, and at the same time they shall pose a competition to advocates and legal advisors.
2. Creating two basic paths of access to legal professions:
  - after having passed 1st degree examination, completed legal apprenticeship and passed 2nd degree examination (equivalent to current professional examination);
  - after having passed 1st degree examination and having performed legal activities for at least four years (those activities shall be specified in statutory manner and the group of people shall be supposed to be competent to act before district courts in specific categories of cases), and then after having passed the 2nd degree state law examination, without necessity to undergo the legal apprenticeship.
3. Standardisation of recruitment criteria with respect to all professional apprenticeships conducted by all lawyers' self-governments with applying one 1st degree state examination.

2.55 It appears that the new proposal being developed by the Minister of Justice concerning entry into the profession may be designed to address such concerns as those held by the IBAHRI and CCBE regarding the limitations on admission to the profession in Poland. However, it should be noted that the Polish Bar Council and the National Council for Legal Advisers are concerned about the information they have received about the new proposals. In particular, the National Council for Legal Advisers has expressed concern that the legislation appears to be inconsistent with two judgements of the Constitutional Tribunal (19 April 2006, number K6/06 and 8 November 2006, number K 30/06).

2.56 The National Council for Legal Advisers has expressed its concern that the new examinations will allow law graduates who have passed the first state law examination to appear in the lower courts without the obligations of professional secrecy and ethics and the established supervision and disciplinary proceedings of the legal professional bodies. The National Council for Legal

Advisers has also indicated that it is concerned that the new proposals breach article 17 of the constitution. The National Council is also concerned that they have not had adequate input into the formulation of the examinations for entry.

#### **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.

#### ***Conclusion and Recommendation***

2.57 The IBAHRI and CCBE are strongly of the opinion that the National Council for Legal Advisers and the Polish Bar Council must play an important role in expanding the profession, as they are also responsible for ensuring that lawyers are well trained and are subject to high ethical standards. The IBAHRI and CCBE recommend that the Government of Poland consult and collaborates with the National Council for Legal Advisers and the Polish Bar Council in the development of alternative entrance arrangements for the legal profession.

2.58 Further, the IBAHRI and CCBE consider that, as the proposals could lead to the development of a new legal profession comprising of law graduates who have passed the first state examination, any new legal profession should be entitled to the same right to independent self-government as the existing professional bodies. The IBAHRI and CCBE also consider that it is vital that any new profession be subject to the same professional ethics and discipline as the existing bodies. The IBAHRI and CCBE will continue to monitor this situation.

#### ***General Recommendations***

2.59 The November 2007 report also made a number of general recommendations concerning the relationship between the Polish Government and the legal profession. These will be considered briefly.

#### **Recommendation 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.

2.60 As examined, it appears that the Polish government has desisted from pursuing legislative

measures compromising the independence of the legal profession. The IBAHRI and CCBE hope that this situation will continue. New legislative amendments impacting on the legal profession, including the proposed new entrance arrangements, may require further examination.

#### Recommendation 14

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.

2.61 The current environment in Poland appears to be much more conducive to ensuring this result. The IBAHRI and CCBE welcome this improvement and commend the efforts of the Polish government to improve the situation.

#### Recommendation 15

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.

2.62 As examined above, the IBAHRI and CCBE conclude that there has been significant progress in improving the relationship between the government and the legal profession. It appears that the Minister of Justice has initiated consultation with the legal profession both on issues concerning the arrangements governing the profession and on proposed legislation more generally. These efforts are applauded by the IBAHRI and CCBE. However, it is apparent from the outstanding issues identified in the report that there remain areas of disagreement between the Polish Government and the legal professional bodies, which will require sustained commitment on both sides to consultation and compromise.

#### Recommendation 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. Recommendation 12

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.

2.63 As with the other general recommendations, significant progress is also evident in these areas. However, the IBAHRI and CCBE note that there are some outstanding issues, including the review of all resolutions of the National Council for Legal Advisers and the Polish Bar Council, that require legislative amendment to ensure that the legal profession can exercise its independence. Further, the development of a new category of lawyers should also be carefully developed, and will be monitored by the IBAHRI and CCBE.

## *Conclusions*

2.64 Representatives of both the Polish Bar Council and the National Council of Legal Advisors indicated that the new government has been far more responsive and has made an effort to both meet with them and involve them in a constructive dialogue. Likewise, the Minister of Justice indicated that his office has made an effort to meet regularly and seek the opinions of the legal professional organisations. These developments offer hope for continued progress in this area and the IBAHRI and CCBE commend the Minister and the Polish Bar Council and the National Council of Legal Advisors for the progress made to date.

