

POINTS TO BE CONSIDERED

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Self-regulation of Bars

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I. INTRODUCTION

In Poland there are two legal professions dedicated to the representation of clients before national courts and state authorities. One of them are attorneys (“*adwokaci*”) and the others are legal advisers. These two professions are regulated and governed separately and differ in their rights, yet to some extent they are similar. However, for the ease of the presentation, I will deal only with the position and regulation of attorneys-at-law.

II. REGULATION

The profession of attorney is concerned as ‘a profession in which the public repose confidence’, a.k.a. liberal profession. As such, it is regulated at three main levels:

- constitutional - Art. 17 of the Constitution of the Republic of Poland of 2nd April 1997 (hereinafter: the Constitution):

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.

- statutory - by the Bar Act of 26th May 1982 (hereinafter: the Bar Act)
- self-regulatory - primarily by the Resolution No. 2/XVIII/98 Compendium of Rules of Attorneys’ Ethics and the Dignity of the Profession (Attorneys’ Code of Conduct), adopted by the Polish Bar Council on 10th October 1998 (consolidated text of 14th December 2011, hereinafter: the Attorneys’ Code of Conduct).

1. By statute

The Bar Act is the core act governing the attorney's profession and self-government. It stipulates:

- terms and conditions of practicing law as an attorney
- District Bar Chambers and their authorities
- authorities of the Polish Bar
- admission to the Bar
- rejection from the Bar
- Attorney's trainees' training
- disciplinary responsibility.

2. By free association

In order to practise as an attorney, one has to be admitted to the Bar, which is the independent organisation and the professional self-government. It is the only association of attorneys-at-law in Poland. The Polish Bar Council has adopted The Attorney's Code of Conduct which regulates:

- terms and conditions of practicing law as an attorney (among others: professional privilege, attorney's immunity, ban on advertising)
- relations between attorneys and national courts and other state authorities
- relations between attorneys and clients
- participation to self-government.

3. Why regulate - control, protection of public, efficient running of courts, competence, honesty

The general purpose of regulating attorneys is similar to the universal principle as to the liberal profession. Therefore, a balance between the need of control of the professionals and the protection of the public has to be found. Attorney's profession is one 'in which the public repose confidence'. It requires advanced skills and knowledge, as its main objective is to represent the interests of the clients and any risk of misrepresentation has to be minimised. At the same time, the sole nature of such practice requires liberty or freedom in the meaning that an attorney cannot be bound by any supervisor and has an independent position, even in relation to the client. Attorney is authorised to revoke the client's power of attorney because of lack of trust in the attorney-client relation:

§51 of the Attorneys' Code of Conduct: The client-attorney relationship is based on trust. An attorney is required to terminate a power of attorney if circumstances indicate that the client has lost trust in him.

In relation to the efficient running of courts, the constitutional right of due process is regulated in Art. 45 § 1 of the Constitution:

Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

It cannot be limited to the cases where client is represented by the legal representative. Therefore, in this context, efficient running of courts is not a justification of regulating the Bar. However, in common opinion of judges, attorneys are to be perceived as partners smoothening the process because of their litigation skills.

Competence of attorneys is one of the most important aspect of functioning of the Bar. Attorneys are obliged to participate in permanent professional training in order to improve their knowledge. In addition, graduates cannot become attorneys automatically after leaving law school. They have to go through the obligatory 3-year Bar training designed to learn practical skills from experienced, practising attorneys before the final Bar exam and admission to the Bar. For all the above, regulation of this legal profession is required.

In terms of honesty, the attorney-client relation is exceptional, especially because of entrusting interests to professional legal representative. For that reason, the matter of honesty and trust is very important. As was mentioned before, lack of trust is sufficient basis for revoking power of attorney. Furthermore, because of the regulated Bar system of disciplinary responsibility and the obligatory third-party insurance of attorneys, clients have certain guarantee of the attorney's responsibility in the event of malpractice.

