



14 August 2019

Dear Mr President,

On 19 July 2019 the Polish Parliament adopted an amendment to the Code of Criminal Procedure (CCP). According to the authors of the amendment, its adoption was justified by a need to accelerate criminal proceedings and guarantee that criminal cases will be processed within a reasonable time. However, the content of the amendment raises serious doubts regarding its compatibility with international law standards, since it will allow public authorities to arbitrarily deprive individuals of liberty and their right to appeal against conviction. It will also limit the scope of the right to defence. As members of the JUSTICIA European Rights Network, we are writing to express our concern about these changes.

Under the amendment, public prosecutors will have a final say in some cases concerning pre-trial detention. If the court decides to revoke pre-trial detention and change it to bail, the prosecutor will be entitled to file an objection against such a decision, thus forcing the court to suspend the execution of its judgement. Until now, it has been solely the court's decision whether to amend such a measure.

These changes add weight to previously raised concerns over the Polish authorities' tendency to increase prosecutorial powers at the expense of judicial independence, violating the principle of equality of arms in criminal proceedings, and greatly expose individuals to the risk of human rights violation. If the final decision on deprivation of liberty will not be taken solely by an independent court, then such provisions will result both in an unlawful deprivation of liberty and a violation of Article 5 of the European Convention on Human Rights.

Moreover, the adopted amendment will also allow appeal courts to sentence a person whom a first instance court had previously conditionally discontinued criminal proceedings and imposed probation measures. Furthermore, the amended CCP will not provide for any possibility for such a person to appeal their conviction. As a result, the abovementioned provisions will violate Article 2.1 of Protocol no. 7 to the European Convention of Human Rights, as well as Article 14.5 of the International Covenant on Civil and Political Rights.

Finally, the adopted amendment will, in some extraordinary cases, allow criminal courts to conduct the evidentiary proceedings without the presence of both the defendant and the defence counsel, even when their absence is justified. At the same time, the amendment does not provide defendants with any effective remedy to compel the court to conduct the evidentiary proceedings again. The court will be obliged to do so only if the defendant proves that the manner of evidence-taking breached their procedural guarantees, especially their right to defence. As a result, the adopted provision raises grave concerns regarding its compliance with human right standards.

The European Court of Human Rights (ECtHR) has repeatedly made clear that the right to be present during criminal proceedings is a vital element of the right to a fair trial. According to the ECtHR, the duty to guarantee the right of a criminal defendant to be present in the courtroom ranks as one of the

essential requirements of Article 6 of the European Convention on Human Rights¹. Without being present, it is difficult to see how the defendant could exercise the specific rights set in Article 6, especially the right to defend themselves in person and to examine or have examined witnesses.

Furthermore, the similar guarantee might be found also in the Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Under its Article 8, EU Member States are obliged to ensure that suspects and accused persons have the right to be present at their trial. Moreover, a trial may be held in their absence only if they were informed, in due time, of the trial and the consequences of their non-appearance and if they are represented by a mandated lawyer.

The *JUSTICIA* European Rights Network considers that none of the solutions adopted in the amendment can be reconciled with the requirements of the right to a fair trial. *JUSTICIA* calls upon the President of Poland to request the review of those provisions by the Constitutional Tribunal or veto the proposed amendment.

Members of *JUSTICIA* European Rights Network

¹ The ECtHR's judgment in the case of *Hermi v. Italy* (Grand Chamber) of 18 October 2010, application no. 18114/02, § 58 – 59.