## **The prosecution system**

2.65 Chapter Four of the November 2007 report addressed threats to the prosecution system in Poland. Among other problems, the November 2007 report identified actions by the government and in particular, the previous Minister of Justice, to pressure prosecutors by intervening in individual cases, publicly criticising prosecutors and, in one reported case, demoting a prosecutor. The November 2007 report also expressed concerns over the combined role of the Minister of Justice and the Public Prosecutor General particularly in light of the efforts of the Minister to gain control over the judiciary and the legal profession.

### ***Separation of the Minister for Justice and the Prosecutor General roles***

#### Recommendation 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 in the manner experienced by Mr Parulski. Should disciplinary action be required this should be done in accordance with established and transparent procedures.

2.66 One of the first announcements made by the incoming government was that it planned to separate the roles of Minister of Justice and Prosecutor General. During his discussions with the delegation, the Minister of Justice indicated that this was being done partly as he understood that he was the only European Minister of Justice whose responsibilities were combined with



that of Prosecutor General. He agreed that there is a need to separate the two offices.

2.67 At present, there is a legislative proposal pending in the Parliament that calls for the separation of these offices. The bill was drafted by a team of experts selected by the Minister of Justice including a former Human Rights Ombudsman and former President of the Constitutional Tribunal, after consultation with the prosecution service. Under the proposal submitted by the government, the Public Prosecutor General would be selected by the President from nominees submitted by the NCJ and the prosecutors.

### **Conclusion**

2.68 The IBAHRI and CCBE commend the Minister of Justice's decision to separate the functions of Minister of Justice and Prosecutor General and look forward to the introduction of this legislation. The IBAHRI and CCBE will continue to monitor the situation until the legislation is introduced and implemented.

### **Attacks against prosecutors**

2.69 The November 2007 report made one recommendation concerning attacks against prosecutors:

#### **Recommendation 19**

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.

2.70 Although the follow up visit did not involve meetings with any prosecutors, the delegation was not informed of any attacks on prosecutors by the current government or Minister of Justice. Additionally, the general change in the tone of the government in its dealings with both the judiciary and the legal profession suggest that such attacks are unlikely. The IBAHRI and CCBE welcome the improved environment, and will continue to monitor the situation.

### **Improving the functioning of the Polish justice system**

#### **Recommendation 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.

2.71 The IBAHRI and CCBE did not investigate progress in discussing solutions to existing problems within the functioning of the Polish justice system. However, both the IBAHRI and CCBE will continue to monitor the situation and encourage the Polish Government to progress its efforts to collaborate with other bodies involved in the administration of justice in Poland.

## **Other areas of concern**

2.72 It is evident from this report that significant progress has been made in Poland since the release of the November 2007 report, and the IBAHRI and CCBE welcome this progress. However, in addition to the recommendations identified in this report as still requiring implementation, the IBAHRI and CCBE were informed that there remain obstacles to the effective functioning of the justice system. Now that the majority of threats made against the independence of the judiciary, the legal profession and the prosecution system have been removed, further attention is required to improve the efficacy of the justice system in Poland.

2.73 A commonly cited problem is the slow consideration of cases by the courts. The courts system in Poland is overburdened. During the initial post communist period, the demands on the courts increased dramatically as work that might ordinarily be handled by administrative agencies was transferred to the courts. As a result, the IBAHRI and CCBE heard reports that the courts are unable – or do not – issue prompt decisions, and there is, among some observers of the courts, a strong sense that justice is being denied by delay.

2.74 Without undertaking a specific review on the current status and needs of the court, the IBAHRI and CCBE are not in a position to make an informed recommendation on this situation. However, the IBAHRI and CCBE encourage the Polish Government and the NCJ to conduct a review of the courts' workload, in order to consider whether reallocation of certain administrative areas of work would be appropriate. Further, the Polish Government and the NCJ are encouraged to consider whether case management, alternative dispute resolution or other processes could be introduced or expanded to improve the prompt delivery of justice in Poland. The IBAHRI would welcome further discussion on how it could assist in these areas.

# Chapter Three: Conclusion and Recommendations

- 3.1 It is evident that rapid and substantial progress has been made to restore the rule of law in Poland since the November 2007 report was released. Many of the November 2007 report's recommendations have now been addressed, and the overall climate has changed dramatically for the better.
- 3.2 However, it must be noted that further action is necessary. Certain legislative changes that were introduced by the former government remain in place, and must be repealed to restore the rule of law. Despite the assurances of the Minister of Justice that legislative powers of concern will rarely, if ever, be used; it is important that these powers are removed from the statute books so that they cannot be used, whether as a threat or in action, in the future.
- 3.3 The IBAHRI and CCBE were pleased to see the change in attitude of the government, and welcome the open approach of the new Minister of Justice to their follow-up review and earlier report.