4. If created by statute - when? Can the statute be changed?

The Bar Act came into force on 1st October 1982. However, the legislative history of Polish attorneys' self-government began in the nineteenth century. The act of 16th August 1849 of the Emperor Franz Josef on the structure of the Bar should be noted as the first legal act regulating the profession of the attorneys on Polish territory. The next ones were:

- Regulation of the President of the Republic of Poland of 7th October 1932 - the Structure of the Bar Act
- The Structure of the Bar Act of 4th May 1938
- The Structure of the Bar Act of 27th June 1950
- The Structure of the Bar Act of 19th December 1963.

The present statute can be changed and it was subject to ten amendments up till now. At present, The Ministry of Justice has prepared the next amendment of the Bar Act, not yet accepted by the Parliament. At the same time the Bar is working on the new project of the Bar Act as a whole. It is being drafted only by attorneys.

5. If the statute can be changed is the permitted change total or only partial?

The total change of the Bar Act is permitted. The border line is drawn by the Constitution which imposes the obligation of creating self-government of liberal professions, that is, among others, attorneys. Therefore, it would be invalid to eliminate the Bar and if the Bar Act is rescinded, the new Bar Act has to be passed.

6. If there is a constitutional principle, of what nature is it and could it be amended easily or with difficulty?

As was shown before, Art. 17 of the Constitution established the right of self-government of liberal professions.

It is situated in Chapter I - The Republic, the core regulation of the authorities of the Republic of Poland.

In order to change this provision, an amendment of the Constitution should be passed. The procedure of passing the constitutional amendment is prescribed by Art. 235 of the Constitution:

- 1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.*
- 2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.*
- 3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.*
- 4. A bill to amend the Constitution shall 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, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.*
- 5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.*
- 6. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.*

Notes:

- the Polish Parliament consists of two houses: the lower house called the Sejm and the upper house called the Senate.
- the statutory number of Deputies (members of the Sejm) is 460
- the statutory number of Senators is 100

7. If the regulation is by statute does the regulatory body include lawyers and non-lawyers - who chooses them - can they be changed by the Minister of Justice and is the Minister of Justice a politician or a lawyer?

As the Polish Bar is regulated by statute, it is passed in the ordinary legislative procedure by the legislative power - the Parliament, members of which are elected in public elections. The bills may be drafted by the specialised commissions, however there is no requirement that they should be consisted solely by lawyers. In terms of public consultations, any bill related e.g. to regulation of legal profession ought to be consulted with its representatives. The Polish Bar Council has the competence of drafting opinions on legislative acts and presenting recommendations concerning the creation and application of the law that may be realised in the frames of public consultations.

In the self-regulatory level, the main act: the Attorneys' Code of Conduct, binding for all the attorneys is created solely by the Bar. It can be changed partially and totally, within the exclusive discretion of the Bar.

The Minister of Justice may propose changes to the statute, however as the executive power, they have to be adopted by the Parliament, the legislative power.

There is no requirement for the Minister of Justice to be a lawyer and the present Minister of Justice of the Republic of Poland is not a lawyer.

8. If there is a chief lawyer - does she/he have any power to appoint or regulate and who chooses her/him?

The President of the Polish Bar Council does not have the independent power to appoint or regulate. She/he is chosen by the National Assembly of the Bar, the highest authority of the Bar.

It is worth mentioning that the Mediation Centre of the Polish Bar Council has been established recently. The President of the Centre has the power to appoint attorneys as mediators and to regulate matters related to the Centre.

9. If there is a free association is its existence recognised by the statute - why and to why extent?

The Polish Bar may be considered as a free association. However, the membership to it is mandatory in order to be permitted to practise as an attorney. As was stated before, it was created and therefore recognised by the Bar Act. Its structure is also regulated by the Bar Act. It is determined by the constitutional principle of right to self-government. This principle and the purpose of such regulation were described above.

III. INDEPENDENCE

1. What is meant by this - freedom to offer services without restriction - cf. Swiss Federal Constitution, or freedom to offer services? To any client without political or economic pressure?

The independence in relation to attorneys may be perceived in two aspects - the independence of the Bar as a whole and the independence of a particular attorney.

The independence of the Bar is one of its core principles. It is independent from any state authorities and is self-governed and self-regulated. The Minister of Justice has very limited supervisory power as to the acts passed by the Bar and it cannot be perceived as any form of dependant relation. The greatest example of the independence of the Bar is the autonomous disciplinary system. As prescribed by §4 of the Attorneys' Code of Conduct:

An attorney shall be subject to disciplinary action for any transgression of attorneys' ethics or infringement of the dignity of the profession in his professional and public conduct as well as in his private life.

The Disciplinary Court, both at district and supreme level, is consisted solely of attorneys.

The independence of a particular attorney means that he is free to provide services without any restrictions, particularly political or economic. As

mentioned before, he has autonomous position even in relation to his client. Economic matters are regulated by the Attorney's Code of Conduct:

§50

1. *In financial matters, an attorney is required to exercise particular scrupulousness in relation to the client.*
2. *An attorney shall inform his client of the level of his fee and the manner in which it should be paid (e.g. on the basis of time of work).*
3. *It is prohibited for an attorney to enter into an agreement with a client which requires that a fee be paid for conducting the case contingent entirely upon the final outcome thereof. An attorney may enter into an agreement providing for an addition fee for achieving a positive outcome in the case.*

§55

1. *An attorney may not refrain from taking steps in a case he conducts on account of the client's failure to pay his fee, and in particular he may not on this account refuse to appear at a hearing. A client's failure to pay fees may instead constitute grounds to terminate the power of attorney in the manner and within the period provided by law.*

2. The independence and the composition of the lawyers' firms

The attorney may not be the employee in the meaning of the labour contract. He may practise only as an independent professional, either as a sole practitioner or in a law firm. The law firm may only provide legal aid services and its partners may only be attorneys-at-law, legal advisers, patent attorneys, tax advisors or registered foreign lawyers. The attorney remains fully independent as to providing services for clients and is not supervised by anyone, e.g. the Managing Director or the CEO of the law firm.

For that reasons, any non-lawyer participation or third-party investment is prohibited for law firms. This is because of the nature of the attorney's profession and for the purpose of his independence, protected by the Bar. Therefore, any risk of dependence of an attorney is eliminated.

3. Is there a constitutional reason why lawyers (or any other professional group) are regulated - why?

The reasoning based on the Constitutional has been explained before. As attorneys are one of the professional groups described as professions 'in which the public repose confidence' they need to be regulated - to sustain the high level of competence of the members of this group and to secure the interests of represented persons. The same case remains e.g. for the physicians.

Recently the Minister of Justice promotes the bill of deregulating certain professions (e.g. taxi drivers or city guides). Although he suggests some changes to the Bar Act, regardless of the constitutional principle of right to self-government, he consents that in principle the attorney's profession cannot be deregulated.

4. Does any national or international law/treaty recognise lawyers and the existence of their profession as part of the Rule of Law and the construction of a proper democratic society?

In the Polish criminal procedure system (including petty offences), the right of a defendant to raise a defence, including the right of being represented by an attorney is one of the core principles of the procedure, codified primarily by the Constitution in Art. 42 § 2:

Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

It is also included to the Code of Criminal Procedure in Art. 6. Its violation causes severe consequences, including the invalidity of the proceedings. As such, it may be perceived as the part of the Rule of Law and the construction of a proper democratic society. Especially because the Constitution ensures the existence of *ex officio* attorney (present also in civil and administrative procedure). As the right to defend the accused persons is reserved exclusively for attorneys, the Polish legal system, including the Constitution recognises this professional group.

The right to raise a defence is recognised by many international treaties, among others: the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.3.c.), Charter of Fundamental Rights of the European Union (Articles 47 and 48). At the European Union level, there are also some steps taken towards achieving common minimum standards of procedural rights in criminal proceedings, including right to legal advice, before and at trial. A Roadmap on procedural rights was adopted in 2009 by the Justice Council. The right to legal advice is one of the steps included in this document. The European Commission will work with the Council and the European Parliament to implement the roadmap. This has been the important issue especially after issuing the Framework Decision on the European Arrest Warrant. The rights of the defence, including the right of being represented is considered as the fundamental right. This shows that the existence of attorneys is heading towards being recognised as the Rule of Law and this profession is needed for the purpose of the construction of a proper democratic society.