## Overall Recommendations

- 3.4 The IBAHRI and CCBE welcome the efforts undertaken by the new Polish Government to implement its overall recommendations. The Minister of Justice's efforts in meeting with the judiciary and the legal professional bodies and to involve them in efforts to propose legislation or amend existing legislation is commended.

## Recommendations

- 3.5 The IBAHRI and CCBE continue to recommend that the Polish Government continues to strive to respect the separation of powers doctrine and constitutional supremacy in all its efforts to address perceived problems in the Polish justice system.

## The judiciary

- 3.6 The IBAHRI and CCBE welcome the Polish Government's abandonment of legislative proposals including the abandonment of a trial period for trainee judges and the proposed changes to the Constitutional tribunal. The IBAHRI and CCBE also welcome the Minister of Justice's submission of an amended brief to the Constitutional Tribunal changing many of the government's former positions on the challenge to the disciplinary arrangements for judges.
- 3.7 However, the IBAHRI and CCBE remain concerned that the Minister of Justice retains the power to second judges to other courts involuntarily. Despite appreciating the Minister of Justice's commitment not to use this power without the consent of the judge, the IBAHRI and CCBE fear that the existence of such a power may serve as a potential threat in future cases,

and that failure to repeal the legislation will allow future Ministers of Justice who may not hold similar views to use this power inappropriately. The IBAHRI and CCBE await the proposed amendment to the 29 June Act with interest.

- 3.8 The IBAHRI and CCBE also continue to hold concerns about the legislative power of the Minister of Justice to appoint court presidents, which remains in place. The IBAHRI and CCBE consider that the responsibilities of the court president go beyond purely administrative tasks, and his or her appointment should be primarily the responsibility of the NCJ. The IBAHRI and CCBE are encouraged by the Minister's indication that he will recommend Presidents only, and will regard the decision of the NCJ as final, but consider that such a limitation should be incorporated into the legislation.
- 3.9 The IBAHRI and CCBE also remain concerned about the lack of a resolution of the President's refusal to appoint judges in 2007. The refusal to appoint, or to provide reasons for not appointing, judges leaves the justice system in question as the process for appointing judges now seems to be undetermined. Although the climate has improved considerably since this time, the resolution of the appointment of judges question remains important.

### **Recommendations**

- 3.10 The IBAHRI and CCBE continue to 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.
- 3.11 The IBAHRI and CCBE recommend the repeal of those provisions in the 29 June Court Act allowing the Minister of Justice to appoint court presidents, or in the alternative, to amend the Act to reflect the Minister of Justice's approach that the final decision lies with the NCJ.
- 3.12 The IBAHRI and CCBE call on the President of Poland to issue reasons for the refusal to appoint the judges, and at a minimum, to engage with the NCJ on the issue of the appointment of judges.

### **The legal profession**

- 3.13 The Polish Government's relationship with the legal profession has also improved significantly since the November 2007 report was released. The mistrust formerly evident between the two parties has lessened considerably, and collaboration between them is improving despite continued areas of disagreement.
- 3.14 The IBAHRI and CCBE are pleased to see that many of their recommendations regarding the legal profession have been addressed. For example, the IBAHRI and CCBE welcome the abandonment of proposals: to create a third category of lawyer; to involve the Minister of Justice in disciplinary proceedings for lawyers; to establish fee limits for advocates and legal advisors; to require asset disclosures; and to require the submission of client contracts. The

IBAHRI and CCBE consider that the abandonment of these proposals has had a very positive impact on the legal profession in Poland, and on its relationship with the government. The IBAHRI and CCBE welcome the efforts to open up the legal profession, but remain concerned that the legal professional bodies are adequately consulted in these formulations. In particular, the IBAHRI and CCBE welcome the consultation processes that have been initiated by the Minister of Justice, and hope that these will expand and continue.

3.15 However, the IBAHRI and CCBE consider that it is inappropriate for the Minister of Justice to have a supervisory role over legal professional associations as it infringes their independence.

### *Recommendations*

3.16 The IBAHRI and CCBE recommend that the legislation granting the Minister of Justice a supervisory role over the legal professional bodies should be repealed, or at a minimum the Minister of Justice and the legal professional bodies should seek to negotiate a workable compromise.

3.17 The IBAHRI and CCBE recommend that the Government of Poland consults and collaborates with the National Council for Legal Advisers and the Polish Bar Council in the development of alternative entrance arrangements for the legal profession.

### **The prosecution system**

3.18 The IBAHRI and CCBE commend the Government of Poland for taking steps towards the separation of the roles of Minister of Justice and Prosecutor General, as recommended by the November 2007 report. The IBAHRI and CCBE will continue to monitor the progress of this legislation and hopes that it is passed and implemented swiftly. The IBAHRI and CCBE also welcome the improved relationship between the government and the prosecution system since the release of the November 2007 report last year.

